

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 37093  
Docket No. MW-36874  
04-3-01-3-483

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly disqualified Track Inspector S. Potrzuski from September 14, 1998 through April 17, 2000 and, upon exonerating him on April 17, 2000, failed to compensate him for all wage loss suffered (System File NEC-BMWE-SD-4061 AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Track Inspector S. Potrzuski shall ' . . . be made whole for all overtime that accrued to the Track Inspector position from September 14, 1998 thru to and including April 17, 2000 including all overtime earned by the employee/s that filled the position at the pro-rata overtime 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.

This claim raises the issue of whether the Claimant suffered any loss of compensation as a result of his being removed from his Track Inspector position pending Investigation from September 14, 1998 through April 17, 2000, during which time he was assigned to a Track Foreman position on the night shift at the same rate of pay. On April 17, 2000 the Carrier notified the Claimant that the charges against him were dropped and that he was no longer disqualified from the Inspector's position. This claim seeks compensation for lost overtime opportunities the Claimant would have had if he remained in the Inspector's position for the 18 month claim period as calculated by the amount of overtime earned by the junior employees who filled his position during this time period, some 2,000 hours of overtime.

The Organization argues that the Claimant is entitled to be made whole for the Carrier's unsubstantiated action in removing him from his day shift Inspector position, a constructive disciplinary response, under Rules 55, 68 and 74. It asserts that a valid method of determining the overtime opportunities the Claimant missed is to look to the employees who filled the Inspector position during the claim period, because it is admitted that the Claimant was not offered any overtime involving Inspector duties. The Organization contends that the Carrier's statement that the Claimant was offered overtime during this period, and had been as an Inspector in the past, and turned it down is unsupported by the record, noting the Claimant's written statements that he did not have comparable overtime opportunities as an Inspector prior to September 1998 and was never given the opportunity to work overtime performing Inspector functions after that date. The Organization asserts that the Carrier never proved that the individuals filling the Claimant's Inspector position worked overtime performing other than inspection work or that the amount of overtime work performed by the Claimant in his Foreman position was relevant and should figure into the calculation of losses. It relies upon Third Division Awards 26574, 31368, 32328 and 32410 in arguing that the Claimant is entitled to compensation for some 2,000 hours of lost Inspector overtime opportunities.

The Carrier contends that the Organization is not seeking that the Claimant be made whole for lost work opportunities, but, rather, unjust enrichment for the Claimant in this case, noting that any claim for compensation must be limited to the net wage loss suffered by the Claimant, citing Public Law Board No. 4732, Award 6; Third Division Award 33024; First Division Award 24224. The Carrier notes that during the two years prior to the claim period, the Claimant averaged less than 100 hours of overtime per year, in the eight and one-half months after being re-qualified for the Inspector's position, the Claimant worked 85 hours of overtime, and during the 18 month claim period the Claimant worked only 25 hours of overtime. The Carrier relies upon the fact that the next junior Foreman on the Claimant's night shift gang worked 417 hours of overtime during the claim period and the individual replacing the Claimant in the Inspector position consistently worked excessive amounts of overtime in the two years prior to assuming that position, in arguing that the Claimant voluntarily chose not to avail himself of much of the overtime that was available to him during the four year period surrounding this claim, a factor which must be taken into consideration in determining whether he sustained any losses as a direct result of being withheld from the Inspector's position. The Carrier asserts that there is no evidence that the Claimant would have worked the amount of overtime claimed (more than 2,000 hours) based upon his established history of minimizing his overtime despite the presence of opportunities, noting that the Claimant failed to mitigate his damages by declining overtime offered to him in his Foreman position during the claim period. The Carrier argues that the Claimant's lack of overtime earnings was not related to any action on its part, and he should not be given a windfall profit in this case.

There is no doubt that an employee is entitled to be made whole as a result of Carrier action disqualifying him from a position based upon charges from which he is later exonerated, and that such remedy includes restoring the employee to the status quo ante, including lost overtime opportunities, where appropriate. See, Third Division Award 31368. However, we also note that such compensation is intended to put the Claimant in the economic position he would have occupied but for the protested action, not to give him a windfall. Third Division Award 33024; Public Law Board No. 4732, Award 6. A careful review of the record convinces the Board that in this case, the Claimant's record of accepting voluntary overtime assignments offered on the basis of seniority, during the time period when he worked as an Inspector prior to September 1998 and after April 2000, as well as during the claim period when he worked as a Foreman, should be considered in determining what, if any, losses he suffered as a result of the Carrier's action.

Comparing the Claimant, whose records reveal acceptance of a minimum amount of overtime, to the employee who assumed his Inspector position during the claim period, whose records show an effort at maximizing overtime earnings, would result in a substantial windfall for the Claimant. The record reveals that the Claimant averaged less than 100 hours of overtime in each of the two years he was an Inspector prior to September 1998, and 85 hours of overtime in 2000 after the removal of his disqualification. Despite at least 417 hours of overtime availability in the Foreman position the Claimant held during the claim period, he chose to work only 25 hours, hardly revealing a desire to accrue overtime compensation despite his assertion that he needed money during that period and his responsibility to mitigate damages. Thus, in directing that the Carrier make the Claimant whole for his loss of overtime earnings opportunities during the claim period, the Board directs the parties to take into account the Claimant's average annual overtime hours in the Inspector position (approximately 100 hours/year) and the percentage of overtime he actually accepted in the Foreman position during the claim period (approximately 6%) in arriving at a figure that would restore the Claimant to the position he would have been in but for the improper disqualification.

**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 July 2004.