

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33232
Docket No. MW-32236
99-3-95-3-43

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Consolidated Rail Corporation)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier deprived Repairman J. Robinson of the opportunity to perform overtime service by assigning him to work at the Ashtabula Yard instead of with his assigned gang (TO-402) at Canton, Ohio beginning June 3, 1993 (System Docket MW-3182).
- (2) As a consequence of the violation referred to in Part (1) above, Repairman J. Robinson shall be allowed fifty-four (54) hours' pay at the repairman's time and one-half rate.”

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 were given due notice of hearing thereon.

The Claimant has established and holds seniority as a Repairman. At all material times herein he was assigned as such to Tie Gang TO-402. Repairman Tomallo also held the same position in that gang, however he was junior in seniority to the Claimant. On June 3-5 and 7-11, 1993 the Claimant was required to remain in Ashtabula, Ohio, while Repairman Tomallo was required to perform overtime service. Following investigation the Carrier authorized payment to the Claimant for 46.5 hours at the straight time rate for Repairman, continuing its long-standing practice in such cases. Thus, the only issue before this Board is whether the claim should require that Claimant be paid the difference between that rate and the overtime rate for the time in question.

This Board has carefully read and considered the reasoned Awards that each of the parties have cited to it. In some cases we find that those Awards are not helpful either because they make no reference to the amount to be paid when the claims were sustained, because they do not contain an explicated rationale why one rate was chosen over the other, or because no contract violation was found. Other Awards, cited by the parties, however do contain enough information or rationale to warrant close consideration. Those cases cited by the Organization arose between the same parties to this dispute and stand for the proposition that but for the Carrier's contract violation the Claimant would have worked the hours in question and would have been paid at the overtime rate. Thus, the overtime rate was deemed the appropriate remedy. (See, Third Division Awards 31453, 31514 and 31521.) On the other hand the Carrier cites Third Division Award 32551, not involving the same parties, which stands for the proposition that in light of the Carrier's long-standing practice to pay these claims at the straight time rate that practice should be followed by this Board because "... to do otherwise would upset the labor relations equilibrium the parties have established between themselves."

We find ourselves therefore between the "rock and hard place" of choosing a remedy, to put the Claimant in the position he would have been in if the contract violation had not prevented that occurrence, and a long standing past practice which in this industry and in labor relations generally defines the parties' respective rights and obligations. And as in most such dilemmas, the choice is not an easy one. However, after careful thought we choose to follow those decisions of the parties for a variety of reasons. First, they reflect the well-established view that a remedy for a contract breach should place the party harmed by the breach in the position he would have been in absent the violation. Second, as they are decisions between these same parties, they must be accorded substantial deference. Third, we can see a distinction between a past

practice between the parties that reflects their contractual rights and obligations and a past practice which defines the remedial action that must take place to correct the contractual violation that was established. In the former, the parties simply continue their bilateral agreement, as they should. In the latter, this Board must determine the remedy for a breach of that bilateral agreement. Claimant is to be paid the difference between the overtime rate and what he was paid for the 46.5 hours actually worked.

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 21st day of April 1999.