

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. 2, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Missouri Pacific Railroad Company

Dispute: Claim of Employees:

1. That the Missouri Pacific Railroad Company violated Rule 8 of the controlling agreement and Article V of the Agreement of April 24, 1970, when they arbitrarily denied Carman M. A. Smith his right to overtime on his second rest day, October 29, 1971.
2. That accordingly, the Missouri Pacific Railroad Company be ordered to compensate Carman Smith in the amount of eight (8) hours at double time rate for October 29, 1971, and in addition to the money amounts claimed herein, Carman Smith shall be paid an additional amount of 6% per annum compounded annually on the anniversary date of the claim.

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.

Claimant was a leadman with a work week of Saturday through Wednesday with rest days of Thursday and Friday. On Thursday October 28, 1971, Claimant was first out on the overtime board and was paid at the time and one-half rate for the work that day. Overtime work was also required on Friday October 29th for two carmen and Claimant was still first out on the overtime board. Carrier refused to assign him to the overtime work since it would have had to compensate him at double time rate and called the next man on the board. Article V of the April 24, 1970 Agreement provides that employees working on their second rest day will be paid double time provided that they have worked their regular work week and their first rest day.

The Organization contends that the parties had agreed that the carmen with the least number of hours of overtime worked would be first to be called for such assignments based on Rule 8 (b), which provides:

"(b) Record will be kept of overtime worked and men called with the purpose in view of distributing the overtime equally. Local Chairman, will upon request, be furnished with record."

In this case, Claimant had thirty-eight hours of overtime on the Board after working his first rest day; the next man on the list had seventy-four hours. October 28th was the first overtime Claimant had worked or been offered in one year. Carrier argues that the leadman's position, which was bid by Claimant, carried a wage differential but also precluded him from being available for much overtime; Carrier urges that if he wanted overtime he should bid off that job. We do not agree with Carrier's position. If a leadman's job puts him into a category which makes application of the overtime provisions, Rule 8 (b) specifically, difficult or impossible to implement, the parties have the obligation to change the Agreement appropriately; this Board cannot accomplish such revisions for the parties, but must simply interpret the Agreement as written. Hence, we find that Claimant must be given the same consideration as any other employees on the overtime board.

Carrier's two principle arguments are that Rule 8 (b) does not require the equalization of overtime at any given time and secondly that Carrier had the right to adjust its assignments of employees to avoid the unnecessary expense of penalty payments, whenever possible. Carrier states, and we agree, that absolute equalization of overtime is impossible and was not contemplated by the parties. Further, it is argued persuasively that the provisions of Rule 8 (b) do not require a first-in first-out award of overtime in any given instance. Carrier cites a number of awards dealing with similar equalization of overtime rules in support of its position. It is noted that these awards hold quite consistently that such rules do not require a rigid procedure for distribution of overtime but are properly implemented if the overtime work "...is distributed substantially equally over a reasonable period of time" (Award 5136). Also see Awards 2123 and 4980. Carrier also cites Awards supporting management's right to use employees at straight time rates, by adjusting forces, thus avoiding overtime payments. It is noted that this latter right is limited, of course, by Agreement rules.

In the case before us we have a conflict between Carrier's right, unspecified by particular rule, to schedule its work in the interest of economy and efficiency (Award 4936), and the proper application of Rule 8 (b). Carrier has recognized the "reasonableness" problem with respect to 8 (b). In our judgement, under the circumstances in this particular case, Carrier has not carried out its obligations under 8 (b) with respect to Claimant reasonably. We do not make any determination as to what period of time is "reasonable" for relative equalization of overtime for this group of employees at this location; however, we find that Carrier should not have refused to use Claimant on October 29th, notwithstanding the double time requirement, in view of his standing on the overtime board. The lack of opportunity for a year for overtime and the fact that the next man on the board had about twice as many hours in as Claimant are very persuasive.

In sustaining the claim, we will only allow straight time compensation for Claimant, following the reasoning in a number of prior cases (Awards 5696, 5942, 5575 and 6559) that compensation for work not performed should be at the straight time rate. We will not allow interest as claimed, since we have repeatedly said that such claims cannot be allowed absent support in the basic collective bargaining agreement.

A W A R D

Claim sustained; payment at straight time only and no interest will be allowed

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 8th day of January, 1974.