

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36546
Docket No. CL-36649
03-3-01-3-184

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(Duluth, Missabe and Iron Range Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood (GL-12722) that:

- (1) Carrier violated the TCU Clerical Agreement at the Transportation Department starting on October 30, 1999 when it held Mr. Terry Hanson off his regularly assigned 7:00 a.m. Crew Caller position at the General Superintendent's Office-Proctor, and required him to work the 6:00 a.m. Lead T&E Timekeeper position at the General Superintendent's Office-Proctor, in order to train successful applicants of this position and also to fill vacancies on this position.
- (2) Carrier shall now be required to compensate Mr. Hanson all compensation lost due to his being held, by the Carrier, on the T&E Timekeeper's position to train successful applicants on this position and to fill vacancies on this position and not allowed to work his regular assigned position of Crew Caller. The total amount of lost compensation to be determined by a joint inspection of the Carrier's records.”

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.

During the time period relevant to this dispute, the Claimant was working the Lead Timekeeper position with assigned hours of 6:00 A.M. to 2:30 P.M., Monday through Friday. By bulletin dated October 25, 1999, the Claimant was awarded the position of Crew Caller, with assigned hours of 7:00 A.M. to 3:00 P.M., Monday through Friday. However, the Claimant was held on his former position to train his replacement. On December 21, 1999, the Claimant filed the instant claim for all wages lost as a result of being held on his former assignment beyond the five calendar days provided in Rule 9(b), which states:

"RULE 9 Bulletins

- (b) Successful applicants for bulletined positions will be placed thereon as quickly as possible but not later than five calendar days after notice of assignment."

There is no question that the Claimant was not placed on the Crew Caller position within five calendar days after notice of assignment. It therefore appears from the record that the Carrier failed to comply with Rule 9(b) when it held the Claimant on his former position beyond the five-day contractual time period.

The remaining question is one of remedy. Generally, in cases of this nature, the employee is awarded the difference in earnings between the two positions. (See Third Division Awards 29490 and 29788.) In this case, however, the facts have an unusual twist.

The Claimant's former position paid a higher rate than the position he was awarded. The daily rates are \$153.95 for the Lead Timekeeper and \$152.49 for the

Crew Caller . The Carrier argues that no wages were lost because the Claimant was already compensated at the higher rate of the two assignments.

The Organization's position is that monetary damages should be awarded because the Claimant lost overtime opportunities which would have been available had he been working his assigned position. It argues that the Crew Caller position is eligible for overtime every Sunday, a point which the Carrier does not dispute, and that the Claimant bid for the position specifically because of the overtime opportunities. The Carrier responds by saying that even if this is so, the Claimant was given three weeks of training on the Crew Caller position and "worked many hours overtime during that process. . . ."

The Organization further asserts that the Claimant is entitled to one hour of overtime for every day he was required to start work at 6:00 A.M. instead of his assigned 7:00 A.M. starting time in his regular position in accordance with Rule 44(b) which states:

"RULE 44 Temporary Assignment Road Service

- (b) Employees required to perform service outside of assigned office hours will be paid as provided in these rules."

The Carrier argues that the foregoing contractual provision is not applicable in this situation. In addition, the Carrier expressed several arguments in its Submission to the Board which represented new material, not part of the handling of the claim on the property. The Board does not consider matters raised de novo, and, accordingly, the Carrier's new material has been disregarded.

In resolving the opposing viewpoints of the parties, we begin with the basic proposition that the purpose of a monetary remedy is to place the injured party in the position he would have been in had the Carrier not violated the Agreement. The underlying rationale is not to punish the Carrier or to give a windfall to the affected employee, but to restore the employee to the monetary position he would have been in if the Carrier adhered to the Agreement in the first place.

Here, the Organization has shown a loss of earnings. The Claimant was denied overtime opportunities he otherwise would have had. To the extent that the payment

sought by the claim is for overtime actually worked by the position the Claimant would have occupied beginning October 30, 1999 until such time that the Claimant was properly placed on his bid position, the Claimant is entitled to such overtime. And, because the remedy in this case is not intended to place the Claimant in a much better position as a result of the claim violation, we further direct that the payment be offset by any overtime actually worked by the Claimant during the time period in question, whether in training for the Crew Caller position or working as Lead Timekeeper.

We are unpersuaded that any further monetary compensation is in order. The Board cannot reasonably conclude that Rule 44 (b), which falls under the heading "Temporary Assignment Road Service," is applicable where, as here, the employee continued to work at the same headquarters location. Absent evidence that temporary road service of any kind was performed, we find that the Organization failed to establish that the Claimant was entitled to any further compensation under the rubric of Rule 44 (b).

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 8th day of May 2003.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 36546

DOCKET NO. CL-36649

NAME OF ORGANIZATION: (Transportation Communications International Union

NAME OF CARRIER: (Duluth, Missabe and Iron Range Railway Company

This matter is again before the Board at the request of the Organization for an Interpretation. In Award 36546, issued May 8, 2003, the Board sustained the claim as follows:

“There is no question that the Claimant was not placed on the Crew Caller position within five calendar days after notice of assignment. It therefore appears from the record that the Carrier failed to comply with Rule 9(b) when it held the Claimant in his former position beyond the five day contractual time period.”

The parties remain in disagreement as to what is owed the Claimant.

The Carrier asserts that no additional funds are due beyond the initial payment of \$3,888.24 to the Claimant. The Organization contends that the Carrier owed the Claimant an additional \$6,161.80.

Consistent with its broad discretionary authority to fashion remedies where the parties are unable to determine an appropriate “make whole” payment, the Board again reviewed the parties’ Submissions. The Board also considered the parties’ correspondence and arguments associated with the request for Interpretation.

The Board finds that neither party offers the Board an accurate or appropriate formula for the assessment of “make whole” damages. It is also apparent that there are several subjective issues that are not easily reduced to objective quantification. Thus,

after careful consideration of the relevant dates, rates, times worked, amounts in dispute, and other pertinent factors, the Board concludes that an additional \$2,584.85 in gross pay is due the Claimant.

Referee Ann S. Kenis who sat with the Division as a neutral member when Award 36546 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of January 2005.