

PUBLIC LAW BOARD NO. 5606

**PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
) DIVISION OF THE INT'L BROTHERHOOD OF TEAMSTERS
 TO)
DISPUTE) SPRINGFIELD TERMINAL RAILWAY COMPANY**

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated Article 10.4(d) of the Agreement when it assigned planned rest day overtime machine operator work to I&R Foreman J. Tracy instead of Equipment Operator Barry B. Raye on November 17 and 18, 2007.**
- 2. As a consequence of the violation referred to in Part 1 above, Equipment Operator Barry B. Raye shall now be allowed \$766.98, which is twenty-four and one-half (24.5) hours' pay at the equipment operator overtime rate of pay. (Carrier File MW-08-03)**

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

The facts of the dispute are brief and simple. It is the contention of the Organization that the Carrier violated the terms of Article 10.4(d) of the Rules Agreement when it failed to call Claimant, an Equipment Operator, for planned overtime work on Saturday, November 17, 2007, and Sunday, November 18, 2007.

Section 10.4(d) of Article 10, "Overtime," of the current Agreement reads in part here pertinent:

Planned overtime, rest day, and holiday work which is a continuation of a work project of a specialized nature, such as tie and surface, rail laying, construction, clean-up, etc., will be given to the specialized crew ordinarily doing this type of work during the regular assigned work week, with the members of the specialized crew being utilized in the order of their seniority, if available.

The basis for the Carrier denial of the claim in handling on the property is a contention that its supervisors in the production zone in which Claimant was working are well aware of the proper call procedure, and that every available individual was asked and either refused the work or they were unable to be reached. Thus, the Carrier opines, if Claimant was not asked, then it only stands to reason that Claimant was unable to be contacted.

The Carrier also argues that it is evident that Claimant did not want to work overtime since documents as presented in conference on the property show that Claimant's crew worked overtime the week before and after the dates being claimed, but Claimant never took any of that overtime.

Lastly, the Carrier says since the Organization has not provided any evidence to establish that the Claimant was not called, or refute the contention that he was called, but could not be reached, there exists a dispute of material facts that precludes the Board from issuing a sustaining award.

The Board finds the Carrier's position untenable. The record may not be read as involving a dispute of material facts. The Claimant was entitled to be called for the overtime work pursuant to Section 10.4(d) of the Agreement. It was incumbent upon the Carrier to show probative support for its contention that Claimant was asked or called and refused the overtime work, or, in the alternative, the extent of effort that was made to contact Claimant in support of argument that he was unable to be reached for the overtime work.

Numerous times in awards of boards of adjustment it has been held that mere assertion, self-serving declarations, and general statements are of no real probative value in the consideration of a dispute. Furthermore, that Claimant may have been asked or called on other occasions and elected not to work overtime at those times, may not be viewed as justification for not calling Claimant in this instance, much less be held to constitute a basis for denial of the claim.

As concerns overtime compensation claimed for the Carrier failure to call Claimant for the planned overtime work at issue, and Carrier argument that should the claim be sustained, payment be limited to that of the straight time rate of pay because Claimant performed no work whatever on the dates of claim. The Board is aware that there have been awards in which only the straight time rate of pay was held to be an appropriate measure of damages in concluding that work must actually be performed for an employee to be entitled to the overtime rate of pay. However, the Board finds the better-reasoned decisions to have concluded that affected employees are entitled to be made whole in the amount of compensation they would have earned absent the contract violation.

In this latter regard, the Board would especially here note the following excerpt from Third Division, NRAB, Award No. 13738, a conclusion that has been referenced in a number of other awards in holding that the time and one-half rate of pay is the appropriate measure of compensatory damages so as to put the affected employee in as good a position as if there had not been an evident breach of contract:

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, . . . 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 of money 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. Therefore, we will sustain the claim for damages as prayed in paragraph (2) of the Claim.

In the circumstances, the Board finds that Claimant is entitled to the time and one-half rate of pay as claimed account not being called for the planned overtime work at issue.

AWARD:

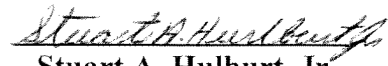
Claim sustained.



Robert E. Peterson
Chair & Neutral Member



Anthony F. Lomanto
Carrier Member



Stuart A. Hulburt, Jr.
Organization Member

North Billerica, MA

Dated April 12, 2010