Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33901
Docket No. MW-32407
00-3-95-3-273

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(SPCSL Corporation (former Chicago, Missouri &
(Western Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned junior employee R. M. Stevens, instead of assigning Heavy Machine Operator S. D. Heffren, to perform the overtime work of moving a Company fuel truck from Woodriver, Illinois to Scottsville, Missouri on Saturday, July 30, 1994 (Carrier's File BMW 94-710 CMW).

(2) As a consequence of the violation referred to in Part (1) above, Claimant S. D. Heffren shall be allowed ten (10) hours' pay at the applicable heavy machine operator's time and one-half rate."

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.

Carrier does not dispute on this record that it erred in assigning junior employee Stevens to perform the overtime work in issue instead of assigning Claimant who was senior, qualified and available. During the claim processing, Carrier paid Claimant 10 hours at his straight time rate of pay in attempted resolution of the matter. The Organization progressed the claim on the basis that the appropriate rate of pay should have been Claimant's time-and-one-half rate since it was a missed overtime assignment. Carrier disagreed. This claim seeks the difference between the straight time rate allowed and the overtime rate claimed.

The only issue before the Board is the remedy for improper assignment of overtime to a junior employee. The Organization contends that the penalty rate is appropriate under the make whole theory of damages finding an employee entitled to receive that which he would have earned if he had performed the work in issue, citing numerous cases including Third Division Awards 27593, 28010, 31514, 31928, 32107. Carrier argues that work must be performed before the time-and-one-half rate is paid, and where no work is performed the pro-rata rate is appropriate, citing Third Division Awards 26534, 30867, 31235, 32327, 32331.

A review of the numerous cases cited by the parties reveals that this Board has consistently held that, absent a showing by Carrier of any practice or established precedent on the property of anything less than actual pecuniary damages for work not performed, the proper "make whole" remedy for a lost overtime work opportunity is payment at the overtime rate. See Special Board of Adjustment No. 280, Award 12; Third Division Awards 23465, 25601, 29855, 30987, 31653.

Accordingly, this claim is sustained for the difference between the ten hours straight time rate allowed and Claimant's appropriate overtime rate of pay.

AWARD

Claim sustained in accordance with the Findings.

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 24th day of January, 2000.