

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41692
Docket No. CL-41965
13-3-NRAB-00003-120319

The Third Division consisted of the regular members and in addition Referee Martin W. Fingerhut when award was rendered.

PARTIES TO DISPUTE: ((Transportation Communications International Union
(BNSF Railway Company

STATEMENT OF CLAIM:

“STATEMENT OF CLAIM I:

Claim of the System Committee of the Organization (GL-13219)
that:

The Carrier violated the May 6, 1980 agreement on September 4, 2009 at 2300 and 2300 hours (2 calls), September 5, 2009 at 2300 hours, September 6, 2009 at 0800, 2300, 2330, and 0215 hours (4 calls), September 8, 2009 at 1900, 2150, 2300 and 2300 hours (4 calls), September 9, 2009 at 0200 hours, September 10, 2009, September 11, 2009 at 2345 hours, September 12, 2009 at 2300 hours, September 13, 2009 at 0140, 0100, 0445, 0703, 0540, 0540, 0610, 0800, 0730 and 0745 (10 calls), September 14, 2009 at 0715, 0800, 0900 and 0900 (4 calls), September 15, 2009 at 1500 hours, September 16, 2009 at 2330 hours, September 17, 2009, September 19, 2009 at 1500 hours, September 21, 2009 at 0400 and 0700 (2 calls), September 22, 2009 at 0700 hours, September 25, 2009 at 2100 and 2300 hours (2 calls), September 26, 2009 at 1145 hours, September 27, 2009 at 0200 and 0700 hours (2 calls), September 2009 at 0700 hours, when it failed to call Troy Anderson Sr., for overtime as a crew hauler on the above dates and used outside contractors (strangers to the agreement) or other clerical employees out of their classification.

The Carrier must now pay Mr. Anderson at the overtime rate for crew hauling for the following dates and hours: September 4, 2009

eight hours, September 5, 2009 eight hours, September 6, 2009
sixteen hours, September 8, 2009 eight hours, September 10, 2009
eight hours, September 11, 2009 eight hours, September 12, 2009
eight hours, September 13, 2009 eight hours, September 14, 2009
eight hours, September 15, 2009 eight hours, September 16, 2009
eight hours, September 17, 2009 eight hours, September 19, 2009
eight hours, September 21, 2009 eight hours, September 22, 2009
eight hours, September 25, 2009 eight hours, September 26, 2009
eight hours, September 27, 2009 eight hours and September 29, 2009
eight hours.

STATEMENT OF CLAIM II:

Claim of the System Committee of the Organization (GL-13219)
that:

DC200911017:

The Carrier violated the May 6, 1980 agreement on October 1, 2009 at 0600 hrs, October 5, 2009 at 0240 and 0700 hrs (2 calls), October 6, 2009 at 0700 hrs, October 9, 2009 at 0700 and a unspecified time (2 calls), October 10, 2009 at 1115 hrs, October 12, 2009 at 1500 hrs, October 13, 2009 at 1500, 1600 and 1700 hrs (3 calls), October 14, 2009 at 1500, 1500 and 1700 hrs (3 calls), October 15, 2009 at 0600 hrs, October 17, 2009 at 1500, 1500 and 2300 hrs (3 calls), October 18, 2009 at 1500 and 1500 hrs (2 calls), October 20, 2009 at 1500, 1500, 1815 and 1900 hrs (4 calls), October 21, 2009 at 0135, 1800 and 2100 hrs (3 calls), October 21, 2009 at 0430 and 0600 hrs (2 calls), October 23, 2009 at 0030 hrs, October 24, 2009 at 2300 hrs, October 26, 2009 at 1100 hrs, October 27, 2009 at 0700 and 0300 hrs (2 calls), October 29, 2009 at 0030, 1800 and 0700 hrs (3 calls), October 2009 at 1530 hrs, October 31, 2009 at 0130 and 2300 hrs (2 calls), when it failed to call Troy Anderson, Sr., for overtime as a crew hauler on the above dates and used outside contractors (strangers to the agreement) or other clerical employees out of their classification.

The Carrier must now pay Mr. Anderson at the overtime rate for crew hauling for the following dates and hours: October 1, 2009 eight hours, October 5, 2009, eight hours, October 9, 2009, sixteen hours, October 10, 2009, eight hours, October 12, 2009 eight hours, October 13, 2009 eight hours, October 14, 2009 eight hours, October 15, 2009 eight hours, October 17, 2009 eight hours, October 20, 2009 eight hours, October 21, 2009 eight hours October 22, 2009 eight hours, October 23, 2009 eight hours October 24, 2009 eight hours, October 26, 2009 eight hours, October 27, 2009 eight hours, October 28, 2009 eight hours, October 29, 2009 sixteen hours, October 30, 2009 eight hours and October 31, 2009 eight hours.

