

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM: "Claim of their System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed and refused to compensate Motor Car Repair Foreman G. Young at the time and one-half overtime rate of pay for service he performed on August 26, 27, September 2, 8, 9, 18, 23 and 24, 1986, and thereafter (System File SJ-5-86/WM-16-86).

(2) As a consequence of the violation referred to within Part (1) hereof, the Claimant shall be allowed pay in the amount of the difference between his straight time rate of pay and his time and one-half overtime rate of pay for the dates enumerated within Part (1) hereof and subsequent dates on which he performed said service."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

To understand the Organization's position, it is essential to understand its view of the facts. Based on Bulletin No. 8472, the Carrier abolished all Group 2 (a) through (c) and Group 3 positions within the Scales and Work Equipment (S&WE) Sub-Department and all positions in the Bridge and Building and Track Sub-Departments. Subsequently, the Carrier reestablished certain positions in certain classifications. However, no positions were reestablished within the S&WE Sub-Department. Thereafter, the Carrier called furloughed employees holding seniority within the S&WE Sub-Department to perform irregular or part-time service.

The Claimant was one of those furloughed employees that was recalled and he was utilized 8 hours on 8 days between August 26 and September 24 (August 26, 27, September 2, 8, 9, 18, 23, 24, 1986). He was paid straight time and it is the contention of the Organization that he is entitled to time and one-half for all hours worked based on Rule 53 which states:

"CALLS

Rule 53 (a) Employees notified or called to perform work not continuous with the regular work period, will be allowed a minimum of two (2) hours and forty (40) minutes at time and one-half rate for two (2) hours and forty (40) minutes of work or less, and if held on duty in excess of two (2) hours and forty (40) minutes, time and one-half will be allowed on minute basis.

* * *

NOTE: Interpretation of above rule: Excerpt from Letter Agreement dated August 15, 1956.

Awards 5156 and 5262 of the Third Division, National Railroad Adjustment Board, have established that on rest days, the beginning of the regular shift referred to in Rule 53(a) is the regular starting time of the employee's work period during his regular assigned work days. The interpretation of this rule is that an employee is entitled to double time pay, if at all, only once during the twenty-four (24) hour period beginning with the starting time of his regular shift and then only after he had performed service for sixteen (16) continuous hours. An example, of the application of this interpretation is as follows:

* * *

(c) Employees laid off in reduction of force and retaining seniority under the provisions of Rule 36 when called back temporarily for special service will be compensated as follows:

When working the full hours of assignment on the gang with which employed will be paid eight (8) hours at pro rata rate.

When called for irregular or part time service outside of regular work period, will be paid as per paragraph (a) of this rule." Emphasis added)

In the opinion of the Organization, because all the jobs were abolished and not rebulletined in this Sub-Department, there were no regular hours. Accordingly, it argues that the Claimant's work was outside regular hours and subject to time and one-half based on Rule 53.

The Board notes at the outset that the Carrier raises a time limit argument. It notes the bulletin abolishing the positions in question was issued July 23, 1986, and that the claim was not filed until October 16 beyond the 60-day time limit. Clearly, the Carrier's argument misses the mark. The Time Limit Rule (Rule 59) requires that all claims must be presented to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim is based. There can be no serious dispute that the cause of action in this case was not the bulletin but the fact that the Claimant was not paid overtime for the dates in question. The claim was filed within 60 days of his knowledge that he was only paid straight time.

Regarding the merits, it is observed that Rule 53 and Section C in particular has been subject to interpretation in a previous dispute between the parties. In Third Division Award 26707 the Board stated the following regarding Rule 53(c):

"The contract states that when a furloughed employee is called back temporarily for special service the employee will be paid at the pro rata rate when working the full hours of assignment. This can mean, according to reasonable rules of language construction, nothing other than the hours of service assigned to the bulletined position. When working outside of these full hours of assignment, the employee on callback must be paid in accordance with Rule 53(a), which is the overtime rate."

(Emphasis added)

Applying this interpretation to the facts and arguments, the Board notes that the Organization has failed to identify or establish the regular hours of the position being worked by the Claimant. It has simply made a carte blanche assertion that all the hours he worked were outside the regular work period. This kind of application of Rule 53 cannot be supported. Ordinarily, an employee who is recalled is recalled to a position or gang and assumes its regular hours. In this unique case, there evidently was not any formally established hours. While the Carrier may have been obligated to post regular hours, that is an independent claim and the fact they did not would not necessarily result in time and one-half being paid for literally every hour a recalled employee worked in such circumstances. The Claimant constructively had regular hours since he did not work in excess of forty hours in any week. Moreover, there is no claim he was not assigned proper rest days.

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Award No. 29220
Docket No. MW-28507
92-3-88-3-323

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 7th day of May 1992.