PUBLIC LAW BOARD NUMBER 3932

Award Number: 14
Case Number: 14

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

STATEMENT OF CLAIM

"This claim is on behalf of A. Iavecchia for time made by Wesley Robinson, trackman on Saturday, November 26, 1983 (8 hrs.). On this date Mr. Robinson performed duties of a truckdriver for Mr. Iavecchia's gang filling pots at Zoo interlocking. Since Mr. Iavecchia was available for work, he should have been utilized ahead of Mr. Robinson.

On Wednesday, November 23, 1983, Mr. Iavecchia was asked by his foreman, R. Coley, to work and he accepted. However, when he arrived at work on Saturday, November 26, 1983, he was advised by Assistant Supervisor, K. J. Webb, that he would not be allowed to work since he did not complete his tour of duty on Friday, November 25, 1983.

Under Rule 55, I am claiming 8 hours at time and one-half for Mr. Iavecchia."

FINDINGS

By letter dated November 30, 1983, the Organization filed Claim on behalf of Claimant seeking compensation on the basis that Carrier violated the Agreement by allowing another employee to perform work on November 26, 1983, that Claimant was entitled to perform.

The issue to be decided in this dispute is whether Claimant

was entitled under the Agreement to perform the work in question.

The position of the Organization is that Carrier violated Rule 55 of the Agreement when it refused to allow Claimant to perform his truck driving duties on the date in question. The Organization alleges that Carrier allowed a trackman (Mr. W. Robinson) to perform truck driving duties on Claimant's gang on November 26, 1983, even though Claimant was the senior, qualified, employee available to perform these duties. The Organization contends that Carrier's refusal constituted a clear violation of Rule 55 which states "Employees...will, if qualified and available, be given preference for overtime work..."

The Organization contends there is no question that Claimant was "available". The Organization alleges that Claimant told Carrier on November 23, 1983 that he would report on November 26, and further that he did report for duty on the 26th. The Organization maintains that there is therefore no question that Claimant was "available" and entitled to perform the work.

Finally, the Organization maintains that the compensation requested is not excessive, since Claimant would have been entitled to compensation at the overtime rate had he been used pursuant to Rule 55 as he should have been.

The position of the Carrier is that it was not required under the Agreement to use Claimant.

Carrier initially admits that Claimant was offered pre-arranged overtime service on November 23, 1983 for service to be performed on November 26, 1983 and that this offer was accepted. However, Carrier maintains that Claimant's subsequent actions rendered him unavailable for the November 26, 1983 assignment. Specifically, Carrier maintains that Claimant marked off on November 25, 1983 without notifying the supervisor who had arranged for the November 26 assignment, and that the supervisor properly assumed that Claimant would be unavailable on the 26th. Carrier argues that under the circumstances it was under no obligation to preserve Claimant's assignment on the hope that he might show up on the 26th, and that it has a right to replace an employee when reasonable uncertainty exists concerning that employee's availability. Carrier further argues that Claimant's own actions created that uncertainty, and that therefore Claimant cannot properly complain about his loss of assignment on November 26. Carrier argues that Claimant originally indicated that his mark-off on November 25 was due to illness and only later alleged that it was in order to attend a high school reunion. Carrier argues that Claimant's later excuse lacks credibility, and that in any event the uncertainty created by his marking off clearly warranted its actions under the circumstances.

Finally, Carrier argues that if the claim is found to be valid, it is nonetheless excessive in regard to the compensation requested. Carrier maintains that Claimant at most would be

entitled to the straight time rate of pay, since he did not perform service on the date in question, and since the Agreement does not otherwise provide for punitive payment.

After review of the record, the Board finds that the Organization's claim must be sustained in part.

As in Case No. 13 before this Board, the crux of this dispute concerns Claimant's "availability" for service on the date in question. It is undisputed that Claimant was eligible to perform service on the date in question pursuant to Rule 55, and that Claimant and Carrier had agreed to such service on November 23, 1983. Therefore, the only question remaining is whether Carrier was justified in concluding that Claimant was unavailable for service on the date in question. In the present case, we find that Carrier lacked such justification, and that accordingly it was obligated to allow Claimant to perform service.

