

BEFORE PUBLIC LAW BOARD NO. 5189

UNITED TRANSPORTATION UNION - YARDMASTER'S DEPARTMENT
and
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

Case No. 3

CLAIM OF EMPLOYEES:

Yardmaster R.A. MacDougall is claiming one day's pay for ten hours at the yardmaster punitive rate of pay for December 5, 1990 for not being called to work the 9 p.m. to 7 a.m. yardmaster position, in violation of Rule 5(c) of the Agreement.

FINDINGS:

The Organization's claim on behalf of the Claimant presents the question of what remedy is appropriate to compensate Claimant for the Carrier's admitted error in calling a junior yardmaster, instead of the Claimant, to fill a vacancy in the yardmaster position on December 5, 1990. Because the Carrier has admitted its mistake, the proper remedy is the only question before this Board in connection with this claim.

In admitting its mistake, the Carrier offered to compensate the Claimant for one day's pay at the straight-time rate of pay. The Organization rejected the offer, contending that the Claimant would have received the punitive rate if he had been called to service and, therefore, is due the punitive rate of pay.

The Carrier denied the claim, asserting that there is no contractual basis for payment at the punitive rate; the Carrier still is willing to settle at the straight-time rate of pay.

The parties being unable to resolve the issue, this matter came before this Board. This Board has reviewed the entire record in this case, and we find that on December 5, 1990, there was a ten-hour vacancy in the yardmaster position. The Carrier called in a junior yardmaster instead of the Claimant. During the week of December 3, 1990, the Claimant already had worked four ten-hour days, for a total of forty hours. There is no question that had the Claimant been properly brought in to work on the fifth day, he would have received time and one-half for the work.

In arguing that payment should be made only at the straight-time rate, the Carrier states simply that there is no contractual provision for paying the premium rate for time not worked. Although it is true that the parties' agreement does not specifically address the situation at issue here, the proper rate of pay for an employee who does not perform work that he should have been called in to perform, this Board disagrees that there is no basis for awarding the premium rate to the Claimant.

Under the most basic principles of contract law, which are used to, among other things, determine remedies when those are not specified in a contract, Claimant is entitled to relief because he was the person who should have been brought into work on the day at issue. The principles of contract law provide that an award of damages is intended to, as much as possible, put the injured person in the position that he or she would have been in had the contract been performed. Basic contract law therefore requires payment at the premium rate in this particular situation. There is no contract provision that prohibits it.


If the Claimant had been called in on December 5, 1990, he would have been paid

at the premium rate of pay for all hours that he would have worked that day. There is no dispute that the Claimant already had worked forty hours that week; the hours that the Claimant would have worked on December 5, 1990, would have been hours 41 through 50 for the week. The parties' Agreement, as well as the federal law, requires that an employee be paid overtime pay, at the rate of time and one-half, for every hour over 40 hours worked during a week. The Claimant should have been called in to work on December 5, 1990, and if he had been, he would have been paid for the ten hours of work at the time and one-half rate. Accordingly, to be properly compensated for the Carrier's mistaking in failing to call him in, the Claimant must be paid for ten hours of work at the premium rate.

For the reasons set forth above, this case shall be sustained.

AWARD

Claim sustained.



PETER R. MEYERS
Neutral Member



Carrier Member



Organization Member

Dated: 6/1/94