

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 41

Carrier File No. 4MWB 90-02-16B

Organization File No. T-M-697-B

STATEMENT OF CLAIM

1. The Agreement was violated when Messrs. N. H. Asp and J. W. Clark were not called and used to perform overtime service in September 20, 1989.

2. As a consequence of the above-mentioned violation, Claimants N. H. Asp and J. W. Clark shall each be allowed eight (8) hours' pay at their respective time and one-half rates and eight (8) hours' pay at their respective double-time rates.

FINDINGS

On September 20, 1989, a number of employees were called to assist in a derailment situation. Those called included employees on the AFE Gang No. 3. The two Claimants had been with the AFE Gang No. 3 since its inception in May 1989. They were not called for the derailment service. There is no dispute as to their availability, qualification and seniority for such work.

The Carrier states that the Claimants were not called because their telephone numbers were not on the so-called "Master Call List" maintained in the Roadmaster's office. The Carrier further

asserts that the Claimants should have been aware that it was their responsibility to advise the Roadmaster's office of their telephone numbers.

By contrast, the Claimants maintained that they had given their telephone numbers to their Foreman upon joining the AFE Gang No. 3. A Claimant's statement provided in the claim handling procedure included the following:

After the Little Falls derailment roadmaster Morris asked me if I thought I should be paid for the overtime. My reply was yes. He then told me that his office did not have my phone number. I told him that I had given my number to the foreman on the first day of the crew. He then called over the foreman who was now Steve Hoffman. Steve Hoffman opened the time book and showed roadmaster Morris and myself the list of all of the original members of AFE #3 and their phone numbers.

That list included my name and phone number and also John Clark's name and phone number. . . .

The Carrier provided a number of documents indicating the maintenance of the Master Call List by the Roadmaster. Lacking, however, was convincing proof that employees, such as the Claimants who had joined AFE #3 Gang only four months earlier, had been directly advised that they were required to provide telephone numbers directly to the Roadmaster. (Clear instructions to this effect were issued after the September 20, 1989 derailment incident.)

On the other hand, there was no contradictory evidence to the Claimants' contention that they had supplied telephone numbers to their Foreman. In this state of the facts, the Board must find

that the Carrier improperly failed to call the Claimants for the derailment service.

As to remedy, the parties disagree as to whether the Claimants should be paid at the punitive rate, as urged by the Organization, or at the straight-time rate, as suggested by the Carrier. The Board is fully aware that this issue is raised frequently and that there is no undisputed "right" answer.

mjd not The Board notes that the NRAB Second Division regularly, but ~~not~~ always, favors payment of straight time in instances where an employee is improperly deprived of work, while under the same circumstances the NRAB Third Division regularly, but not always, grants pay at the rate the claimant(s) would have worked.

In support of its position, the Organization cites a number of Awards, including two Awards rendered by this Board. Almost all these Awards concern the failure to assign the claimant(s) to work which was improperly assigned to others. The matter here under review is somewhat different.

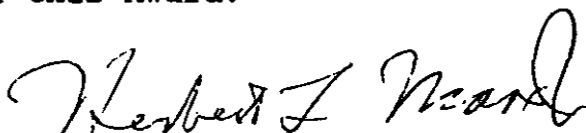
Here, according to the Roadmaster's statement, "I called everyone that was assigned to both AFE Crews . . .". Thus, it cannot be shown that other employees worked in the Claimants' position; rather the Claimants simply were not called as additional workers at the derailment site. In other words, there is no showing that any employees were erroneously called, as is usually the case.

Under these limited circumstances, the Board concludes that the 16 hours' pay claimed should be paid at the straight-time rate,

since the Claimants were not required to perform overtime service. At the same time, the Board recognizes that, if any pattern is to be followed generally, it would be that of the Third Division, which is charged with reviewing disputes involving Maintenance of Way employees.

A W A R D

Claim sustained to the extent provided in the Findings. The Carrier is directed to place this Award into effect within 30 days of the date of this Award.



HERBERT L. MARX, Jr, Chairman and Neutral Member

 CONCURRENCE/DISSENT TO FOLLOW
MARK J. SCHAPPAUGH, Employee Member


D. J. MERRELL, Carrier Member

NEW YORK, NY

DATED: September 12, 1994