Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13575
Docket No. 13271
00-2-97-2-45

The Second Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

(Brotherhood Railway Carmen Division
(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Delaware & Hudson Railway Company, Inc.

STATEMENT OF CLAIM:

"Claim of the Committee of the Union that:

1. That the Delaware and Hudson Railway Company violated the terms of our current agreement, in particular Rule 2 when they arbitrarily ordered or otherwise assigned two (2) furloughed carmen, utilizing them as part time or extra board employees, to perform routine carman duties at East Binghamton, NY yard.

2. That, accordingly, the carrier be ordered to compensate regular assigned carmen Bruce Brown and Terry Graves in the amount of eight (8) hours pay. This is the amount of compensation lost as a result of the Carrier's improper assignment of work to furloughed carmen."

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 portion of Rule 2 referred to by the Organization in its initial claim on the property is Rule 2.11. That Rule reads as follows:

> "The Carrier shall have the right to use furloughed employees to perform extra work, and relief work on regular positions during absence of regular occupants, provided such employees have signified in the manner provided in paragraph 2.12 hereof their desire to be so used. It is also understood that management retains the right to use a regular employee, under pertinent rules of the agreement, rather than call a furloughed employee.
>
> 'Extra work' is special project work or extraordinary work of less than 30 days' duration which requires extra employees in addition to those regularly assigned. The intent of this rule is to permit the utilization of furloughed employees who have voluntarily made application for extra and relief work to perform work known to be of a limited duration rather than require a furloughed employee to accept recall for such temporary work or forfeit his seniority."

On June 27, 1996, the Organization filed the above-quoted claim. The Organization maintained that the Carrier had violated Rule 2.11 when it called two furloughed employees and told them to report to work on June 10, 1996. It contended that the employees in question worked on "cripples" and also performed work on cars for Penn Trucking. The Carrier denied the claim on July 29, 1996. In its denial, the Carrier asserted that Rule 2.11 sanctions its use of furloughed employees to perform extra work and relief work. It maintained that the work in question was extraordinary work and was of limited duration (i.e., less than 30 days). The Carrier also noted that the Organization had asked the Carrier to use the two furloughed employees "as much as possible and in lieu of overtime." The Organization had previously acknowledged making such a request in a letter dated June 26, 1996.

In its appeal dated July 30, 1996, however, the Organization maintained that the work performed on the cripples by the two furloughed employees was not extraordinary work within the meaning of Rule 2.11. It also maintained that, while the Organization's letter of June 26, 1996 did ask the Carrier to use the two furloughed employees in question, it had not intended for the Agreement to "be circumvented or ignored." By

letter of August 5, 1996, the Organization next appealed the denial to the Assistant Vice President Labor Relations. In that appeal, the Organization contended that not only was the work at issue not "extraordinary work," but in addition the two men had been "regularly employed for sixty-two (62) days on a position working normal, routine duties that are performed on a daily basis by the regularly assigned carmen."

In its September 19, 1996 response, the Carrier noted that the employees used for the work in question were "protected carmen collecting a guarantee." The Carrier maintained that using the furloughed protected Carmen to perform the work at issue, it was in compliance with Rule 2.11 of the Agreement. Further, it noted that Rule 43.2 of the Agreement specifically details what Carmen's work is, and the work to which the furloughed employees were assigned falls under that Rule. The Carrier suggested, somewhat rhetorically, that it found it hard to believe that the Organization would oppose using Carmen to do Carmen's work. In addition, the Carrier pointed out that nothing in the Agreement prevented the Carrier from calling employees who were available to work straight time and receiving a guarantee in lieu of calling employees at the overtime rate. Finally, the Carrier contended that the work involved was, in fact, "extraordinary" in that it was work that "could not be completed by the regular employees in time to satisfy the customers' needs." The Carrier also noted that the employees called in "do not have regular jobs" and were "called in day for day by the Manager as required." Therefore, there was no known vacancy of 30 days or more.

The Organization reiterated its position in a letter dated September 27, 1996. In its November 1, 1996 response the Carrier restated its position and noted, as well, that the two employees called in to work, who had been furloughed on February 16, 1996, had worked only 12 days and six days, respectively, up to and including June 6, 1996. The Carrier also restated its position that the work at issue was extraordinary Carmen's work, and that the employees called were called in accordance with the Agreement. In its November 10, 1996 response the Organization referred the Carrier to Article I, Section 6(g) of the September 25, 1964 Shop Crafts' Agreement, which pertains to employee protection. That Section reads as follows:

> "An employee receiving a coordination allowance shall be subject to call to return to service after being notified in accordance with the working agreement, and such employee may be required to return to the service of the employing carrier for other reasonably comparable employment for which he is physically and mentally qualified and which does not require

a change in his place of residence, if his return does not infringe upon the employment rights of other employees under the working agreement."

The Organization contended that the Carrier also violated Section 6(g) when it did not recall the employees in accordance with the working Agreement and that the Carrier's actions "circumvented the provisions of our overtime Agreement for the regular assigned employees." The overtime provision to which the Organization refers is Rule 7 - Equalizing Overtime. That Rule reads as follows:

"7.1 When it becomes necessary for employees to work overtime they shall not be laid off during regular working hours to equalize the time.

7.2 There will be an overtime call list (or call board) established for the respective crafts or classes at the various shops or in the various departments, as may be agreed upon locally to meet service requirements, preferably by employees who volunteer for overtime service. The overtime call board will be available to the view of employees. The overtime call list will be made available to the Local Chairman concerned upon request."

The Carrier reaffirmed its rejection of the claim on March 3, 1997.

The Board carefully reviewed the applicable Agreement language in this case. Section 6(g) of the 1964 Agreement is clear on its face. Any recall of furloughed employees must not interfere with the contractually provided rights of other, current employees under the working Agreement. Rule 2.11 of the controlling Agreement between the Parties provides that the Carrier may call furloughed employees to perform "extra work" or extraordinary work of less than 30 days duration which require extra employees in addition to those regularly assigned. Rule 2.11 also provides that management retains the right to use a regular employee, under pertinent Rules of the Agreement, rather than call a furloughed employee.

There is nothing in the Agreement between the Parties that requires the Carrier to use regular employees on an overtime basis rather than use furloughed employees for extra or extraordinary work of less than 30 days duration at straight time. The Carrier argued persuasively, and the Organization has not disproved, that the work at issue was, in fact "extra" or "extraordinary" work, that could not be accomplished by the regular employees in a manner sufficiently timely to meet customer needs. Rule 7 is also clear

in its language, in that its provisions come into effect only "when it becomes necessary for employees to work overtime." Because qualified furloughed employees were available, it was clearly not necessary for regular employees to work overtime.

In light of the foregoing the Board finds no basis upon which to sustain the claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 20th day of December, 2000.