Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7404
SECOND DIVISION Docket No. 7280
2-MP-CM-'77

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: (System Federation No. 2, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Missouri Pacific Railroad Company

Dispute: Claim of Employes:

1. That the Missouri Pacific Railroad Company violated the controlling agreement, particularly Rule 17, when Carman C. Allen, Settegast Yard, Houston, Texas, was unjustly withheld from his regular assignment September 20, 1975.

2. That accordingly, the Missouri Pacific Railroad Company be ordered to compensate Carman C. Allen in the amount of eight hours (8') at the straight time rate for September 20, 1975.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

Claimant reported for work at 11:20 p.m., 20 minutes after his assigned starting time of 11 p.m. He had not advised the Carrier of his anticipated tardiness by telephone prior to his arrival. His explanation was that he had to repair a flat tire on his car while en route to work and that he had telephoned his supervisor, but there was no answer when he did call; and that he proceeded to work as quickly as possible rather than incur a further delay by another telephone. Upon reporting at 11:20 p.m., he was advised that he would not be permitted to work.

Requiring the immediate assignment of an employe in Claimant's position, Carrier called for an employe on the overtime roster from the previous shift. The replacement employe, who was still on the premises, arrived at 11:30 p.m. and filled the Claimant's position.

In this sequence of actions, the Organization claims that the Carrier is in violation of Rule 17, Absence from Work Without Leave, which reads:

> "Employes shall not lay off without first obtaining permission from their foreman to do so, except in cases of sickness or other good cause of which the foreman shall be promptly advised."

The Board finds that the Carrier is not in violation of Rule 17. As stated in Award No. 7384, involving the same Carrier and the same rule:

> "As to Rule 17, the portion referred to by the Organization simply grants employes a right to 'lay off' where absence is caused by 'sickness or other good cause of which the foreman shall be promptly advised.' Even assuming that in this instance the Claimant advised his foreman as 'promptly' as possible -- that is, by reporting to work -- the rule does not go to the issue of whether the Carrier is required to give work to an employe reporting late."

On a separate aspect of the claim, no proof is shown that the action taken by the Carrier was a disciplinary measure which would have required an investigatory process under Rule 32. The Carrier reasonably based its actions in calling a replacement on the need for prompt performance of the Claimant's job.

Under the particular circumstances here involved, however, the Board will find the Carrier in violation of the rules of the Agreement in refusing to permit Claimant to work upon his arrival. This is based on the Claimant's entitlement to work on his job under the seniority provisions of the Agreement, and absent his already having been replaced in his work owing to his tardiness.

In Award No. 7355 (Marx), the Board found that the Carrier did not violate rules of the agreement when it refused to permit an employee to work after the employee reported one-half hour late. But in Award No. 7355, there is no indication that the Claimant was replaced on his job for that work shift.

In the case currently before the Board, the Claimant was available for work before his replacement arrived, and thus could have undertaken even sooner the pending work assignment. Further, under Rules 4(a) or 4(c), the liability to the called-in employee is limited to either one or four straight time hours, as may have been applicable. Thus the Carrier's defense as to additional cost if the Claimant was allowed to work is not valid.

What is basically at issue is who has the right to work not yet commenced. Obviously, the Claimant, under seniority rules of the Agreement, has claim to his own work shift over another employee on overtime call-in.

The Board distinguishes this case from that in Awards No. 7374 and 7384 (Marx). In both of these cases, the employees involved reported 42-45 minutes late, had undisputed poor attendance records (lessening the probability that they would show at all), and had already been replaced in their work assignments due to their tardiness.

For emphasis, it is noted that in the present case, the Carrier offered no evidence of the Claimant's history of tardiness (except a single unsubstantiated reference in correspondence). More important, the Carrier required work to be performed in the Claimant's assignment, and such work had not yet been commenced when the Claimant reported for duty.

Claimant seeks eight hours' pay in his claim. Since he was unavailable for a full work shift, the claim cannot be sustained beyond seven hours and 40 minutes.

A W A R D

Claim sustained as modified above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 2nd day of December, 1977.