

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33854
Docket No. MS-32279
99-3-95-3-107

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

(Jeffrey J. Bainter

PARTIES TO DISPUTE: (

(Norfolk and Western Railway Company

STATEMENT OF CLAIM:

"On July 8, 1993 for seven (7) hours overtime Carrier violated the provisions of our effective working agreement (Nickel Plate Road) dated February 1, 1951 when it used Assistant Section Foreman R.A. Hicks assigned as such to Campbellstown Section in Campbellstown, Ohio to perform the work of Section Truck Driver-Laborer in driving a Section Truck to Seven Mile, Ohio, where he worked to repair a sun kink utilizing tools from the Section Truck and then returned to his assigned headquarters location at Campbellstown, Ohio. Carrier failed and refused to allow Section Truck Driver-Laborer J. J. Bainter who is qualified, available and entitled to operate the truck in question during normally assigned hours to perform the above mentioned work on overtime in accordance with established seniority.

'Seniority begins at the time the employee's pay starts when last entering service. Seniority will be restricted to the seniority districts, as hereinafter provided, on which seniority has been established. Rights accruing to employees under their seniority entitled them to consideration for positions in accordance with their relative length of service on their respective seniority districts.' Rules 1-(A) and 1-(B). Hence the agreement was violated when the Carrier chose to utilize assigned Assistant Section Foreman R.A. Hicks to perform the work of Section Truck Driver-Laborer and failed and refused to use Section Truck Driver-Laborer J. J. Bainter to perform the above mentioned work in accordance with my established seniority rights. I therefore request that I be paid seven (7) hours at my respective time and one half-rate of pay."

FINDINGS:

The Third 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.

At all material times herein the Claimant was assigned as a Section Laborer-Truck Driver to the Campbellstown Section track maintenance gang with responsibility for the area in the vicinity of New Castle, Indiana, to Mill (Cincinnati), Ohio. On July 8, 1993 at Seven Mile, Ohio (Milepost 37.2), located in that territory, there was a sun kink, or an expansion of a section of rail due to excessive heat. Assistant Section Foreman Hicks, who resided at Eaton, Ohio, (Milepost 59.8) was called to inspect and repair the defect. Claimant, who resided at Muncie, Indiana, (Milepost 122) was not called to do so.

The Claimant contends that the work in question was within the scope of his position and that he therefore should have been assigned to complete the task. Because he was not, and therefore did not work the overtime that he would have worked if he had been assigned the task, he makes this claim for the overtime in question.

The Carrier on the other hand raises several different arguments. First, it contends that the work in question was not within the scope of the Claimant's position. This argument must be rejected however for Rule 52(c) states that "(a)ll work of . . . maintaining, . . . and other work incidental thereto shall be performed by employes in the Track Department" The Carrier's second argument is that the defect in the section of rail created an emergency condition and that the Assistant Section Foreman was closer in geographic proximity than the Claimant. However, the record contains only an assertion that there was an emergency condition and Carrier did not provide any documentation as to the time and frequency of train traffic over the rail section in

question that would support its claim. Although it may not require much of a stretch of one's imagination to conclude that an expansion to rails could cause a serious accident, that fact alone does not mean that time was of the essence. Rather, the time and frequency with which the portion of rail in question was to be used would also be relevant and we have no such evidence on the record. Accordingly, we find that the Claimant had an enforceable claim to the work that was not nullified by any emergency condition.

The Carrier's final argument is that although there was a contract violation, the remedy must be payment at straight time, asserting that payment at any premium rate is punitive. In support of its argument it cites Board precedent, including cases decided on its own property. On the other hand, there is a line of authority, including cases decided on the property, that the appropriate remedy in these cases is that payment should be made at the appropriate premium overtime rate. Thus, there are clearly two schools of thought on this issue.

The Board squarely chooses to follow the school of thought that the appropriate penalty in this type of case is to pay the Claimant at the premium overtime rate of pay. Our reason for doing so is quite simple. When a contract is violated either the Carrier has done something it may not do, or failed to do something it was obligated to do. In either instance, and in this case, the Claimant should have and would have been assigned to perform the work in question and therefore should have and would have worked the time in question. Accordingly, a remedy to the contract breach is to restore the conditions that would have been extant had the breach not taken place. In this case those conditions would have been the time lost, which was overtime work. Thus, he must be compensated at the premium overtime rate.

AWARD

Claim sustained.

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 Third Division

Dated at Chicago, Illinois, this 21st day of December 1999.