

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40436
Docket No. MW-40519
10-3-NRAB-00003-080378**

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

**(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: **(**
(Soo Line Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to pay Messrs. T. Thibado, J. Skroch and S. Gary their lump sum payment in accordance with the provisions of Memorandum No. 10 for their respective assignment and service on Cross System Production Crew No. 1 – Distribution and Pickup from January 1 through the abolishment of their respective positions on said gang on March 30, 2006 (System File C-06-280-030/8-00495).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants T. Thibado, J. Skroch and S. Gary shall now each receive a lump sum payment equal to five percent (not to exceed \$1,000) of their respective compensation earned on said Cross System Production Gang from January 1 through March 30, 2006.”**

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 Claimants bid to and were assigned to Cross System Production Crew No. 1 – Distribution and Pickup when it was initially bulletined by the Carrier during the 2005 calendar year. Cross system gangs are governed by Memorandum No. 10, which allows these gangs to move across the seniority boundaries of the SOO and Milwaukee Districts without penalty. Pertinent here is the last paragraph of the Memorandum, which states as follows:

“Rates of pay on positions established on cross system production crews will be 1% above the otherwise applicable rate. Each employe assigned to a cross system production crew established under the terms of this agreement, who does not leave the gang voluntarily, shall be entitled to a lump sum payment equal to five percent of his or her compensation earned during the calendar year on that crew. Such compensation shall not exceed \$1,000 and, it shall be paid within 30 days of the completion of the employe’s service on the gang.”

By virtue of their assignment on a cross system production gang, the Claimants were compensated at the one percent higher rates of pay for all time worked thereon during calendar year 2005 pursuant to the provisions of Memorandum No. 10. Because the Claimants did not voluntarily leave the gang in 2005, they were also paid the lump sum payment provided by Memorandum No. 10 for calendar year 2005.

Cross System Production Crew No. 1 was not abolished by the Carrier at the end of the 2005 calendar year and continued to work into the 2006 calendar year. The Claimants remained assigned to Cross System Production Crew No. 1 and were properly compensated at the one percent higher rates of pay for work on the production crew from January 1 until it was abolished on March 30, 2006.

On or around May 15, 2006, the Claimants received their paychecks and noticed that they had not received a lump sum payment for work performed on the cross system production crew during the 2006 calendar year. This claim was initiated on their behalf on June 17, 2006. The Organization contends that the Claimants should have received a lump sum payment for work performed on the cross system production crew during the 2006 calendar year in accordance with the clear and unambiguous terms of Memorandum No. 10. In the Organization's view, there is no other plausible interpretation for the agreed upon language.

The Carrier advanced procedural and substantive arguments during claim handling to support the denial of the claim. The Carrier argued, first, that the claim herein was untimely presented and should be dismissed. According to the Carrier, the Claimants' positions were abolished on March 30, 2006, yet the claim was not presented until June 19, 2006, beyond the 60-day time limit provided in Rule 21(1) of the Agreement.

As a general matter, great care and careful scrutiny are mandated whenever procedural defects are raised by either party to prevent adjudication on the merits. Any doubts as to the interpretation of contractual time limits should be resolved against forfeiture of the right to process the claim. Bearing these general and well-established principles in mind, the Board does not agree that the claim is time-barred due to the Organization's failure to file the claim at an earlier point in time. The claim was timely filed when the Claimants discovered through payroll payments that they had not received a lump sum payment for the calendar year 2006. The Carrier did not establish that the Claimants or the Organization knew or reasonably should have known prior to that time that there would be no lump sum payment for the 2006 calendar year. Accordingly, the claim will be decided on its merits and will not be dismissed on the basis of untimeliness.

The Carrier next argued that it fully complied with the provisions set forth in Memorandum No. 10. The Carrier pointed out that the Claimants worked and received a rate of pay one percent above the otherwise applicable rate, along with the lump sum payment that was paid within 30 days of the completion of service on the gang. The lump sum payment was made in accordance with the compensation earned during the calendar year on the respective crew. The Claimants did not complete a second calendar year and were not entitled to double compensation. Moreover, the Claimants were compensated the maximum of \$1,000.00 for a bonus payment and the Memorandum does not provide for payment above that amount.

The Board carefully reviewed the record and the respective positions of the parties. We are unaware of any prior determinations with respect to the issue herein. Resolution of the parties' conflicting interpretations must be made by looking to the language itself. The last paragraph of Memorandum No. 10 entitles each cross system production crew member, who does not voluntarily leave the gang, to "a lump sum payment equal to five percent of his or her compensation earned during the calendar year on that crew." (Emphasis added) The parties differ on the meaning and application of the term "calendar year." It seems clear from the context, however, that the parties did not intend to limit the lump sum payment to one year. If they had so intended, the language would have stated that crew members would be entitled to a lump sum payment based on compensation earned "only during the first calendar year assigned to the crew." Nor did the parties limit lump sum payments to only those cases where the crew has worked for an entire calendar year. Whatever compensation has been earned within a given calendar year becomes the basis for computing the lump sum payment. So, for example, employees who are assigned to one of these crews in the beginning of March and who work until the end of the year would receive a lump sum payment that is calculated at five percent of the amount earned during the nine months that had been worked during that calendar year on the crew. Further, the concept of a \$1,000.00 "cap" as argued by the Carrier is not expressed in Memorandum No. 10. It is the compensation earned during a particular calendar year that "shall not exceed \$1,000.00," not an overall cap on the lump sum payment.

Based on the foregoing, we find that the claim has merit and that the Organization's interpretation of the disputed language comports with the plain meaning of Memorandum No. 10. To accept the Carrier's interpretation would result in a wholly incongruent construction of the last paragraph of Memorandum No. 10. Consistent with the unambiguous language of Memorandum No. 10, the Claimants are entitled to receive a lump sum payment equal to five percent (not to exceed \$1,000.00) of their respective compensation earned on the Cross Production Gang from January 1 through March 30, 2006.

AWARD

Claim sustained.

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 14th day of May 2010.