Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7970
SECOND DIVISION Docket No. 7860
2-WT-CM-'79

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

Parties to Dispute: (System Federation No. 106, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Washington Terminal Company

Dispute: Claim of Employes:

1. That the Carrier violated the controlling agreement on February 26, and 27, 1977 when they failed to call Carmen E. E. Gosnell, J. L. Huffman, A. A. Di Carlo, G. L. DiGennaro, D. Harkleroad, C. S. Kelly, E. J. DiPietro, and J. D. Rowles but called Apprentices J. Tana and A. L. Phillips to work a total of thirty three hours each.

2. That accordingly the Washington Terminal Company be ordered to compensate Carmen;

E. E. Gosnell eight hours at time and one half
J. L. Huffman eight hours at time and one half
A. A. DiCarlo eight hours at time and one half
G. L. DiGennaro Nine hours at time and one half
D. Harkleroad eight hours at time and one half
C. S. Kelly nine hours at time and one half
E. J. DiPietro eight hours at time and one half
J. D. Rowles eight hours at time and one half

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.

This dispute involves the alleged improper use of two apprentices on an overtime assignment instead of using employes on the overtime list. The facts are that the Claimants had been asked to work overtime, being first up on the overtime board, on Saturday February 26, 1977. This overtime assignment was cancelled at 3:30 P.M. on Friday February 25th. On February 26th two apprentice Carmen were called to perform overtime work on that day

as well as February 27 and February 28th. The two men worked for a total of 66 hours. Carrier alleged that the overtime board had been exhausted prior to calling the two apprentices.

The relevant contractual provisions include Rule 34, which provides, in pertinent part:

> "When it becomes necessary to assign Apprentices to night work in order to gain full knowledge of the craft, or to work overtime, such arrangements will be worked out by representatives of management and local Committee."

Rule 11 of the Agreement provides that overtime records will be maintained for the purpose of distributing overtime equally.

Carrier first maintains that the Claim presented at the lower level was different than the Claim presented at the top two levels in the procedure on the property. The record does not support Carrier's argument; the Claim was not materially changed during the handling on the property. The addition of a rule allegedly violated does not fatally flaw the process (see Award 6048). The Claim presented to this Board was the same Claim as that handled at the highest level on the property.

Carrier argues that the Enginehouse Foreman, upon learning of the need for work on Saturday, attempted to contact each of the Claimants but without success. Carrier argues that it would have preferred to have Claimants perform the work rather than the apprentices, but that they deliberately did not answer their telephones because they were angered by the cancelled overtime on Friday. Petitioner disagrees and insists that Claimants were available for overtime on the dates involved and were not called. Petitioner notes that the two apprentices were sons of supervisors.

During the handling on the property Petitioner presented signed statements from the Claimants indicating that they were available and were not called. Carrier presented no evidence whatever, on the property, indicating that the men had been called, other than the bald assertion that the overtime list had been exhausted. There also appears to be some conflict in Carrier's exhibits as to whether or not some of the Claimants had been reached. Carrier belatedly presented a letter from the foreman with its submission to this Board. Without evaluating the probity of that document, it is clearly too late and may not be considered by this Board as evidence. This position is long established on all Divisions of the N.R.A.B. (see Awards 6508, 6988 and 7464 for example).

In disputes of this nature it is well recognized that Carrier is required to provide some evidence that it has indeed made the appropriate calls to utilize the overtime Board before it is free to avail itself of other alternatives. In some awards this Board has held that even more than one call is necessary to sustain Carrier's contention that a proper effort

had been made. In the insant dispute there is no evidence whatever to indicate when calls were made and by whom. On the other hand there was evidence submitted that Claimants were available. There is, then, no irreconcilable conflict as urged by Carrier.

In addition to the conclusion above, there is no doubt but that Carrier violated Rule 34 in using the apprentices on the overtime assignment without arranging the matter with the local committee. In fact, Carrier admitted that it did violate that Rule, although unintentionally. It must be concluded that Petitioner has established a prima facie case in support of its Claim. With respect to the remedy, Claimants must be made whole, but at straight time rates for time not worked, as contended by Carrier.

A W A R D

Claim sustained; Claimants will be paid at straight time rates only.

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 13th day of June, 1979.