DC200912018:

The Carrier violated the May 6, 1980 agreement on November 1, 2009, November 2, 2009 at 1145 and 2300 hrs (2 calls), November 4, 2009 at 0130 hrs, November 5, 2009 at 2300 hrs (2 calls), November 7, 2009 at 2315 hrs, November 8, 2009 at 2330 hrs, November 9, 2009 at midnight and 1000 hrs (2 calls), November 11, 2009 at 1500, 2130 hrs (3 calls), November 12, 2009 at 0200 hrs, November 13, 2009 at 0630 hrs, November 14, 2009 at 2300 hrs, November 15, 2009 2300 hrs, November 17, 2009 2300 hrs, November 17, 2009 at 0700 and 2300 hrs (2 calls), November 18, 2009 at 0630 and 2300 hrs (2 calls), November 19, 2009 at 0630 hrs and 2300 hrs (2 calls), November 20, 2009 at 2300 hrs, November 22, 2009 at 1230 and 2300 hrs (2 calls), November 24, 2009 at 0700 hrs, November 25, 2009 at 2300 hrs, November 27, 2009 2nd shift and November 30, 2009 at 0430 when it failed to call Troy Anderson, Sr., for overtime as a crew hauler on the above dates and used outside contractors or on November 27 trainmaster Diane Schimmerhorn (strangers to the agreement).

The Carrier must now pay Mr. Anderson at the overtime rate for crew hauling for the following dates and hours: November 1, 2009 eight hours, November 1, 2009 eight hours, November 1, 2009 eight hours, November 2, 2009 eight hours, November 4, 2009 sixteen hours, November 5, 2009 sixteen hours, November 7, 2009 eight

hours, November 8, 2009 eight hours, November 9, 2009 sixteen hours, November 11, 2009 eight hours, November 12, 2009 eight hours, November 13, 2009 eight hours, November 14, 2009 eight hours November 15, 2009 eight hours, November 16, 2009 eight hours November 17, 2009 eight hours, November 18, 2009 eight hours November 19, 2009 sixteen hours, November 20, 2009 eight hours November 22, 2009 eight hours, November 24, 2009 eight hours, November 25, 2009 eight hours, November 27, 2009 eight hours November 29, 2009 eight hours.

DC201001017:

The Carrier violated the May 6, 1980 agreement on December 1, 2009 at 0700 hrs, December 2, 2009 at 0700, 0700 and 0900 hrs (3 calls), December 5, 2009 at 0700 and 2300 hrs (2 calls), December 2009 at 2300 hrs and extra yard position (2 calls), December 2009 at 2300 hrs, December 10, 2009 at 2300 hrs, December 12, 2009 at 2300 hrs, December 13, 2009 at 2300 hrs, December 14, 2009 at 2300 hrs, December 15, 2009 at 0700 and 2300 hrs (2 calls), December 16, 2009 2300 hrs, December 17, 2009 2300 hrs, December 18, 2009 2300 hrs, December 21, 2009 at 0700 hrs, December 28, 2009 at 0130 hrs, December 29, 2009 at 2300 hrs, December 30, 2009 at 2300 hrs, and December 31, 2009 at 0130 when it failed to call Troy Anderson, Sr., for overtime as a crew hauler on the above dates and used outside contractors or other employees not in compliance with Rule 37.

The Carrier must now pay Mr. Anderson at the overtime rate for crew hauling for the following dates and hours: December 1, 2009 eight hours, December 2, 2009 eight hours, December 5, 2009 sixteen hours, December 8, 2009 sixteen hours, December 9, 2009 eight hours, December 10, 2009 eight hours, December 12, 2009 eight hours, December 13, 2009 eight hours, December 14, 2009 eight hours, December 15, 2009 sixteen hours, December 16, 2009 eight hours, December 17, 2009 eight hours, December 18, 2009 eight hours, December 21, 2009 eight hours, December 28, 2009 eight hours, December 29, 2009 eight hours, December 30, 2009 eight hours, December 31, 2009 eight hours.

