

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37996
Docket No. MW-36691
06-3-01-3-235

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to call and assign Machine Operator M. G. Lowry to perform machine operator overtime service (operate snow plow) on January 29 and 30, 2000 and instead assigned junior employee D. W. Sanderson (System File CEI00400R/1226527 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. G. Lowry shall now be compensated for twenty and one-half (20.5) hours' pay at the applicable machine operator's time and one-half rate of pay."

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.

It is undisputed that a Machine Operator junior to the Claimant was assigned to position himself in a hotel room on January 29 for the purpose of operating a Jordan Spreader to plow snow on January 30, 2000 on the Villa Grove Subdivision. The Claimant held Machine Operator seniority on the same territory and had plowed snow there in 1998 and 1999. The Claimant's qualification is not in issue as the Carrier admitted that he would have been called if another Machine Operator had been required. The Claimant was available at home and could have performed the overtime service. No attempt was made to call him for the assignment. He had some 18 years of service over the territory in question.

The Organization relied upon two primary Rules of the Agreement to support the instant claim. Rule 1(c) reads as follows:

"Rights accruing to employees under their seniority entitles them to consideration for positions in accordance with their relative length of service with the railroad."

The other Rule cited by the Organization is Rule 14 Section 1(j). It governs the priority assignment of work on unassigned days between the "regular employee" and other employees. After reviewing the record, we agree with the Carrier that no employees were regularly assigned to the Jordan Spreader at the time of the instant claim. We do not find the Rule to be applicable to the facts at hand.

According to the Carrier official who made the assignment, the junior employee was chosen "... on account of his profound knowledge of the territory." The official did not believe Rule 1(c) was applicable because no positions were created within his interpretation of the Rule.

The parties also jostled over whether emergency circumstances were involved. The Organization refuted the existence of an emergency situation in its final correspondence on the property. The letter was dated April 6, 2001, which was nearly one month before the record was closed on the property. The Carrier did not respond in any manner whatsoever. As a result, the record is devoid of any details, such as storm timing or ferocity, to support the claim of emergency circumstances. Thus, we must accept as fact the Organization's assertion that the overtime involved was pre-planned by virtue of positioning the junior employee in advance of the need for snow plowing.

The proper interpretation of Rule 1(c) has long been established on this property between these same parties. In Third Division Award 2716, which dates from 1944, the Board found as follows:

"We are of the opinion that this rule applies to all positions, whether it be a regular bulletined position, a temporary position or one that is required to be performed only with overtime work."

Award 2716 cited three other Awards for approval of its determination. Award 2716 was also cited favorably in Third Division Award 6136 issued in 1953. The same interpretation has survived thereafter. See Third Division Award 20120, issued in 1974, and the several Awards cited therein.

Given that the Claimant's qualifications to operate the Jordan Spreader are conceded, we must find that the Carrier violated Rule 1(c) when he was denied the overtime opportunity.

Turning to the question of remedy, we note that the number of hours involved is not in dispute. Only the proper rate of pay, straight time versus overtime, is in controversy. Although the Awards of this Board follow two views on this question, the precedent on this property does not provide an overtime remedy for time not actually worked. See Third Division Award 29084 and Second Division Award 7537. Therefore, we sustain the claim for the hours noted, but the remedy is limited to the straight time rate of pay.

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 25th day of October 2006.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 37996, DOCKET MW-36691
(Referee Wallin)

Inasmuch as the award was sustained in part, a concurrence is required only to the extent that the Majority recognized that the Carrier violated the Agreement when it failed to assign the Claimant to perform the overtime work at issue here.

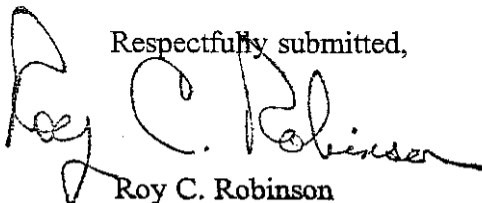
The DISSENT is directed towards the Majority's erroneous finding that there was no basis to award the Claimant the remedy requested, i.e., the overtime rate of pay.

To say that the Organization is perplexed by the Majorities findings, insofar as the ultimate remedy is concerned is an understatement. Attached to the Organization's submission was Award **2716** involving these same parties which was identified as Employees' Exhibit "B-1". That case involved an identical situation as we had in the instant case wherein the Carrier ignored the claimant's seniority and assigned a junior employe to perform overtime work instead of the Claimant. The Board in that case disregarded the Carrier's absurd reasons for ignoring the claimant's seniority and sustained the claim in full, i.e., it paid the claim at the time and one-half rate. What makes the findings in the case so bizarre is that the Majority cited Award **2716** in the text of its Award at Page 3 thereof, but ignored its final findings. Had the Majority taken the time to read that Award to the end, it could not have manufactured the remedy it did in this case.

To compound its error, the Majority went on to cite one, single, solitary Third Division Award (29084) involving these parties as precedent to support its decision. The problem with the citation of that award as precedent to deny the overtime rate of pay was that the Majority in that case held:

"However, the claim seeks 72 hours for both Claimants when the total hours worked was only 72 hours. Each Claimant shall therefore only be entitled to 36 hours pay. Further, without more of a showing as to why Claimants should be compensated at the overtime rate as requested in the claim, the awarded compensation shall be at the straight time rate."

It is crystal clear in the award cited above that the prayer for the overtime rate in that case was never explained and it was therefor reduced to the straight time rate of pay. Clearly it falls far short as reliable precedent on which this Board should rely to deny a missed overtime opportunity to be paid at the time and one-half rate. Insofar as the failure of the Majority to award the proper monetary remedy in this case is concerned, I dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member