

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 31579
Docket No. CL-32174
96-3-94-3-600

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Transportation Communications International
(Union
PARTIES TO DISPUTE: (CSX Transportation, Inc. (former
(Seaboard Coastline Railroad Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Union
(GL-11108) that:

- (1) Carrier violated the Agreement on September 25, 1993, when it failed to call Claimant H. L. Browder for vacancy at the Yard Office, Florence, South Carolina.
- (2) Because of the aforementioned violation, CSX Transportation shall now be required to compensate Claimant, ID 144905, his daily guaranteed rate at the overtime rate for not being called to protect Position No. 313 at the Florence Yard Office due to the incumbent being off sick."

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.

The claim filed on the property sought overtime payment for Claimant for the Carrier's failure on September 25, 1993 to call Claimant, a first shift Operator observing his rest day, to fill a third shift General Clerk's position which became vacant due to the incumbent marking off sick. After the claim was filed, the Carrier paid Claimant at the straight time rate. Claimant's entitlement to the difference between the overtime and the straight time rates remains in dispute.

The Carrier's unilateral payment to Claimant after the claim was filed serves as an admission that Claimant was improperly bypassed for the call. Indeed, in its Submission, the Carrier states "[t]he Carrier does not dispute that the Claimant should have been called for the overtime on the date in question." The question here is how to remedy that violation — that is, through straight time or overtime compensation?

It is not disputed that had Claimant been called to work, he would have received the overtime rate. It therefore follows that in order to make Claimant whole for the lost work opportunity stemming from the Carrier's improper failure to call Claimant that Claimant should receive the overtime rate. That type of remedy serves two functions — it makes Claimant whole for the lost overtime work opportunity and does not permit the Carrier to benefit from its violation of the Agreement.

But the Carrier properly points out that it has been decided that compensation for time not worked has been at the straight time and not the punitive rate. See Second Division Awards 6359, 7356; Third Division Awards 13697, 18942, 19814, 19884, 22071, 28647; Fourth Division Award 4516 cited by the Carrier. Clearly, there are two schools of thought on how to remedy these kinds of cases (1) make whole through compensation at the overtime rate for loss of the overtime work opportunity (as the Organization argues) and (2) straight time compensation only for instances where no work was actually performed (as the Carrier argues).

We find the logic of the Awards cited by the Carrier inapplicable to this case.

First, none of the Awards relied upon by the Carrier arose on this property under this Agreement covering these employees that would establish precedent on the property that, for stability purposes, would need to be followed.

Second, the Carrier did not dispute the Organization's assertion on the property that it had followed a past practice whereby had Claimant missed or refused the call, it would have deducted the guaranteed overtime rate from Claimant. Thus, if Carrier would have deducted Claimant's guarantee compensation at the overtime rate for missing the call, it follows that the Carrier should be required to pay Claimant at the overtime rate for failing to properly make the call.

Based on the above and under the circumstances of this particular case, in order to make Claimant whole for the lost work opportunity, we find the overtime rate should have been paid for the Carrier's improperly bypassing Claimant for the overtime opportunity. Claimant shall therefore be entitled to the difference between the overtime rate and the straight time rate already allowed.

In light of the result, the Organization's procedural argument is moot.

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 29th day of August 1996.