STATEMENT OF CLAIM III:

**Claim of the System Committee of the Organization (GL-13219)
that:**

DC201003001:

The Carrier violated the May 6, 1980 agreement on January 2, 2010 at 0600 hrs, January 3, 2010 at 2300 hrs, January 4, 2010 at 2300 hrs, January 6, 2010 at 0100 hrs and 2300 hrs (2 calls), January 10, 2010 at 2300 hrs, January 15, 2010 at 1500 hrs, January 16, 2010, January 18, 2010 at 0900 hrs, January 19, 2010 at 1500 hrs, January 20, 2010 at 2300 hrs, January 25, 2010 at 1500 hrs, January 26, 2010 at 0700 hrs, January 27, 2010 at 2300 hrs and January 30, 2010 at 2300 hrs when it failed to call Troy Anderson, Sr., for overtime as a crew hauler on the above dates and used outside contractors (strangers to the agreement) or other employees not in compliance with Rule 37.

The Carrier must now pay Mr. Anderson at the overtime rate for crew hauling for the following dates and hours: January 2, 2010 8 hours, January 3, 2010 8 hours, January 4, 2010 8 hours, January 6, 2010 16 hours, January 10, 2010 8 hours, January 15, 2010 8 hours, January 16, 2010 8 hours, January 18, 2010 8 hours, January 19, 2010 8 hours, January 20, 2010 8 hours, January 25, 2010, 8 hours, January 26, 2010 8 hours, January 27, 2010 8 hours and January 30, 2010 8 hours.

DC201004001:

The Carrier violated the May 6, 1980 agreement on February 1, 2010 at 1500 hrs, February 2, 2010 at 0700 hrs, February 3, 2010 at 0900 and 2300 hrs (2 calls), February 4, 2010 at 2300 hrs, February 5, 2010 at 2300 hrs, February 6, 2010 at 2300 hrs, February 7, 2010 at 1000 and 2300 hrs (2 calls), February 8, 2010 at 2300 hrs, February 9, 2010 at 0700, 1000, 2300 hrs (3 calls), February 14, 2010 at 2300 and midnight hrs (2 calls), February 15, 2010 at midnight, February 16, 2010 at 0630, 0700 and 2300 hrs (3 calls),

February 20, 2010 at 0700 and 2300 hrs (2 calls), February 21, 2010 at 2300 hrs, February 22, 2010 at 0630 hrs, February 25, 2010 at 1500 hrs, February 27, 2010 at 2300 hrs and February 28, 2010 at 2300 hrs when it failed to call Troy Anderson, Sr., for overtime as a crew hauler on the above dates and used outside contractors or other employees not in compliance with Rule 37.

The Carrier must now pay Mr. Anderson at the overtime rate for crew hauling for the following dates and hours: February 1, 2010 8 hours, February 2, 2010 8 hours, February 3, 2010 16 hours, February 4, 2010 8 hours, February 5, 2010 8 hours, February 6, 2010 8 hours, February 7, 2010 16 hours, February 8, 2010 8 hours, February 9, 2010 16 hours, February 14, 2010 8 hours, February 15, 2010 8 hours, February 16, 2010 16 hours, February 20, 2010 16 hours, February 21, 2010 8 hours, February 22, 2010 8 hours, February 25, 2010, 8 hours, February 27, 2010 8 hours and February 28, 2010 8 hours.

DC201004017:

The Carrier violated the May 6, 1980 agreement on March 1, 2, 3, 10, 12, 13, 14, 15, 16, 20, 21, 22, 24, 29 and 30, 2010 -reference the Local Chairman's original claim for specific hours - when it failed to call Troy Anderson, Sr., for overtime as a crew hauler on the above dates and used outside contractors or other employees not in compliance with Rule 37.

The Carrier must now pay Mr. Anderson at the overtime rate for crew hauling for the following dates: March 1, 2010 8 hours, March 2, 2010 8 hours, March 3, 2010 8 hours, March 10, 2010 8 hours, March 12, 2010 8 hours, March 13, 2010 8 hours, March 14, 2010 16 hours, March 15, 2010 8 hours, March 16, 2010 8 hours, March 20, 2010 16 hours, March 21, 2010 8 hours, March 22, 2010 16 hours, March 24, 2010 8 hours, March 29, 2010 16 hours, March 30, 2010 8 hours.

STATEMENT OF CLAIM IV:

Claim of the System Committee of the Organization (GL-13219) that:

The Carrier violated the May 6, 1980 agreement on April 2, 2010 at 1735 and 2300 hrs (2 calls), April 7, 2010, at 0020 and 2300 hours (2 calls), April 9, 2010 at 2300 hrs, April 11, 2010 at 2300 hours, April 12, 2010 0600 and 2300 hrs (2 calls), April 13, 2010 at 2300 hours, April 14, 2010 at 2300 hrs, April 17, 2010 at 2300 hrs, April 20, 2010 at 0700 and 2300 hrs (2 calls), April 24, 2010 1500, 1600, 1730 and 2300 hrs (4 calls), April 26, 2010 at 2300 hrs, April 27, 2010 at 1500, 1500 and 2300 hrs (3 calls), April 28, 2010 1500 and 2300 hrs (2 calls), May 4 at 2300 hrs, May 7, 2010 at 2300 hrs (2 calls), May 8, 2010 at 1500 and 2300 hrs (2 calls), May 10, 2010 at 2300 hrs, May 11, 2010 at 0930 and 2300 hrs (2 calls), May 12, 2010 at 2300 hrs when it failed to call Troy Anderson, Sr., for overtime as a crew hauler on the above dates and used outside contractors (strangers to the agreement) or other employees not in compliance with Rule 37.

