

Award No. 6132

Docket No. 5931

2-LV-CM-'71

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee William H. McPherson when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 96, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

LEHIGH VALLEY RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That within the meaning of the controlling agreement the Carrier at Buffalo, N.Y. Car Department unjustly dealt with Carmen Ralph I. Miller and D. Waryk when they were not called out to perform emergency road service on February 22, 1969.

2. That the Carrier accordingly be ordered to compensate the above named eight (8) hours at the time and one-half rate of pay respectively on account of said violation.

EMPLOYEES' STATEMENT OF FACTS: Carmen Ralph I. Miller and D. Waryk, hereinafter referred to as the claimants, are regularly assigned to position "Car Repairer" (Regular) 7:00 A.M. to 3:30 P.M. shift, with bulletined assigned duties "Truck Driver, or Operator, Road Work, Derailments" and all other work pertaining to carmen's duties. R. I. Miller is regularly assigned to this position and D. Waryk has the relief assignment.

The work schedule posted on the bulletin board for the holiday, February 22, 1969 listed four carmen and one leader to work on Tift Terminal Shop Track.

The Emergency road positions of the claimants were blanked.

Carman Raymond Hollis, who was scheduled to work on the shop track on this date, was instructed to load coupler on truck, pick up two (2) carmen at East Buffalo, and replace broken coupler on Car UP 29534 at Williamsville, New York.

This dispute has been handled with all officers designated to handle disputes, including the highest officer, all of who have declined to adjust same.

The Agreement effective September 1, 1949 as it has been subsequently amended is controlling.

This is exactly carrier's point, the subject work upon which this claim is based is not distinguished from any other work performed on the holiday in this case and the distribution of overtime which determined the employes to work on date of claim.

Therefore, use of the employes February 22, 1969 was completely in accord with the employes' own position which was sustained in Award 5304, Docket 5082.

In the handling on the property, employes stated that a carman at East Buffalo was used improperly to perform subject work.

This statement by the employes which did not name the employe improperly used, according to their allegation, was not substantiated in any way. Carrier states it knows of no rule of agreement to restrict use of employes entitled to work on holidays and employes have not supported their statement.

CONTENTION OF CARRIER

Carrier submits employes have failed to support their position in this case and it should not be sustained.

Carrier has shown that it did carry out the requirements of Rule 12, did properly list the employes entitled to work on Washington's birthday holiday, February 22, 1969 on the basis of those employes entitled to work by reason of least overtime worked by them and utilized the employes so entitled to work to perform the required work.

Employes, as shown, have been shown to have taken a position that no employe they represent has a guarantee to work on a Holiday.

Employes have also been shown to have had their position sustained in Award 5304, Docket 5082, on this property by argument they now seek to reverse in this case.

Claimants were not entitled to subject work on date of claim and are not entitled to any payment in this case, for the work made the subject of claim and the claim 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.

Parties to said dispute waived right of appearance at hearing thereon.

On the Washington's Birthday holiday of February 22, 1969, one carman on duty at Buffalo and two at East Buffalo were sent by truck to replace a broken coupler at Williamsville during the day shift. Claimants are regularly assigned to the position of Car Repairer, with bulletined assigned duties as

truck driver, operator, road work, derailments, and all other work pertaining to carmen's duties. The carman seniority lists at Buffalo and East Buffalo were consolidated and dovetailed as of June 15, 1968.

The Organization contends that Claimants are regularly assigned to emergency road service in accordance with Rules 11 and 18, that one of the carmen assigned to the road work in this instance was not eligible for such assignment because he occupied a "frozen" position at East Buffalo, that Claimants' right to the assignment was in effect recognized by the Carrier when it settled two similar claims in 1959 and 1962, that members of the wreck train crew distribute overtime in wrecking service only among wreck crew members, and that the same procedure has been used in emergency road service, with only the regularly assigned carmen participating in such overtime.

The Carrier contends that Rules 11 and 18 do not support this claim, that the assignment was made as required by Rule 12 on Distribution of Overtime and in accordance with our Award 5304, and that certain of the Organization's exhibits should be excluded as not introduced on the property.

Carrier's objection to these exhibits is not sustained. They were covered by Employees' reference to "earlier settlements" and the "frozen position." If Carrier had any doubt as to these references, it could readily have obtained further identification.

Employees' contention regarding the frozen position is based on the seniority merger agreement of June 1968, wherein it is provided that the positions held by two designated carmen at East Buffalo "shall be excluded from any displacement by a senior carman on the dovetailed seniority roster . . ." We do not find in this provision anything that makes the assignment of one of these men to the road service in this case obviously inappropriate.

Rule 18, dealing with the posting of new jobs and vacancies, and Rule 11, dealing chiefly with payment for emergency road service and wrecking service, do not in our opinion support the claim. The basic question is whether the description of duties of the Claimants as including road work gives them exclusive call to all such work at all times. It does give them the right to any road service assignments that originate while they are on duty, including whatever overtime may be involved in the assignment; but we see nothing in the Agreement that would give the same type of exclusivity over other carmen in road assignments that applies, for example, to carmen in general over the other crafts in performing the duties reserved to their craft.

The pertinent part of Rule 12 (relied on by Carrier) states: "Record will be kept of overtime worked and men called with the purpose in view of distributing the overtime equally." We recognize that this rule has not been interpreted by the Parties to prohibit the granting of special assignment rights to, for example, members of wreck crews. Our Award 5304 does not negate that practice. It does hold that all overtime should be recorded as a basis for seeking to equalize overtime assignments.

Conceivably, overtime assignments on road service might be made on the same basis as in wrecking service. The Organization contends that this has indeed been the fact on this road. To meet its burden of proof in this respect, it has shown two instances in which apparently similar claims were granted by the Carrier some ten years ago. However, both of those claims were granted

with the proviso that "due to the particular circumstances in this case and without precedent established or prejudice to my views. . . ." We believe that we must respect the "without prejudice" proviso of such settlements because we cannot know all the details of those cases and more importantly because refusal to respect the proviso might well reduce the number of grievance settlements obtained on the property.

We conclude that the Organization has failed to sustain its burden of proving a company-wide practice of assigning road service at all hours only to carmen whose bulletined assigned duties include road work.

AWARD

Claim denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION**

**ATTEST: E. A. Killeen
Executive Secretary**

Dated at Chicago, Illinois, this 21st day of April, 1971.