SPECIAL BOARD OF ADJUSTMENT NO. 1087

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Organization,

and

NORFOLK SOUTHERN RAILWAY COMPANY,

Carrier.

Case No. 21
Award No. 21



**OPINION AND AWARD**

Hearing Date: April 6, 2006
Hearing Location: Sacramento, California
Date of Award: October 27, 2006

BOARD MEMBERS

Employe Members: R. B. Wehrli and Donald F. Griffin
Carrier Members: Kenneth Gradia and John Hennecke
Neutral Member: John B. LaRocco

## ORGANIZATION'S STATEMENT OF THE ISSUES

1. Does a Carrier place a Claimant in a worse position with respect to compensation and, thus, violate Article IV, Section 1 of the February 7, 1965 Agreement, as amended in 1996, when the carrier fails to use Claimant's protected "normal rate" in calculating the compensation Claimant is entitled to receive under the Rules Agreement for working overtime?

2. Is the NS estopped from asserting that Claimant's challenge to the manner in which the NS calculated the compensation due to him under Article IV, Section 1 of the amended February 7, 1965 Agreement, is untimely when (a) the NS, at the time it paid Claimant most, but not all of the required MDA, and contrary to its obligations under Article 1, Section A of the October 25, 1996 Claims Handling Agreement, failed to provide the Claimant with a written decision informing him that his claim had been denied insofar as it sought compensation at the protected rate for overtime hours, and stating the reasons for that denial, and (b) the BMWED raised its challenge to the NS' calculation methodology as soon as it learned of the NS' failure to use the Claimant's protected rate to calculate the compensation due for overtime work?

## CARRIER'S QUESTION AT ISSUE

Does the February 7, 1965 Mediation Agreement as amended by the September 26, 1996 Agreement provide that hours of casual or unassigned overtime be considered part of an employee's established "normal rate of compensation" thereby increasing a protected employee's "normal rate of compensation" by 50% for any casual and unassigned overtime hours worked?

OPINION OF THE BOARD

This Board, after hearing upon the who record and all evidence, finds that the parties herein are Carrier and Employe within the meaning of the Railway Labor Act as amended; that this Board has jurisdiction over the parties and the subject matter of the dispute herein; that this Board is duly constituted according to the 1996 Mediation (National) Agreement and as specified in a National Mediation Board appointment letter dated August 18, 2004; and that all parties were given due notice of the hearing held on this matter.

I. BACKGROUND AND SUMMARY OF THE FACTS

Claimant, J. M. Price, is a protected employee pursuant to Article I, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended, by the September 26, 1996 Mediation Agreement.

On January 5, 2001, the Carrier abolished Claimant's position at the Atlanta Rail Welding Shop. While the record is not entirely clear, Claimant was apparently furloughed for a short time before returning to active service in a position lower rated than his former position. According to the Carrier, Claimant's hourly protected rate was $17.50 per hour.[1] Thereafter, Claimant held positions that were lower rated than his hourly guarantee.

Sections 1 and 2 of Article IV of the February 7, 1965 Job Stabilization Agreement, as amended, provide:

> Section 1 - Subject to the provisions of Section 3 of this Article IV, protected employees who hold regularly assigned positions shall not be placed in a worse position with respect to compensation than the normal rate of compensation for said regularly assigned position as of the date they become protected provided, however, that in addition thereto such compensation shall be adjusted to include subsequent general wage increases.

[1] During the ensuing years, Claimant's protected rate rose due to subsequent general wage increases. As of May 2005, Claimant's hourly guarantee was $18.84.

> Section 2 - Subject to the provisions of Section 3 of this Article IV, all other employees entitled to preservation of employment shall not be placed in a worse position with respect to compensation than that earned during a base period comprised of the last twelve months in which they performed compensated service immediately preceding the date of this Agreement. For purposes of determining whether, or to what extent, such an employee has been placed in a worse position with respect to his compensation, his total compensation and total time paid for during the base period will be separately divided by twelve. If his compensation in his current employment is less in any month(commencing with the first month following the date of this agreement) than his average base period compensation (adjusted to include subsequent general wage increases), he shall be paid the difference less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average time paid for during the base period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the time paid for during the base period; provided, however, that in determining compensation in his current employment the employee shall be treated as occupying the position producing the highest rate of pay and compensation to which his seniority entitles him under the working agreement and which does not require a change in residence.