The Carrier must now pay Mr. Anderson at the overtime rate for crew hauling for the following dates and hours: April 2, 2010 8 hours, April 7, 2010 16 hours, April 9, 2010 8 hours, April 11, 2010 8 hours, April 12, 2010 16 hours, April 13, 2010 8 hours, April 14, 2010 8 hours, April 17, 2010 8 hours, April 20, 2010 16 hours, April 24, 2010 16 hours, April 26, 2010 8 hours, April 27, 2010 16 hours, April 28, 2010 16 hours, May 4, 2010 8 hours, May 7, 2010 8 hours, May 8, 2010 16 hours, May 10, 2010 8 hours, May 11, 2010 16 hours, and May 12, 2010 8 hours."

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.

On May 15, 2007, the Claimant sustained an on-duty injury while employed as a Conductor. The injury prevented his further employment as a Conductor and the Claimant thereafter accepted the Carrier's offer of employment as a Crew Hauler. The Claimant began crew-hauler work on June 22, 2009. The new position required overtime which the Claimant performed.

On September 3, 2009, the Carrier notified the Claimant that he could no longer work overtime as a Crew Hauler. The Carrier stated that the basis for its decision was the testimony of the Claimant at the trial of his personal injury action against the Carrier which took place in August 2009. The trial resulted in a jury verdict in favor of the Claimant.

On October 12, 2009, the Organization representing the Claimant filed the first in a series of claims alleging that the Carrier violated the Agreement when it did not allow the Claimant to work overtime. On October 29, the Carrier sent a letter to the Claimant's medical provider asking whether the Claimant could work three to four hours of overtime per day. The medical provider responded in the affirmative and the Carrier allowed the Claimant to work up to 12 hours a day beginning December 4, 2009.

The Organization, however, continued to file claims for the Claimant for not being allowed to work 16 hours per day. On March 11, 2010, in response to another letter from the Carrier the medical provider stated that the Claimant,

“. . . may work unlimited overtime if driving a vehicle. [The Claimant] has never had restrictions on his driving a vehicle in the past.”

On May 20, the Carrier released the Claimant to work up to eight hours of overtime per day.

In its defense to the merits of the claims, the Carrier relied on the doctrine of estoppel. It alleged that the Claimant testified at his personal injury trial that he was

physically unable to work overtime. Accordingly, the Carrier argued, under the recognized doctrine of estoppel he was thereafter precluded from contending that he was able to work overtime.

The Board concludes, however, after a careful review of the facts that, for two reasons, the doctrine of estoppel is not appropriate in this case. First, the testimony given by the Claimant at the trial does not support the conclusion that he was contending that he was physically unable to work overtime. At most, his testimony was that overtime work caused him pain which required medication to ease. He did not testify that the pain prevented him from working overtime. Second, regardless of what the Claimant testified to at the trial concerning his physical condition, the Carrier's action in thereafter requesting the Claimant's medical provider to present evidence of his physical condition opened the door to allowing the Claimant to present medical evidence on that issue. Indeed, the door was opened twice. The first instance dealt with his ability to work three or four hours of overtime; the second instance his ability to work eight hours of overtime. In each case, upon receiving the medical report the Carrier allowed the Claimant to work the overtime described in the report. The Carrier did not require the Claimant to be examined by one of its own physicians, and there is no medical evidence that the Claimant was unable to work eight hours of overtime. The doctrine of estoppel is not applicable where the Carrier invites the employee to present evidence of his physical condition to perform the work. The merits of the claim must be sustained.

With respect to the remedy, the Carrier raises appropriate questions concerning the validity of many of the specific claims made by the Organization. The questions relate, inter alia, to whether there were overtime vacancies existing on the claim dates and, if so, whether the Claimant stood to be called for such vacancies. The Board, accordingly, remands the dispute to the property for a check of the Carrier's records with respect to the claim dates and sustains those claims found to be consistent with Rule 37 of the Agreement.

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 16th day of September 2013.