

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 26070
Docket No. 46017
04-1-03-1-G-1735

The First Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

“Claim of Gateway Western Railway Engineer W. L. Klasing for various amounts of additional earnings totaling \$434.22 on various dates in November 2001 while working the Slater Local – identified as Carrier File No. G0102-3075.”

FINDINGS:

The First 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.

The Claimant herein submitted time slips requesting that his total pay for each day of the claim be \$4.00 more than the total pay earned by the conductor on the job. He based his time slips on Rule 57 of the BLE/KCS Agreement, which reads, in pertinent part, as follows:

"GATEWAY WESTERN RULE 57 - CERTIFICATION ALLOWANCE

Effective July 1, 1995 Engineers on Gateway Western Railway who possess FRA Certification will receive an allowance of \$4.00 per tour of duty worked. This certification allowance will provide the Engineer no less than \$4.00 in additional compensation per tour of duty than the compensation earned by any other train crew member."

The Carrier denied the claims on the basis that the conductors involved in the train crew are no longer paid under the former GWWR Agreement which was the case when Rule 57 was written. Conductors are now paid under per national rules under the KCS Agreement. In the Carrier's view, Rule 57 has essentially been rendered moot by the change applicable to the conductors.

This dispute is not one of first impression. First Division Awards 25449 and 25978 have previously addressed this issue. Indeed, Award 25978 involved identical facts as well as the same Claimant arising out of the month of October 2001.

The instant dispute raises the same contentions that were resolved in Award 25978. Except for the time frame involved, the Carrier has reiterated the identical contentions it advanced in Award 25978. As written in 1995, Rule 57 provided that the engineer would earn no less than \$4.00 more than any other member of the train crew. While it does not explicitly say that it is a pay differential guarantee rule, it also clearly does not say it will apply only so long as other train crew members continue to be paid under the former GWWR Agreement.

We have carefully reviewed Awards 25449 and 25978 and do not find them to be palpably erroneous. They represent legitimate interpretations of Rule 57. Accordingly, in the interest of providing consistency and stability to the instant parties, we will not depart from their findings.

AWARD

Claim sustained.

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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 First Division

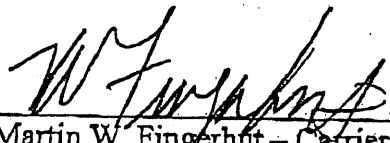
Dated at Chicago, Illinois, this 24th day of November 2004.


CARRIER MEMBER'S DISSENT
To First Division Awards 26069 and 26070

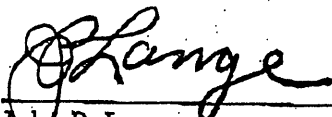
The Board chose to ignore the Carrier's detailed argument on the merits and instead chose to perpetuate error. We feel the Board has amended the contract by misconstruing the language to include a guaranteed wage differential provision that is not stated or intended. There is nothing in the language of the award to explain why the Board agreed with the Organization's interpretation. Dr. Jacob Seidenberg once wrote:

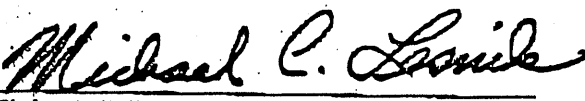
It would be unwarranted and untoward for this Board to insert a non-existent provision into a contract by interpreting or construing said contract. The solemnity and dignity which our system of law invests in written contracts precludes this Board from finding, by implication, that a non-existent provision exists in a written contract. (Award No. 2 Public Law Board 1740)

The Board reasons that the claims should be sustained "in the interest of providing consistency and stability". We feel two wrongs don't make a right and the damage of inserting a non-existent provision in a negotiated contract far outweighs whatever value may exist in providing illusory stability. We dissent.


Martin W. Fingerhut - Carrier Member


Bjorne R. Henderson


John P. Lange


Michael C. Lesnik