

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44013
Docket No. SG-45441
20-3-NRAB-00003-190204**

The Third Division consisted of the regular members and in addition Referee Erica Tener when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation –
(AMTRAK**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the National Railroad Passenger Corp. (Amtrak):

Claim on behalf of J.D. Cribb, for 144.75 hours at his overtime rate of pay; account Carrier violated the current Signalmen’s Agreement, particularly Rule 57, when from March 16, 2017 through June 1, 2017, it failed to compensate him the overtime compensation he would have earned after being exonerated for charges made at a disciplinary investigation, thereby causing the Claimant a loss of wages. Carrier’s File No. BRS-SD-1254. General Chairman’s File No. AEGC # 201710210. BRS File Case No. 15943-NRPC(S). NMB Code No. 172.”

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.

Relevant Agreement Language

“Rule 57 – Discipline and Appeals

- (b) When a major offense has been committed, an employee suspected by the Management to be guilty thereof may be held out service pending trial and decision.

An employee held out of service pursuant to his rule shall remain under pay as though he were in active service on his regular position unless medically disqualified. Compensation under this rule shall continue until the decision is rendered following the trial/investigation, except that if the employee or his duly authorized representative request a postponement of the employee’s trial/investigation, the employee will not be compensated for the period of such postponement.

- (m) When an employee is held out of service in connection with an offense, and thereafter is exonerated, he shall be reinstated and compensated for the amount he would have earned had he not been held out of service.”

The following facts are undisputed. J.D. Cribb (Claimant) was removed from service pending investigation by the Carrier on March 16, 2017. The Claimant was one of nine employees removed from service pending the outcome of an Amtrak OIG investigation into excessive overtime by the Claimant’s gang. On May 29, 2017 the Claimant was exonerated and returned to service. The Claimant received payment for earnings of his regular position until he returned to service.

The Organization argues Rule 57 parts (b) and (m) require the Carrier reimburse the Claimant for all lost wages including any overtime he may have missed while held out of service. The Organization argues the language is clear and unambiguous, when an employee is exonerated following an investigation/trial, he should be paid the amount he would have earned had he not been held out of service at all. In this case, the Organization contends the amount of overtime is not speculative. Based on available payroll records, the Claimant missed out on 144.75 hours of overtime

between March 16, 2017 and June 1, 2017, which is the period during which he was held out of service.

The Organization argues the language is clear and unambiguous. In support of its position, the Organization has presented numerous awards from across the industry. The Organization argues there is considerable arbitral precedence in back-pay awards to include overtime payments at one and one-half time as granted by the contract.

The Carrier argues it should not be penalized because there has been no violation of the Agreement. Rule 57(b) grants the Carrier authority to withhold an employee from service pending investigation as long as he is paid as though in active service in his “regular” position. In this case, the Claimant received his pay throughout the time he was withheld from service. Rule 57(m), the Carrier argues, requires the Carrier reinstate employees who have been exonerated and pay him anything that he did not receive under Rule 57(b). In this case, the Claimant was paid while withheld from service, so no additional payments are necessary.

The Carrier argues there are conflicting arbitral decisions on whether overtime should be included when backpay is awarded. Additionally, the Carrier maintains, there is nothing in Rule 57 that explicitly provides for potentially lost overtime at the overtime rate of one and one-half times the regular rate.

The Carrier notes this dispute is the result of unusual circumstances in which nine employees, including the Claimant, were held out of service for an OIG investigation. As a result, there was an excessive amount of overtime available for those employees who remained on duty. The Carrier asserts it would be speculative to assume the Claimant would have accepted all of the overtime work that may have been offered to him. The Carrier concludes that if the Board finds overtime should be granted, the payments due to the Claimant should be made at the straight time rate and not at one and one-half time.

The Board has carefully reviewed the record in this matter. The language in Rule 57(b) of the Agreement is clear and unambiguous. It grants the Carrier the right to remove an employee from service pending the outcome of an investigation/trial. The Rule also provides that employees withheld from service be paid as though in active service in his regular position. The Carrier did not violate any part of this language.

Rule 57(m) contains requirements the Carrier must follow when employees are exonerated following an investigation. In those cases, the employee is to “reinstated and compensated for the amount he would have earned had he not been held out of service.” The Board finds that this language is also clear and unambiguous. An exonerated employee must be reimbursed for any compensation he may have lost as a result of his having been held from service. In this case, once the Claimant was exonerated, he was reinstated.

Many of the awards cited by the Organization discuss overtime being awarded at the overtime rate when a Carrier has violated the contract in cases such as improperly bypassing someone in an overtime situation. In this case, the Carrier did not violate the Agreement when it withheld the Claimant from service. Rule 57(m) requires that an exonerated employee be made whole, as if he had never been held from service in the first place. The Board can find nothing in Rule 57 that explicitly provides for lost overtime at the overtime rate of one and one-half time as requested by the Organization. The Board finds that payment of overtime at the Claimant’s straight time rate more consistent with prior rulings as cited by the parties.

The Organization presented undisputed evidence of the number of hours worked by the Claimant’s replacement during the period he was withheld from service. Based on the unusual circumstances in this particular case, the Board finds the Claimant is entitled to receive 144.75 hours at his 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 28th day of April 2020.

