

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37983
Docket No. CL-38984
06-3-05-3-381

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
(BNSF Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization that:

1. Carrier violated the TCU's Clerks' Working Agreement at Minot, ND on Friday, June 16, 2000 when it failed to call clerical employees covered by the agreement to fill the vacant 2300-0700 Crew Hauler Position #5336, a seven-day position. Instead the position was filled by strangers to the agreement; Yardmaster Mark Gindy and an outside contractor.
2. Carrier shall now be required to compensate Claimant Myron Schroeder eight (8) hours pay at the overtime rate of \$117.64 for June 16, 2000.”

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 regular incumbent of a Crew Hauler third shift position at Minot, North Dakota, was on sick leave during the period June 11 through June 16, 2000.

On Friday, June 16, 2000, the second shift Crew Hauler was released to go home by the Yardmaster because he did not have enough time remaining in his shift to haul the train crew on duty without incurring overtime. When no one showed up to fill the third shift Crew Hauler vacancy, the Yardmaster hauled the crew. Moreover, the Organization alleges that an outside contractor was called in to fill the remainder of the shift. No clerical employee was called for the vacant position.

The Claimant is the senior first shift Crew Hauler. According to his statement, he reported for duty on Saturday, June 17, 2000 and inquired about the matter. He was informed that the records showed a vacancy the previous day and that the Placement Center "must have forgotten to call someone."

The Organization filed the instant claim on behalf of the Claimant for eight hours at the time and one-half rate, claiming that he should have been called to fill the third shift crew hauling vacancy. In support thereof, the Organization relied upon the following Agreement provisions:

"RULE 1 SCOPE

* * *

- A. Work now covered by the scope of this agreement shall not be removed except by agreement between the parties.

* * *

- C. Positions and work includes the following:

* * *

7. Storekeepers and Assistants, Material Supervisors
... Chauffeurs....

RULE 37 ASSIGNMENT OF OVERTIME

- C. When it becomes necessary to fill short vacancies by working overtime, such overtime will be worked by available incumbent or incumbents of the classification where the vacancy exists by calling the senior available employee from that shift who is off duty that day. If unable to fill the vacancy from this source, calls will then be made in seniority order of available qualified employees from the other shifts in that classification who can be doubled or are off duty that day. . . .”

On August 24, 2000, the Carrier responded to the claim, offering to settle the matter a non-referable basis by allowing the Claimant eight hours at the straight time rate of pay. The Organization rejected the Carrier's offer by letter dated October 20, 2000, stating that, in accordance with numerous prior Awards, the Claimant was entitled to eight hours at the time and one-half rate of pay in order to provide a make whole remedy for the lost overtime opportunity.

The Carrier denied the appeal, conceding an Agreement violation but challenging the requested remedy. The Carrier cited Board precedents holding that overtime is paid only when work or service has been performed. The Carrier further argued that the accepted interpretation of the applicable Rules of the Agreement was determined by the action of the parties themselves and such practice provided support for payment at the straight time rate of pay. In response, the Organization denied that such a past practice exists.

In later claim handling, after the parties conferenced the claim, and after the Organization notified the Carrier of its intent to docket the claim before the Board, the Carrier advanced the argument that the claim should be denied on the merits based on lack of Agreement support and evidence.

The Board described the claim handling in some detail because we believe that it is dispositive of the outcome in the instant case. On the merits, we recognize that the Carrier's offer of settlement was made on a non-referable basis. As the Carrier correctly points out, a variety of considerations exist when such settlement offers are made and it is obvious that the intent of the parties in making such settlements on a non-referable basis is to preclude the establishment of precedents which may be cited to their disadvantage at a later date. The Board recognizes such

conditions in claims settlements and we will not conclude that an offer by the Carrier to settle a claim constitutes an admission that the claim has merit.

So stating, however, we also recognize that the Carrier subsequently conceded during the claim handling that there was a violation of the Agreement and identified the remedy as the only unresolved issue. In our view, this was an admission that weighs heavily against the Carrier's later position protesting the claim on its merits. On this record, we find that the claim violation has been proven and thus the only remaining question centers on how to remedy the violation.

As both parties have pointed out, there is a clear divergence of views on the subject of whether to award pay at the overtime rate when an employee has been improperly denied the opportunity to perform service that would have entitled him to compensation at such a rate of pay. The Board reviewed the numerous cited cases and studied their logic in considerable detail. The reasoning is cogent on both sides. In the absence of specific language in the Agreement, the Board may draw upon an existing practice on a particular property as a guide in determining how the parties have dealt with these discrepant views and remedied similar violations. Such a practice should be given deference over how cases have been decided on other carriers. To do otherwise would upset the stability the parties have themselves established.

Based on a careful review of the evidence in this case, the Board is satisfied that there is a sufficient practice on the Carrier, and with the Organization, that claims of this nature are routinely settled by payment for the hours the employee would have worked at the straight time rate of pay. Accordingly, the Claimant shall be compensated eight hours at the straight time rate of pay.

AWARD

Claim sustained in accordance with the Findings.

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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 25th day of October 2006.