

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30589
Docket No. SG-30777
94-3-92-3-583

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(The Long Island Rail Road Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Long Island Rail Road:

- (a) Claim #S.G.-33-90 on behalf of the following members: C. Lawing, Foreman, J. Backes and P McKenna Ass't Foreman, Signalmen R. Lehr, T. Jones, R. Nobile, H. Serper, J. Warmuth, P. McGlone, M. Babiak, T. Domanico, R. Terrett, J. Kurtz. Headquarters in Babylon Trailer with tours of duty Monday to Friday, 8:00 AM to 4:00 PM, Saturday and Sunday relief days, Gang's #30, 31, 33 and 34.

Claim on being but not limited to, Carrier violated Signalmen's Agreement rule 40-(g) overtime and rule 41, pre-determined overtime on the following time and dates:

Fri. 10/05/90 and Sat. 10/06/90	10:30 PM to 6:30 PM
Fri. 10/12/90 and Sat. 10/13/90	10:30 PM to 6:30 PM
Fri. 10/19/90 and Sat. 10/20/90	10:30 PM to 6:30 PM
Fri. 10/26/90 and Sat. 10/27/90	10:30 PM to 6:30 PM
Fri. 11/02/90 and Sat. 11/03/90	10:30 PM to 6:30 PM

- (b) The men in Gangs 30, 31, 33 and 34 therefore claim as settlement, 80 hours each at the rate of time and a half including differential. Please advise when and how this claim will be paid." Carrier File No. SG-33-90. G.C. File No. SG-33-90. BRS Case No. 8713-LI.

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Sometime during the fall of 1990, Carrier determined that a radio antenna cable, suspended from the wall of its East New York tunnel, needed to be replaced. Due to the heavy volume of rail traffic through the tunnel during the week, it was decided that work on the project would be confined to weekend nights. Carrier proceeded to schedule overtime on five weekends to complete the project. Rule 41 of the Agreement covers assignment of employees to pre-determined overtime. It provides:

"When a portion of a particular gang must be worked on pre-determined overtime, those with greatest seniority will be given first opportunity on the following basis:

(a) That such employees are able and qualified for the particular job.

(b) That such employees are members of the gang working on the project prior to the overtime date.

(c) That the scheduled overtime is a continuance of the project worked prior to the overtime date."

The Organization contends that employees with the greatest seniority were not given first opportunity to work overtime in the antenna cable replacement project, as Carrier utilized junior employees to Claimants as Foremen and as Signalmen in this overtime work. Carrier denied the claim on the basis that the less senior individuals that were used on overtime had worked on the project prior to the overtime assignment.

The facts in this record do not support Carrier's arguments. While Carrier has offered evidence that perhaps some pre-project planning may have occurred for about one hour sometime before the project commenced, the evidence conclusively demonstrates that all of the work on the project was done on overtime. There is absolutely no showing that the scheduled overtime was a continuance of work performed prior to the overtime dates, so as to trigger the application of paragraph (c) of Rule 41.

An uncomplicated reading of Rule 41 indicates that when pre-determined overtime is to be worked, employees with the greatest seniority will be given first opportunity to do the work. If the conditions of paragraphs (a), (b) and (c) are not present, then seniority must prevail. Carrier has not demonstrated that the conditions of (a), (b) and/or (c) were present so as to permit the assignment of employees junior to Claimants to work on the project. Accordingly, the claim will be sustained.

Carrier has argued that if the claim is to be sustained, it had only ought to be at straight time rates, rather than overtime rates, as the Organization requests. This Division of this Board has long subscribed to the notion that when an employee is deprived of a work opportunity due to a Carrier violation of the agreement, the proper remedy is to make the employee whole for what he would have earned absent the violation. In Third Division Award 25601, the Board stated:

"The Organization, however, lists more than 75 Awards, the most recent of which are 15909, 16254, 16295, 16481, 16784, 16811, 16814, 16820, 17748 and 17917, which support its position that the remedy should be the earnings Claimant would have received had the improper assignment not been made.

Better reasoned opinions remedy an overtime violation with a make whole payment. Here the evidence shows that Claimant, if he had worked, would have earned 8 hours and 20 minutes at time-and-one-half. There is no element of retribution or punishment in such a remedy. Carrier and Claimant are placed in the same position they would have been in had Carrier not violated the Agreement. Payment would have been made at the overtime rates. It is Claimant who would be penalized if he were reimbursed at straight time or only for actual hours worked. The payment to the junior employee is the result of the Carrier's improper assignment and does not make a remedy which makes Claimant whole a penalty."

Award 25601 is sound and it will be followed here. Payment to Claimants to be made at time and one-half rates. (There is some indications in this record that some of the Claimants may have been paid a portion of the lost work hours in a settlement effort while the matter was being handled on the property. If this is the case, Carrier may deduct such settlement payments from the amounts due under this Award.)

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 2nd day of December 1994.