Award No. 3096
Docket No. 2887
2-P&LE-TWUOA-'59

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee D. Emmett Ferguson when the award was rendered.

PARTIES TO DISPUTE:

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO (Railroad Division)

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY

THE LAKE ERIE AND EASTERN RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: On Saturday, January 12, 1957 the carrier called five welders to work on this day.

At the present time there is no overtime agreement at this point and since there is no overtime agreement the oldest employes are entitled to this work.

Mr. Kira and Mr. Schuster are older employes than the men that were called for this work on January 12, 1957.

Since there is no overtime agreement and Mr. Kira and Mr. Schuster were not called to work Saturday, January 12, 1957, the Organization requests the Carrier to compensate the two employes, eight (8) hours each man at the punitive rate of pay for this day.

EMPLOYES' STATEMENT OF FACTS: That at the present time there is no overtime agreement. This means at the time this claim was instituted with the carrier.

That Mr. Kira and Mr. Schuster were the senior employes and should have been called for the welding work.

That Mr. Kira and Mr. Schuster are welders and were available for this work.

That five (5) welders worked on January 12, 1957 and all were junior to Mr. Kira and Mr. Schuster.

That at this point (McKees Rocks, Pa.) when there was any overtime it has always been the practice to call the oldest men as there is no overtime agreement at this point.

assigned to perform the work would receive if he had performed it. In other words, the loss sustained is the value of the work under the agreement if it were regularly assigned. The overtime rate has no application for the reason that work in question was not performed in excess of eight hours on any day as that rule requires.* * *"

Likewise in Second Division Award No. 1951, Referee Donaldson ruled:

"* * * The claimant seeks payment for the work lost at the overtime rate apparently on the theory that if he had been called for the work it would have been done at that rate by virtue of the fact that the claimed dates were his rest days. While there is some differences in the awards of this Division upon this point, the better reasoning would seem to support those decisions allowing simply the pro-rata rate. The overtime rule has no application to time not worked. See Awards 1771, 1772, 1782, 1799 and 1825, Second Division.* * *"

When a similar issue was before the Third Division, the Board said in Award 3193:

"* * * In the absence of Agreement to the contrary, the general rule is that the right to work is not the equivalent of work performed so far as the overtime rule is concerned. The overtime rule itself is consonant with this theory when it provided that 'time in excess of (8) hours exclusive of meal period on any day will be considered overtime'. The overtime rule clearly means that work performed in excess of eight hours will be considered overtime. Consequently time not actually worked cannot be treated at overtime rate unless the Agreement specifically provides. This conclusion is supported by this Division Awards 2346, 2695, 3049.* * *"

This same conclusion is also supported by the following Third Division Awards: 3232, 3376, 3251, 3271, 3504, 3745, 3277, 3770, 3371, 3375, 3837, 4073 and 4196.

CONCLUSION

The carrier has conclusively shown that the overtime worked on Saturday, January 12, 1957, was assigned in accordance with the long established and accepted practice governing the distribution of overtime in the McKees Rocks Shops. The employes have failed to cite any rule that was violated and, in fact, admit that there was no rule in the agreement to govern the distribution of overtime at the time the instant claim arose.

The carrier respectfully submits the claim is without merit and 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 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.

The parties to said dispute were given due notice of hearing thereon.

This claim is for pay for two employes who were not used for overtime work while five junior men were worked. The two claimants are regularly assigned at Y Shops on running repairs. The overtime work which was performed at K. S. Shop consisted of welding roofs on cars being constructed there.

The organization bases its claim on a change in the past practice which it asserts "is as good as a rule or an agreement." On its part the carrier points out the absence of any rule governing distribution of overtime, and also that in the present instance it followed the custom of using men for overtime work which might arise at the particular facility where they were on duty regularly.

We conclude from the evidence presented that there has been no rule violation shown, and that as regards past practice, the evidence in favor of the carrier outweighs the claims paid in wreck crew situations presented by the organization.

AWARD

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 27th day of January, 1959.