**LABOR MEMBER'S CONCURRING AND DISSENTING OPINION TO NATIONAL
RAILROAD ADJUSTMENT BOARD THIRD DIVISION AWARD NO. 44013; SG-45441
AND THIRD DIVISION AWARD NO. 44014; SG-45442**

(REFEREE Erica Tener)

The Majority correctly decided the basic issue of this dispute, holding that:

“Rule 57(m) contains requirements the Carrier must follow when employees are exonerated following an investigation. In those cases, the employee is to “reinstated and compensated for the amount he would have earned had he not been held out of service.” The Board finds that this language is also clear and unambiguous. An exonerated employee must be reimbursed for any compensation he may have lost as a result of his having been held from service.”

The record crystalized the parties' dispute over the payment under Rule 57 (m) for the overtime hours that were lost as a result of being held from service. On this issue the Majority properly found that the Claimant was to be paid for the hours of overtime he would have earned had he not been withheld from service in addition to the straight time hours he had already been compensated for under Rule 57 (b).

However, cause for dissent arises in the closing paragraphs of the findings, where the Majority failed to provide the required damages for the breach of agreement, awarding the hours at the straight time rate of pay rather than the overtime rate of pay. Providing the proper damages when a violation occurs is necessary to maintaining the integrity of agreements; Referee Daugherty in Third Division Award No. 5893 summarized this fundamental and axiomatic principle by holding:

“...If violations go unpunished, there may be insufficient incentive to avoid repetitions thereof.”

The Majority found that the Claimant was not paid the overtime hours owed to him under Rule 57 (m). Therefore, the Claimant was to be paid “the amount he would have earned had he not been held from service”; yet, the Majority found that he was only entitled to a fraction of the amount he would have earned. The Majority's finding runs counter to the well-reasoned and well-supported principle that the employee should be awarded what they would have earned if not for the Carrier's violation of the Agreement. This principle was well laid out and established in Third Division Award No. 13738, where Referee Dorsey held:

“Had Claimants been called and performed the work involved, as was their contractual entitlement, they would have been paid, by operation of the terms of the Agreement, time and one-half for the hours worked. In like circumstances this Board has awarded damages at the pro rata rate in some instances, and the overtime rate in others. The cases in which the pro rata rate was awarded as the measure of damages, in a number of which the Referee in this case sat as a member of the Board, are contra to the

great body of Federal Labor Law and the Law of Damages. The loss suffered by an employee as a result of a violation of a collective bargaining contract by an employer, it has been judicially held, is the amount the employee would have earned absent the contract violation. Where this amount is the overtime rate an arbitrary reduction by this Board is ultra vires."

This principle was again succinctly covered in Third Division Award No. 25601 where the Board held:

"Payment would have been made at the overtime rates. It is Claimant who would be penalized if he were reimbursed at straight time or only for actual hours worked."

A small sampling of the numerous Awards of the Board that followed this sound reasoning include Third Division Award Nos. 16821, 17748, 17917, 20413, 26431, 31571, 35569, 35564, 36722, and 37049. Additionally, in Public Law Board 7693, Award No. 2, between these same parties, Referee Capone held:

"The Claimants here were deprived the opportunity to work in excess of their regular tour of duty which if properly provided to them would have paid them the overtime rate. There is no basis in the record here to deprive the Claimants the opportunity to be 'made whole'".

The Majority further erred in finding that the lack of explicit language in Rule 57 for payment at the one and one-half time prevents such payment. Third Division Award No. 19947 not only studied the countering arguments of straight time pay versus overtime pay, it also explained the misplaced rationale for the deprivation of the overtime rate for damages. The Board held:

"These contentions are not wholly without merit and Carrier's presentation in general is an impressive one. Also, we frankly acknowledge that there is a credible rationale to support each line of the conflicting authorities. We are concerned, though, that the straight time authorities are characterized by an undue absorption in the historical purpose of overtime, as well as a strained search of the contract itself to find specific guidelines on the measure of damages. Overtime rates evolved both from public laws and negotiation at the bargaining table, but we fail to see in this history any express or implied prohibition against taking the loss of overtime into account, along with the loss of straight time, when a Carrier's violation of an employee's contractual rights to work is under appraisal. Also, we know that many things are left unsaid in a collectively bargained agreement and that the measure of damages for a contract violation is one of the most common among them. On balance, therefore, we are skeptical about the rationale of the straight time authorities for we believe it may contain underlying defects which are absent from the overtime rationale. Accordingly, we shall adhere to the ruling laid down in Award 13738 and sustain the claim."(Emphasis ours)

The hours claimed were established as overtime hours, in excess of the regular assigned working hours, and, therefore, paid at the time and one half rate under the Agreement. The Claimant was deprived of these hours by Carrier when he was removed from service; subsequently, when the Claimant was exonerated the provision of 57 (m) provided he "shall be reinstated and compensated the amount he would have earned had he not been held out of service." The Majority fell into palpable error, ignoring well-established principles adhered to by the Board for decades, by awarding the Claimant two-thirds of the compensation he would have earned if no violation had occurred and, in turn, made it less costly for Carrier to violate rather than observe the Agreement.

For these reasons and to the extent indicated, I respectfully dissent.

A handwritten signature in black ink, reading "Brandon Elvey". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

Brandon Elvey

Labor Member