

Award No. 5136

Docket No. 4979

2-C&O-CM-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Harold M. Weston when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Southern Region)**

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement, Carman J. E. Christian was unjustly dealt with and his service rights violated when he was not given the privilege of working overtime in compliance with Rule 11 of the Shop Crafts Agreement.

2. That accordingly, the Carrier be ordered to compensate Carman Christian eight (8) hours at the carman applicable time and one-half (1½) rate for September 4, 1964.

EMPLOYEES' STATEMENT OF FACTS: Carman J. E. Christian, hereinafter referred to as the claimant, is employed as such, by the Chesapeake and Ohio Railway Company, hereinafter referred to as the carrier, in its yards at Russell, Kentucky as a car inspector on the second shift, with a work week Thursday through Monday, rest days Tuesday and Wednesday. The carrier's Russell Yards is a large yard where trains are made up, switched and cars are repaired.

On September 3, 1964 Carman W. T. Sammons was first out on the overtime board, was called and refused said call. Carman H. Vanderhoof Sr., was second out and could not be reached by telephone. Carman H. Gambill third out, called and accepted, leaving the claimant first out.

On September 4, 1964 it was necessary to call one man from the carmen's overtime board and the claimant who was first out, his name was ignored. Carman Sammons was called again for the first shift in violation of rule 11 of the shop crafts agreement. This was called to the attention of the carrier's General Car Foreman, Perkins and he agreed to take corrective measures but failed to do so. After calling to the attention of the

of overtime worked by the individual employees, and that the employee who is low in hours at one time will be high at another. Obviously Christian has not been denied overtime earnings as a result of using Sammons to work overtime on September 4, 1964. Carrier does not know which of these employees has more overtime hours charged to them in the aggregate, but assumes that the local committee is taking proper action to adjust the overtime board for the purpose of seeing that the overtime is distributed as equally as possible.

Without prejudice to the above position, it should be noted that the claim is excessive in that payment at time and one-half rate is requested. Under the doctrine repeatedly set forth by the board, payment for service not performed is allowed only at straight time rate. Thus, even if the employees' contention were valid, which it is not, Christian would not be due the amount claimed.

In summation, carrier submits that:

- (1) The applicable rules provide that overtime shall be distributed as equally as possible.
- (2) The usage of Sammons on September 4, 1964, did not damage Claimant who was given the opportunity to equalize over a period of time.
- (3) First-in, first-out or rotation principles cannot be applied to an equalizing arrangement.
- (4) The position taken by the Employees is in opposition to the overtime rules as interpreted on this Carrier for more than 40 years.
- (5) The Employees have the responsibility to adjust the overtime board at Russell Shop Track and can equalize the overtime of any of the employees over a period of time.
- (6) Awards of the Board fully support the Carrier's position.
- (7) Carrier's overtime records show that Claimant has performed more overtime work than Sammons subsequent to September 4, 1964.

The claim is without merit. It should be denied.

FINDINGS: The Second 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 basis issue is whether or not Carrier violated Rule 11 of the applicable agreement when it used W. T. Sammons rather than Claimant, who was first-out at the time, for overtime work on the first shift on September 4, 1964 at Russell, Kentucky. Both employees are regularly assigned carmen carried on the same seniority roster and overtime board. Sammons had been called for overtime work on the 11:00 P.M. shift on September 3, 1964, when he was first out, but had refused that work. Petitioner maintains that favoritism is being shown in giving Sammons daylight overtime.

The many awards that have considered Rule 11 quite consistently hold that it does not restrict overtime distribution to a first-in first-out basis or any precise formula but is properly observed if the work is distributed substantially equally over a reasonable period of time. See Awards 2035, 2040, 2123 and 4980.

While the fact that Claimant was first out at the time that the disputed work was given Sammons may be some evidence of favoritism, it is not sufficient in and of itself to substantiate a contention of unfair discrimination. The burden of proof in that regard rests with Petitioner and the record does not establish that over a reasonable period of time, Claimant has not received a fair share of overtime, including daytime work. The claim accordingly will be denied.

The remedy of an employee, who believes that he is being unjustly treated with respect to overtime distribution, is to bring a claim based on a reasonable period of time rather than on an isolated incident.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 13th day of April, 1967.

(Exhibits not reproduced.)

Keenan Printing Co., Chicago, Ill.

Printed in U.S.A.