While Claimant occupied positions having rates lower than his guarantee, the Carrier paid Claimant protective benefits (a monthly displacement allowance) measured by the difference between his hourly protected rate and his straight-time hourly earnings. Claimant occasionally performed overtime service. The payroll records submitted by Claimant indicate that the overtime was sporadic albeit, he performed several hours of overtime service during some pay periods. Citing Rule 24(a) of the schedule agreement, the Carrier paid Claimant one and one-half times the rate of the position he occupied for all overtime hours that Claimant worked.

On February 5, 2003, the Organization initiated a claim charging that the Carrier should have paid Claimant one and one-half times his protected rate for every hour of overtime service that he

performed going back to January 2002. In the claim, the Organization gave an example. When Claimant worked overtime, the Carrier multiplied the straight rate of the position by one and one-half and so, it paid Claimant $25.95 per overtime hour. The Organization alleges that the Carrier should have utilized Claimant's protected rate which would have paid him $27.21 for each hour of overtime service. The Organization now seeks the difference between the two figures for each hour that Claimant worked overtime while he was receiving a monthly displacement allowance.

In its February 11, 2003 response to the claim, the Carrier not only denied the claim but also asserted that any claims covering months prior to December 2002 were barred by the 60-day time limitation contained in Section I-A of the October 25, 1996 Dispute Resolution Procedures Agreement, which reads:

> Section I-A - Each Carrier shall designate an officer or officers to receive initial claims arising under either the February 7, 1965 Agreement or the Washington Job Protection Agreement of 1936 ("WJPA") The Carrier shall notify the Union in writing of the names and addresses of such designated officer or officers. All claims under the provisions of these Agreements shall be presented to the designated officer by the employee or his representative within sixty (60) days following the end of the calendar month in which the claim arose. The claim shall be barred if not presented within such period. The designated officer who received the claim shall deny or allow it within sixty (60) days from the date of its receipt. Any denial must be in writing and state the reasons for denial of the claim. If the designated officer fails to respond to the claim within the time provided, the claim shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims.

II. THE POSITIONS OF THE PARTIES

A. The Organization's Position

Whenever Claimant performed overtime service, his normal rate of compensation, as specified in Article II, Section 1 of the amended Job Stabilization Agreement, was his protected overtime rate. By paying Claimant only one and one-half times the rate of the position that he occupied for overtime service, the Carrier violated Article IV, Section 1 because it placed Claimant in a worse position with respect to his aggregate compensation. In essence Claimant is earning less than he would have earned had he not been displaced from his regularly assigned position which originally determined his protected rate. Put simply, for the overtime hours that Claimant worked, his normal rate of compensation was his protected overtime rate.

The Carrier narrowly construes the term "normal rate" to mean the straight-time rate of compensation even though Article VI, Section 1 does not refer to straight-time rate. Also, contrary to the Carrier's argument, the Organization is not seeking to include overtime in Claimant's protected rate or to raise his protected rate. Rather, Claimant is entitled to his normal rate of overtime compensation when he performed overtime service.

The Organization acknowledges that Claimant was not insured of working any amount of overtime service. However, when he worked overtime, his normal rate of compensation, that is, his protected rate, is adjusted by the punitive rate multiplier in Schedule Rule 24(a). Article IV, Section 1 is plain and clear. Claimant is treated, for compensation purposes, as if he still occupied the regular assigned shop position which was abolished.

The Carrier's position ignores the distinction between Article IV, Section 1 and Article IV, Section 2. Under the Carrier's interpretation, a protected employee covered by Article IV, Section 1 will receive less protected pay, in a relative sense, than an employee covered by Article IV, Section 2 because a Section 2 employee's guarantee includes time worked in excess of straight-time during the base period. Therefore, the Carrier's interpretation discriminates against Article IV, Section 1 employees. The discrimination is eliminated if overtime service is compensated at the protected overtime rate.

The Carrier wrongly relies on prior awards of *Special Board of Adjustment No. 605* that concerned whether or not overtime compensation is included in the protected rate. These awards are irrelevant to determining what is the normal rate of compensation for an employee once he is entitled to receive a monthly displacement allowance.