We initially agree with Carrier that it has the right to make alternative scheduling plans when it becomes reasonably uncertain that an employee will be able to perform his scheduled duties. However, Carrier has failed to demonstrate any reasonable basis for such doubt. Whether Claimant marked off due to illness or for other reason on November 25, 1983 has little relevance, since a prior agreement between the parties indicated that Claimant would perform service on November 26, 1983. Further, Claimant made no indication to Carrier that his absence

would be extended or that he would otherwise be unable to report for work on the 26th. Finally, Claimant did in fact show up at the proper time on the 26th to report for duty. If Carrier had any doubts concerning Claimant's status, it could have taken one of two actions: either call Claimant and confirm his status or assume that Claimant would fulfill his duties. Carrier clearly could have disciplined Claimant for failing to protect his agreed upon assignment. It therefore seems unjust to allow Carrier to merely assume that Claimant might fail to do so. In sum, we find that Carrier's actions were based on an unreasonable assumption that could have been easily confirmed or denied through minimal checking. We therefore find that Claimant was "available" for service within the meaning of Rule 55, and was therefore entitled to perform the work. Finally, we find Claimant was not entitled to the compensation requested. The prevailing weight of railroad arbitral authority holds that the punitive rate is not available for work not performed. Claimant, therefore, is entitled only to the straight time rate.

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AWARD

Claim disposed of per Findings herein.

Nicholas Duncan
Neutral Member

Carrier Member

Organization Member - see dissent

DATE: 8-26-86

The Employees disagree with the Board's finding that: "[T]he prevailing weight of railroad arbitral authority holds that the punitive rate is not available for work not performed". Contrary to the Board's contention, the great majority of the awards concerning this issue have held that where the Carrier has violated the Agreement and a monetary is justified, the rate of pay applicable is the rate the employee would have received had he performed the work in question. The most recent award on the rate of pay issue is NRAB Third Division Award No. 25601, which held:

> "Carrier's bypass of Lopez for the overtime assigned is not disputed, only the remedy.
>
> The Carrier contends that loss of a right to work overtime should not be treated as the equivalent of actually performing overtime work under the overtime and call-out Rules, reciting a number of Awards including Fourth Division Award 3333 and Third Division Awards 10776, 5708, 5929 and 5967. Carrier asserts that Claimant should be paid only on a pro rata basis and not at an overtime rate since the hours were not actually worked on that basis. It argues that overtime work is to be compensated with premium payment only when the overtime is actually worked and that Claimant is entitled to be paid at a straight time rate for the hours actually worked by the junior employee improperly assigned since payment at time-and-one-half would constitute a penalty against the Carrier. Third Division Award 4244 states, 'One who claims compensation for having been deprived of work that he was entitled to perform, has not done the thing tht makes the higher rate applicable' (emphasis in original)
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> The Organization, however, lists more than 75 Awards, the most recent of which are 15909, 16254, 16295, 16481, 16748, 16811, 16814, 16820, 17748 and 17917, which support its position that the remedy should be the earnings Claimant would have received had the improper assignment not been made.
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> Better reasoned opinions remedy an overtime violation with a make whole payment. Here the eveidence shows that Claimant, if he had worked, would have earned 8 hours and 20 minutes at time-and-one-half. There is no element of retribution or

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> punishment is such a remedy. Carrier and Claimant are placed in the same position they would have been in had Carrier not violated the Agreement. 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. The payment to the junior employee is the result of the Carrier's improper assignment and does not make a remedy which makes Claimant whole a penalty. (emphasis in original)

Addtionally, the Employees cite Decision No. 433, Docket No. 563 of The Pennsylvania Railroad-Pennsylvania-Reading Seashore Lines Maintenance of Way System Board of Adjustment which authorized payment of a claim for a violation of Rules 4-E-1 and 4-E-2 at the overtime rate. Rule 4-E-2 is the language taken verbatim from the Carrier's predecessor railroad and incorporated into the current Rule 55 of the Schedule Agreement. This Award is further evidence the "weight of arbitral authority" is in favor of payment of such claims at the overtime rate.

For the reasons expressed above, the Employees must respectfully dissent from this Award No. 14, Public Law Board No. 3932.

Respectfully submitted

J. D. Dodd

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Employee member