Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36087
Docket No. MW-34590
02-3-98-3-228

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier recalled assigned junior employes M. Corkill and F. Ramirez to perform overtime service (snow removal work) at Mile Post 4 on the Austin Sub on January 10 and 11, 1997 instead of assigning senior employes R. Shimek and D. A. Meyer (System File C-03-97-C060-03/8-00219-013 CMP).

(2) As a consequence of the violation referred to in Part (1) above, Mr. R. Shimek shall be allowed fourteen (14) hours and forty (40) minutes' pay at his time and one-half rate and Mr. D.A. Meyer shall be compensated for eleven (11) hours' pay at his 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.

At the time of the incident in question, Claimants R. J. Shimek and D. R. Meyer had established and held seniority in the Track Sub-Department of the Maintenance of Way and Structures Department as Section Laborers dating from June 3, 1974 and October 27, 1973 respectively. M. Corkill and F. Ramirez had established seniority as Section Laborers dating from July 22, 1980 and May 10, 1976 respectively. Thus, it is clear that the Claimants are senior to Corkill and Ramirez. As background information, Claimant Meyer and Laborer Ramirez reside in Mason City, Iowa. Claimant Shimek resides in Nora Springs, Iowa, approximately ten miles east of Mason City, Iowa. Corkill resides in Austin, Minnesota, approximately 44 miles north of Mason City, Iowa.

The facts in this matter appear to be uncontested. On January 10, 1997, CP train operating from Austin, Minnesota, traveling to Mason City, Iowa, became stuck in the snow at Mile Post 4.0, located four miles north of Mason City on the Austin Section. The Carrier required the services of its Track Sub-Department employees to shovel snow to free the train. It first called the Foreman of the Austin Section who was unable to get to the work location because of road conditions in his area. The Carrier then called and assigned Corkill and Ramirez to dislodge the train.

Corkill and Ramirez began to shovel snow at 9:30 P.M. on Friday, January 10 and worked until 1:10 A.M. on Saturday, January 11, 1997. They returned to work at 7:00 A.M. on Saturday and worked until 6:00 P.M., expending a total of 14 hours and 40 minutes in the performance of the subject work.

On June 24, 1998, the Carrier notified the Board that it was directing its Payroll Department to pay the amounts claimed by the Organization that were due to the Claimants. This does not appear to be in dispute.

The Organization takes the position that the Carrier failed to recognize the Claimant's superior seniority in assigning overtime service on January 10 and 11, 1997. While the Carrier contends that an emergency existed, the Organization takes the position that no such emergency occurred. Even if such emergency did exist, the Claimants were located in close proximity to the work site and logically should have been called first. Because of this error, the Board should rule for the Organization. The Board notes that the Organization originally asked that the Claimants be made whole. However, (as noted above) as the Claimants have already been paid in full, the

only remaining remedy is a ruling that the Carrier acted in violation of the Agreement when it did not select the Claimants for the positions.

Conversely, the Carrier takes the position that inasmuch as the Claimants have been paid in full for their claim, the matter is now moot and must be dismissed, causing the Board to lose jurisdiction to issue an award in this matter. Once a claim is paid, the matter becomes hypothetical and the Board has repeatedly ruled that it will not grant such advisory awards.

After a review of the evidence, the Board finds that it must agree with the Carrier that the Board does not have jurisdiction over this matter. Here, the claim has been paid in full and the Claimants have been made whole. While we acknowledge that the issue has not been met on its merits, we are not required to make such a determination under these circumstances.

The Board addressed a similar issue in Second Division Award 6993 when it discussed why the Board did not possess jurisdiction in a situation when the Carrier had paid a claim in full:

> "The Claimant was paid the full amount of compensation due him under the claim, on March 25, 1975. The Employees contend that the Carrier has no right under the Railway Labor Act and the Agreement of the Parties to unilaterally pay the claim without prejudice to the merits of the dispute on the property when the dispute was properly pending before this Board.
>
> Since the Claimant has been paid in full, we find the issues now presented to this Board to be moot and therefore will dismiss the claim. . . ."

Similarly, in Second Division Award 11031 the Board held:

> ". . . Claimant's requested relief thus was granted before this Board had an opportunity to decide the merits of the Claim which was presented to it. The Organization, nonetheless, would have us decide the dispute because the dispute is likely to arise again. If and when the issue does arise again, it will, at that time, be ripe for decision. Until that time, however, this Board will follow the sage version proffered in Second Division Awards 2672 and 1017, and conclude that the dispute lacks a

controversy thus declining Organization's request to issue an advisory opinion in this dispute."

The Board agrees with the above-cited Awards and finds that because the Claimants were paid in full for their claim, there is no existing controversy in this matter. While the issue has not been fully adjudicated, there is no reason to further process this matter as the claim has been paid in full. As Award 11031 stated above, "If and when the issue does arise again, it will, at that time, be ripe for decision."

Based on the record in the instant case, we find that the Board does not have jurisdiction to resolve this matter. The claim will be dismissed.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of July 2002.

LABOR MEMBER'S DISSENT
TO
AWARD 36087, DOCKET MW-34590
(Referee Bierig)

The Dissent is directed towards the Majority's erroneous finding that the Board lacked jurisdiction to decide this case. The Board held:

> "After a review of the evidence, the Board finds that it must agree with the Carrier that the Board does not have jurisdiction over this matter. Here, the claim has been paid in full and the Claimants have been made whole. While we acknowledge that the issue has not been met on its merits, we are not required to make such a determination under these circumstances."

As we stated at the hearing of this case, the Carrier alleged that it had paid this claim, without prejudice to its position. There are several problems with the Carrier's position. First, the correspondence exchanged between the parties relative to payment of monies as outlined in the Statement of Claim occurred after the notice of intent to file this case to the Board was submitted. Hence, in accordance with the rules of the Board and Section 3 of the Railway Labor Act such cannot be considered because it was never discussed between the parties nor raised during the handling of the dispute on the property. Second, there is no evidence whatsoever to show, much less prove that the Claimants ever received payment for the claim at issue here. If we were to consider the correspondence generated after the notice of intent was filed, it should be pointed out that the General Chairman never agreed to dismiss the merits of the case. Hence, the Board has the authority and the duty to rule on the merits of the case.

In support of our position, we cited Awards 32457 and 32266 that decided similar disputes wherein the Carrier alleged it paid the claim and that the dispute was moot. Those decisions were decided on solid reasoning and should have been followed in this dispute. Sadly, the Majority in this case took the easy way out much to the dismay of the Organization.

Inasmuch as the General Chairman did not agree to a settlement "without prejudice to its position" such an offer was just that, an offer. This Board has consistently held that compromise offers that have been rejected by the other party should not be considered by the Board. The Carrier cannot have it both ways.

Because the Carrier waived its position on the merits as evidenced by its submission to the Board it has no standing to defend its position on the merits. By the Majority buying into the Carrier's allegation that it paid the claim "without prejudice to its position" as evidence that the claim was moot was made in palpable error and this Award is of no precedential value.

Respectfully submitted,

Roy C. Robinson

Roy C. Robinson
Labor Member