Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8681
Docket No. 8570
2-D&RGW-FO-'81

The Second Division consisted of the regular members and in addition Referee James F. Scearce when award was rendered.

Parties to Dispute: (International Brotherhood of Firemen & Oilers
(Denver and Rio Grande Western Railroad Company

Dispute: Claim of Employes:

1. Under the current controlling Agreement, Jr. John V. Bowling, laborer Grand Junction, Colorado, was denied the right to work the last four hours of his shift on August 3, 1978.

2. That, accordingly, The Denver and Rio Grande Western Railroad Company be ordered to compensate Mr. John V. Bowling for four hours pay at the 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.

Claimant was regularly assigned on the day shift as a Laborer at the Carrier's diesel locomotive facility at Grand Junction, Colorado. On August 3, 1978, the Claimant was called off the overtime board to fill a vacancy on the preceding shift. He worked eight (8) hours on the overtime turn, part of which was as a "Hostler Helper;" in this capacity, he assisted the "Hostler," who was responsibile for re-positioning locomotives within the facility. For performing such duty, the Claimant was paid a $1.00 allowance. After completing the aforementioned turn of overtime (which actually began at 11:30 p.m. on August 2, 1978), the Claimant moved directly to his regular assignment and commenced his regular shift. He was only allowed to work four (4) hours, at which time he was sent home. According to the Carrier, the Claimant's performance of work as Hostler Helper placed him under the control of the "Hours of Service Act" as amended by Public Law 91-348 (eff. July 8, 1976). The Federal Railroad Administration, on May 31, 1977, issued the following interpretations of the 1976 Amendment:

> "... With the passage of the 1976 amendments, both inside and outside hostlers are considered to be connected with the movement of trains. Previously, only outside hostlers were covered. Any other employee who is actually engaged in or connected with the movement of any train is also covered, regardless of his job title."

and

"... all duty time for a railroad even though otherwise not subject to the Act must be included when computing total on-duty time of an individual who performs one or more of the types of service covered by the act. This is known as the principle of 'commingled service.'"

It was such pronouncement, per the Carrier, that became the basis to conclude that the Claimant -- filling the duty of Hostler Helper -- was performing "commingled service" which was "connected with the movement" of trains in the same manner as the Hostler does. Essentially, the Carrier asserts that a Federal Statute takes pre-eminence over a provision of a collective bargaining agreement, particularly where following the latter would be a violation of law. Here, the Carrier asserts failure on its part to follow the FRA's directive would potentially subject it to a severe penalty. According to the Organization, the Claimant is covered by an Agreement that is not subject to the Hours of Service Law. It also points out that Hostler Helpers per se are not referenced in the aforecited Statute, and that there are no assigned Hostler Helper positions at this facility. The Organization asserts that the Carrier forced the Claimant to suspend work in order to absorb overtime, thus violating Rule 8 (a) of the Agreement.

While recognizing that this Board is without authority to interpret the Hours of Service Law, we are compelled to point out that where the Carrier can require a laborer or any other classified employee to perform service as a Hostler Helper -- for which the allowance of $1.00 is paid, it potentially limits such employees from achieving overtime pay which otherwise could be worked or more significantly, as in this case, from achieving their regular pay. The record of this case does not indicate whether or not the hours worked pre-shift by the Claimant were, in whole or part, calculated at straight time since the Claimant was not permitted to work beyond a total of twelve hours; if so, we are compelled to point out that such an affected employee would be required to "make his time" the hard way. Thus, while the Board must defer to the FRA on matters pertaining to the application of the Hours of Service Law and conclude that we are without authority to comment on the issuance of interpretation to such Statute, we are duly authorized to conclude that the Carrier may not compel an employee to perform service, as was done here, which has the ultimate result of denying the opportunity to work and the attendance compensation for which such employee is entitled under the provisions of applicable collective bargaining agreements.

A W A R D

Claim is dismissed on its merits due to lack of authority by this Board to consider such claim. This Board concludes that in the future, the Carrier may not compel employees covered by the terms of the Agreement to perform duties which has the result of depriving them of other rights under the Agreement.

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 15th day of April, 1981.