The Carrier is equitably estopped from raising the 60-day time limitation in the October 25, 1996 Agreement for two reasons. First, for many months following his displacement, the Carrier paid Claimant protective benefits without explaining how it calculated his monthly displacement allowance. Claimant detrimentally relied on the Carrier's failure to disclose material facts which estops the Carrier from using its own misconduct as an affirmative defense. *Salado - Diaz v. Ashcroft*, 395 F.3d 1158 (9th Cir. 2005). Second, the Carrier combined allowances for two months and although Claimant noticed a discrepancy, he could not possibly uncover the reason for the discrepancy. It was not until Claimant contacted a Carrier labor relations official that he realized that the Carrier was paying him at the overtime rate for the position he held. The Carrier had an affirmative duty to timely communicate to Claimant both how it calculated his overtime

compensation and Claimant's right to protective benefits. *Kosakow v. New Rochelle Radiology Associates*, 274 F.3d 706 (2nd Cir. 2001).[2] Therefore, all portions of the claim herein are ripe for a decision on the merits.

The Carrier shall pay Claimant the difference between what it paid him for overtime service and what it should have paid him predicated on his protected overtime rate.

B. The Carrier's Position

Section I-A of the October 25, 1996 Dispute Resolution Procedures Agreement precisely fixes a 60-day limitation period for the filing of claims under the February 7, 1965 Job Stabilization Agreement, as amended, by the September 26, 1996 Mediation Agreement. Consequently, to the extent that Claimant is seeking compensation for months prior to December 2002, the claims are barred by Section I-A. Claimant could have and should have submitted timely claims each month that he alleges that the Carrier paid him less protective benefits than he was purportedly entitled to receive. The Board must disregard the Organization's equitable estoppel contention because the argument was not raised on the property.

Turning to the merits of the claim, Schedule Rule 14(a) describes how to compute overtime compensation. The Carrier properly paid Claimant one and one-half times the rate of the position that he occupied for each hour of overtime service that Claimant performed. The February 7, 1965 Job Stabilization Agreement, as amended, does not mention either overtime compensation or premium pay. Thus, the Organization had to invent a "protected overtime rate." There is no such pay rate.

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[2] Like the Carrier herein, the employer in ***Kosakow*** failed to post required notices under federal employment laws which equitably estopped the employer from contending that an employee failed to promptly pursue his legal rights.

Rather, Article IV, Section 1 refers to the "normal rate of compensation for said regularly assigned position . . ." which is the regular rate of pay attached to the position. The regular or normal rate is obviously the straight-time pay rate. If the drafters of the Job Stabilization Agreement intended to have a guarantee for every hour worked, including overtime service, they would have written broader language into Article IV, Section 1. Moreover, any overtime pay that Claimant earned is not part of his normal rate of compensation because the Job Stabilization Agreement does not provide for the inclusion of casual or unassigned overtime in the calculation of a protected rate. *Special Board of Adjustment No. 605, Award No. 949* (Friedman). Overtime pay is only included when the overtime becomes a regular component of the daily rate of pay for a particular position and is paid even when an employee does not work overtime. *Special Board of Adjustment No. 605, Award No. 46*, (Rohman); *Special Board of Adjustment No. 605, Award No. 47* (Rohman). Overtime compensation is excluded from a guarantee.

In this case, Claimant worked casual overtime. Nothing in the Job Stabilization Agreement vested him with a separate protected overtime rate for his overtime service. Since Claimant was not a multi-rated employee, he had a single protected rate. The Organization improvidently manufactured a second protected rate.

The February 7, 1965 Job Stabilization Agreement has been in effect for 40 years. Yet, there is not any arbitrated decision that directly addressed the allegation raised by the Organization in this case. It is implausible, if not incredible, that some labor organization would not have raised the issue sooner if the Job Stabilization Agreement contemplated a protected overtime rate. The Carrier submitted letters from the three other major railroads, the Union Pacific Railroad Company, the

Burlington Northern Santa Fe Railway Company and the CSX Transportation Company. Labor relations officers from each of the three railroads emphatically declared that the railroads do not pay overtime based on an employee's guarantee and protective benefits are only paid according to the difference in rates for straight-time hours worked.[3]

In summary, the Carrier properly paid Claimant the protective benefits to which he was entitled under the Job Stabilization Agreement, as amended.

