Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8730
SECOND DIVISION Docket No. 8749
2-C&O-CM-'81

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

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Chesapeake & Ohio Railway Company

Dispute: Claim of Employes:

1. Claim: That Carman, James L. Baines' service rights and rules of the controlling agreement were violated on March 16, 1978 account J. W. Wright, Carpenter (differential rated employe) was utilized in wrecking service in violation of Rule 11. Accordingly, Baines is entitled to be additionally compensated three (3) hours at the Carmen's applicable time and one-half (1½) rate in lieu of said violation.

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.

Rule 11(d) of the pertinent contract states:

"(d) Employes performing special work for which a differential is paid will not participate in road work, except the kind of work for which they are paid a differential rate."

The contract also contains the following understanding of Rule 11:

"(1) Employes who are paid a differential for performing work requiring special skill or training, will when available, be given the overtime at home station, in their department, and road work on their territory, in connection with their special kind of work; but will not be given other overtime or road work, except when other competent men of their craft are not available."

It is undisputed that on March 16, 1978, during the course of the first shift the Carrier sent Mr. J. W. Wright who was working as a differentially rated general carpenter along with four other Carmen, to Williamsburg, Virginia. Williamsburg is approximately 26 miles from Newport News, the home point for

Mr. Wright and Mr. Baines, the Claimant. The purpose of the trip was to rerail one car. Mr. Wright's shift was scheduled to end at 3:30 p.m., however, the rerailing was not completed at that time and he did not return to Newport News until 6:30 p.m.

Mr. Baines and the Organization contend that Rule 11 prohibits the Carrier from sending a differential employee out on the road at all and particularly when it involves overtime as was involved in this situation. The claim represents the overtime worked by Mr. Wright.

Regarding the merits, the Carrier argues that when it sent Mr. Wright to Williamsburg he was engaged in wrecking service. In this regard, it is their contention that it has been the practice at Newport News for many years not to make any distinction between differentiated employees and regular Carmen when making assignments for wrecking service which was not expected to involve overtime. The Carrier further argues that the fact Mr. Wright's assignment on March 16 involved overtime was beyond the control of the Carrier. When Mr. Wright was assigned to the wrecking service it was fully anticipated, asserts the Carrier, that he would return by 3:30 p.m. However, due to a delay in the arrival of the locomotive crew at the derailment, overtime was worked unexpectedly.

In deciding the merits, the Board would see its task as making a determination if (1) in the writing of the language of Rule 11 the parties wished to equate straight time wrecking service with the term "road work". The Organization implies that the terms are equivalent when they contend Mr. Wright had no right to be engaged in wrecking service on the road in the first place. On the other hand, the Carrier argues the ambiguity of Rule 11 is resolved by the aforementioned past practice, which they assert is undenied, and (2) it would be our task, if Rule 11 doesn't apply to straight time wrecking service but that it applies to all overtime, to decide if the Carrier is liable for "unanticipated" overtime. If this were the case, we would expect a showing on the Organization's part that the Carrier could have or should have reasonably known overtime would be involved when making a straight time wrecking service assignment.

However, before we can address ourselves to the above questions en route to a finding on the merits, we must address ourselves to the Carrier's argument that the Board is without jurisdiction to consider the claim inasmuch as it was not handled in accordance with Rule 35. The pertinent portion of Rule 35 states:

> "2. If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance and the representative of the Carrier shall be notified in writing, within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed..."

The Carrier argues that Mr. A. M. Childers, Manager of Car Department, never received a rejection of his first step declination as is clearly required by Rule 35.

In reviewing the record in regard to this contention, the Board observes that the lack of a rejection to Mr. Childer's declination was brought to the attention of the Organization in the Carrier's second and final step declination on September 22, 1978. It was stated therein:

> "Initially, Mr. Childers declined the instant claim by a letter dated June 9, 1978, and we are advised that he has not been notified of the rejection of his decision as required by Rule 35 of the Agreement. Therefore, the claim is not properly before this office on appeal and cannot be entertained."

The claim was discussed in conference December 6, 1978. Then on January 11, 1979, the Organization furnished to the Carrier's highest officer designated to handle claims a copy of a letter dated June 25, 1978, addressed to Mr. Childers which they contended constituted a proper rejection. On March 22, 1979, the Carrier further advised the Organization that as of February 2, 1979, "that Mr. Baines' letter of June 25, 1978 was never received by Mr. Childers."

In reviewing the arguments relative to the procedural soundness of the grievance we find that the Organization has failed to convince us that they complied with the requirements of Rule 35. Rule 35 places a positive obligation on the Organization to notify the Carrier of the rejection of a denial. It also makes clear that "failing to comply with this provision, the matter shall be considered closed..." Rule 35 places obligations on both the Organization and the Carrier in the handling of claims. In this case, the Organization failed to meet theirs. The record is clear that Mr. Childers has never received a rejection of his declination. In dismissing the claim on this procedural basis, we are only applying the agreement as written. See Second Division Award 1847 and Third Division Awards 13529, 21192 and 8564, a case identical to the instant one in respect to procedural issues, wherein the following comments were made:

> "We recognize full well that a dismissal that is not based on the merits of the case is not entirely satisfactory; it possesses the vice of leaving Claimants with the feeling that they have not had 'their day in court.' We would very much prefer not to base this decision on Article V of the Agreement. Nevertheless, each of the parties is responsible for the inclusion of this language in the Agreement and what we may think of its wisdom, relative importance of soundness is not at all material. It is our function to interpret the Agreement as it now stands and not to rewrite it in accordance with our own theories of labor-management relations. We are not disposed to strain interpretations in order to escape the technicalities of a plain meaning. Nor is it proper or desirable to resort to fictions and distortions to spell out a waiver, where none exists, in an effort to avoid a decision based on procedural defects rather than on the merits.

"Here the Agreement is clear and unambiguous with respect to the immediate point in issue and it is entirely certain that the Petitioner has not complied with a requirement expressly made essential by the Agreement between the parties."

A W A R D

Claim dismissed.

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 3rd day of June, 1981.