

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: { System Federation No. 10, Railway Employees'
Department, A. F. of L. - C. I. O.
(Firemen & Oilers)
{ Denver & Rio Grande Western Railroad Company

Dispute: Claim of Employees:

1. Under the current controlling Agreement, Mr. J. Duran, Laborer, Grand Junction, Colorado, was denied an opportunity to perform overtime service on his second rest day, April 30, 1977.
2. That, accordingly, The Denver and Rio Grande Western Railroad Company be ordered to compensate Mr. J. Duran for eight hours pay at the double-time pro rata rate.

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.

Laborer J. Duran, performed service for the Carrier on his first rest day, April 29, 1977, at time-and-one-half rate. Work was available on April 30, 1977 but Duran was not called. There was no indication that he was not available for such work if called. Instead, another laborer, J. Dickey, was called and performed the work at time-and-one-half rate. There is no dispute that on both days Duran had a lower overtime accumulation than Dickey.

The Organization claims that Duran should have been called to work on April 30, 1977, on his second rest day and thereby receive pay at double time.

The Organization's submission refers to work by Duran on April 20, 1977 as being his first rest day; the Board takes this, as shown by other argument and exhibits as a typographical error for April 29. The Carrier raised questions concerning the Claimant's actual work hours during the preceding week, raising doubt as to the propriety of the time-and-one-half payment on the first rest day and as to whether he would have been entitled to double time if he had worked his second rest day. As pointed out by the Organization, there is no showing that this was discussed on the property, and such information is therefore not properly before the Board.

As a threshold issue, the Carrier argues that the claim as presented by the Organization to the Board differs from the claim discussed on the property. While there is some differences in wording, the Board finds there is no doubt as to the event and the rules alleged to be violated and does not find this a fatal defect in the Board's review of the matter.

Rule 8(b) provides as follows:

"(b) Records will be kept of overtime worked for the purpose of distributing overtime. The manner of such distribution will be by mutual agreement between the Master Mechanic or his representative and the local committee representing the employees at each point, it being understood the distribution of the overtime will be sole responsibility of the committee."

Article IV of the June 12, 1970 NMB Case No. A-8804, applicable to the Carrier and Organization reads as follows:

"Pay for Service on Second Consecutive Rest Day

All agreements, rules, interpretations and practices, however established, are amended to provide that service performed by a regularly assigned hourly or daily rated employee on the second rest day of his assignment shall be paid at double the basic straight time rate provided he has worked all the hours of his assignment in that work week and has worked on the first rest day of his work week, except that emergency work paid for under the call rules will not be counted as qualifying service under this rule, nor will it be paid under the provisions hereof."

At the outset, the Board notes that Article IV of the June 12, 1970 document simply determines what rate of pay shall apply (i.e., double time) under specific circumstances. It does not require the Carrier to have work performed under such circumstances; such guidance must come, if at all, from rules under a specific Agreement between the Carrier and the Organization.

It is the Organization's position that, since Duran was low man on the overtime distribution list, he was entitled to work on his second rest day, and that the fact that double time may have been applicable is no bar to such requirement.

The Carrier defends its position on at least two bases. First, Rule 8(b) does not mandate the use of the low man on the overtime distribution list. Second, the use of an employee on either ~~time-and-one-half~~, rather than at the double time rate, has been an accepted practice (although the Carrier cites no specific instances of such practice).

The Board notes that Rule 8(b) is readily distinguishable from rules in many other agreements covering the same subject which refer to distribution of overtime "equally" or "as equally as possible" or some other phrase specifying the manner in which overtime is distributed among eligible employees. As shown by the submitted overtime records, Duran was considerably lower in accumulated overtime hours on

April 30 than other employes on the Board. This record shows his accumulation at 100 hours and four other employes (including Dickey) at 229 to 371 hours. It is conceivable (though the Board makes no such judgment here) that Duran might have had some general claim as to overtime distribution based on this figure. But the issue here is simply whether any rule and/or established practice not contrary to rule required his assignment on April 30. No such requirement can be read into Rule 8(b), nor has the Organization shown mutual agreement to any "low man first out" fixed and unvarying practice. Thus the claim as to a right to work on this particular day -- whether at time-and-a-half or double time punitive rate -- must fall.

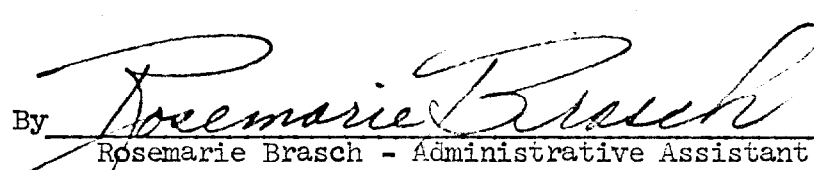
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 9th day of January 1980.