III. DISCUSSION

The issue is whether a protected employee, who is relegated to holding a position with a lower hourly rate of pay than his protected rate, is entitled under the provisions of the February 7 Agreement to receive one and one-half times his protected rate or one and one-half times the rate of the position he occupies when the protected employee performs overtime service.

The starting point for resolving the issue is Article IV of the February 7, 1965 Job Stabilization Agreement which is entitled, *Compensation Due Protected Employees*. Article IV, Section 1 plainly provides that the protected employee receives "... the normal rate of compensation for said regularly assigned position as of the date they become protected . . ." so that the employee is not placed ". . . in a worse position with respect to compensation . . .." As the Carrier points out, Article IV, Section 1 alludes to neither "premium pay" nor "overtime pay." The absence of these terms implies that overtime is irrelevant to a guarantee as well as the calculation of a monthly displacement allowance. Normal compensation means "regular" wages. *Special Board of Adjustment No. 605, Award No. 46* (Rohman). While *Award No. 46* ruled that regular overtime

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[3] The CSX officer indicated that another labor organization had filed a claim analogous to the one herein and it was not progressed to arbitration.

permanently affixed to a job so that the employee was paid the overtime even during the employee's vacation is part of the normal rate of compensation, the Board's use of the word "regular" to define normal compensation strongly suggests that overtime service performed subsequent to the setting of the protected rate is irrelevant to the normal rate of compensation.

Besides the absence of any support for the Organization's claim based on the language of Article IV, Section 1, the Organization's position would indirectly result in an upward adjustment of Claimant's protected rate. The Organization posits that for certain hours that Claimant worked (the overtime hours), his protected rate would be higher than his normal rate of compensation. In essence, the Organization would be raising Claimant's protected rate for certain hours by the difference between the so-called protected overtime rate and the overtime rate calculated according to the hourly rate of the position that Claimant held. This would establish a two-tiered protected rate. If Claimant is working straight-time hours, he would merely receive the difference between the normal rate of compensation of his regularly assigned position the he held when he became protected and the straight-time hourly earnings of the position he works. When Claimant performs overtime service, his protected rate would actually increase if his overtime compensation was calculated by multiplying one and one-half times his protected rate because it would adjust his protected rate upward by the difference between the two calculations. The February 7, 1965 Job Stabilization Agreement does not allow an upward adjustment of the protected rate except for subsequent general wage increases. *Special Board of Adjustment No. 605, Award No. 68* (Zumas). More importantly, since Article IV, Section 1 expressly provides for an adjustment in the protected rate for subsequent

general wage increases, the expression of that upward adjustment precludes any other upward adjustments.

Paying Claimant overtime compensation based on the rate of the position he actually works does not treat him disparately from employees covered by Article IV, Section 2. There is not any evidence in the record before us that Section 2 employees are paid a separate protected overtime rate. Therefore, Article IV, Section 1 employees are on an equal plane with Article IV, Section 2 employees when they perform overtime service in the particular position that they hold even when they are receiving a monthly displacement allowance. The Organization's argument of disparate treatment between employees covered by Section 1 vis-à-vis Section 2 employees, at most, concerns the formula for calculating the protected pay for Section 2 employees which, as discussed earlier, is unrelated to determining the proper level of compensation for any employee who performs overtime work subsequent to attaining a guarantee.

In conclusion, the provisions of the February 7 Agreement do not entitle Claimant to be compensated at one and one-half times his protected rate when he worked overtime on positions having a lower-rate than the rate of the regularly assigned position he occupied when he became a protected employee. Inasmuch as we are denying this claim on its merits, this Board need not address or consider whether the portion of the claim covering the period prior to December 2002 is barred by the time limitation set forth in Section I-A of the October 25, 1996 Agreement.

## AWARD AND ORDER

1. The Answer to the Organization's First Statement at Issue is No;

2. The Organization's Second Statement of the Issue is moot; and,

3. The Answer to the Carrier's Question at Issue is No.

Dated: October 27, 2006

Rick Wehrli
Union Member

Ken Gradia
Carrier Member

Donald F. Griffin
Union Member

John Hennecke
Carrier Member

John B. LaRocco
Neutral Member