

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 12737
Docket No. 12572
94-2-92-2-104

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/Division of TCU
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(Norfolk Southern Railway Company

STATEMENT OF CLAIM:

- "1. That the Norfolk Southern Railroad Company and/or its Corporate Parent, the Norfolk Southern Corporation, violated the terms and conditions of the current Agreement on June 23, 29 and 30, 1991, also July 6, 7 and 14, 1991, when Carmen were skipped over for overtime due to the fact that they would have been working on their second rest day and would have been eligible for pay at the double time rate. Also, student mechanics were used in the place of carmen for this overtime when Carmen were willing and able to work.
2. That accordingly, the Norfolk Southern Railroad Company and/or its parent, the Norfolk Southern Corporation, now be ordered to provide the following relief: (1) that Carman P. A. Gunkel be paid thirty-two (32) hours pay at the double time rate of pay. (2) that Carman C. J. Varner be paid eight (8) hours pay at the double time rate of pay. (3) that Carman D. M. Kallmeyer be paid twenty-four (24) hours pay at the double time rate of pay. (4) that Carman H. L. Bridges be paid eight (8) hours pay at the double time rate of pay. (5) that Carman G. H. Short be paid twenty-four (24) hours of pay at the double time rate of pay. In addition to this monetary relief, we are requesting that the practice of 'skipping over' Carmen due to the fact that they will be eligible for double time pay be stopped and that rule 10 of the Agreement be strictly complied with. We are also requesting that no student mechanic be used for overtime as long as there is a Carman that will accept the call."

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 waived right of appearance at hearing thereon.

The Claim of the Organization is that the Carrier violated the Agreement in the assignment of overtime. The Organization alleges that at the Carrier's Gest Street Yard in Cincinnati, Ohio the Senior General Foreman issued an order circumventing the language of the Agreement by ordering that no Carman would be called for overtime if he would qualify for double time. Overtime assignment thereafter skipped Carmen who stood to gain from the Agreement and assigned overtime instead to those who would not receive double time. The Organization also alleges that the Carrier even went around Carmen altogether when necessary to assign overtime to Student Mechanics in violation of the Student Mechanics Agreement.

The Carrier denied that any order to circumvent Carmen from the application of the double time payment was given. The Carrier further denied that Student Mechanics had ever been used in place of Carmen in the assignment of overtime. It is the position of the Carrier that the Agreement does not require an overtime call procedure as alleged by the Organization, but only a fair distribution of overtime which the Carrier has provided. While the Carrier notes some inequities in overtime it denies any Agreement violation.

Of the Rules herein disputed, the central issue is the meaning and application of Rules 10 and 5(c). Rule 10 states in pertinent part that:

"Record will be kept of overtime worked and men called with the purpose in view of distributing the overtime as equally as possible consistent with forty (40) hour week rules."

Rule 5(c) states in part that:

"Service performed by a regularly assigned... employee on the second rest day of his assignment shall be paid at double the basic straight time rate...."

In these consolidated Claims, the general effect was that the Claimant had worked his full week's assigned hours and had been called to work overtime on his first rest day. The Claimants were on the overtime board where employees with the least number of hours were first called. As employees refused or accepted overtime, those remaining rotated up the list to be called. When the Claimants reached the top of the list, and would have been called out for overtime on their second rest day, the Carrier skipped over them to another Carman, or in the Organization's allegations a Student Mechanic. The Carrier therefore did not pay double time by skipping the use of Claimants for overtime needs.

There is compelling evidence in this record that an instruction was given not to call Carmen who were eligible for double time pay. Neither the Master Mechanic nor the Senior General Foreman denied this assertion. Although the Carrier "totally and emphatically" denied any new instructions, the only probative evidence are nine statements from employees confirming the instructions.

The Board also finds that the asserted use of Student Mechanics is grounded by probative evidence. Although denied by the Carrier, the only proof in this record is supplied by the Organization. Of the employee statements, there are those stating as example:

"I was available to work this shift and was not called because I had worked my first rest day. Also I was the 1st available man for this shift by our overtime board. A student mechanic was called and worked the shift."

Additionally, the Organization presented numerous individual cards from the Yard and Student Mechanic overtime boards documenting the Claimant skipped and the Student Mechanic who worked. The Board considers this probative evidence that Student Mechanics were utilized for overtime in place of Journey Mechanics.

The Board has reviewed this extensive record and the numerous Awards presented by each party to this dispute. We see the central issue as the equitable distribution of overtime in compliance with Rule 10. The Organization must prove that the Carrier has failed to divide the overtime as equally as possible among Carmen to show a violation of Rule 10. After full review we firmly hold that there is no Rule prohibiting the Carrier from skipping an employee in its attempt to distribute overtime on a fair and equitable manner. We find no Rule which requires the Carrier to utilize a first in-first out order for overtime distribution.

We have reviewed the full record to ascertain whether there is evidence that over a reasonable period of time, the Carrier has failed to distribute overtime. There is no denial by the Organization that two of the Claimants who were skipped had "10 times the overtime hours of the other three." A review of the time records demonstrates that when a Claimant was skipped, the person who replaced him for overtime had fewer overtime hours. There is no evidence presented by the Organization on point, demonstrating an unequal distribution of overtime. Accordingly, those portions of the Claim based on alleged violations of Rule 10 must be denied.

We have carefully considered the Organization's argument that the Carrier violated the Student Mechanics Agreement. As previously noted, the Organization presented supporting statements from employees. The Carrier argued that the Organization has "not presented one shred of evidence to support such contention." The burden of proof is on the Organization to demonstrate that a Carman was entitled to the work in preference to the employee used. Here the Organization argues that the Claimant was entitled due to the fact that Section 4 Article 4 of the Student Mechanic Agreement states that:

"A creditable day of training... shall consist of 8 hours, exclusive of overtime... student mechanics shall be assigned a work week of 40 hours... Such assignments may consist of work days,... to best facilitate training... provided there is a mechanic on the craft assigned to the shift. This will not preclude a student from working overtime with a mechanic to finish a job; however, this will not be used to the detriment of other mechanics." (emphasis added)

There is no dispute in this record that two overtime boards are maintained at the Gest Street Yard and a separate overtime list is maintained for Student Mechanics. During the dates of this Claim Carmen were needed on a daily basis to work overtime. The Organization has alleged with supporting documentation that when available Carmen were skipped, Student Mechanics were called from the overtime board to work. Signed letters (example, supra) attest to this fact as well as the names of the Student Mechanics called. As Carmen were available, willing and skipped that part of the Claim must be sustained as Claimants lost work opportunity. Student Mechanics may not be used to the detriment of Carmen.

AWARD

Claim sustained in accordance with the Findings.

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O R D E R

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 Second Division

Dated at Chicago, Illinois, this 13th day of September 1994.