Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9267
SECOND DIVISION Docket No. 9004
2-MP-CM-'82

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
(Missouri Pacific Railroad Company

Dispute: Claim of Employes:

1. That the Missouri Pacific Railroad Company violated Article V of the Agreement of April 24, 1970 at Dupo, Illinois when they refused to call and use Carman K. F. Shondy who was first out on the overtime board, February 23, 1979.

2. That the Missouri Pacific Railroad Company be ordered to compensate Carman K. F. Shondy in the amount of eight (8) hours additional pay at pro rata rate for their violation of his rights.

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.

This case involves the interpretation of Article V which has been the subject of numerous disputes between the parties. Article V reads as follows:

> "All agreements, rules, interpretations and practices, however established, are amended to provide that service performed by a regularly assigned hourly or daily rated employe 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 his 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 for under the provisions hereof."

Certain facts are not in dispute. The Claimant was employed by the Carrier on their Dupo, Illinois, repair track. His work week was Saturday through Wednesday, with rest days on Thursday and Friday. On Thursday, February 22, 1979, after working his full work week, the Claimant was called to work eight hours of overtime on his first rest day. The Claimant was called for this overtime from the overtime board for working the repair yard which operates on a first-in first-out basis. On Friday,

February 23, 1979, the Carrier called the Carman R. W. Sultzer to work overtime. The Organization contends that the Agreement was violated by the Carrier when they refused to call the Claimant from the overtime board when he was available on his second rest day. Because they failed to call him on his second rest day, they believe he is entitled to double time compensation for this failure to be called per Article V. They believe that the Carrier violated 20 years of past practice when they called R. W. Sultzer for this work when his name was not even on the overtime board. The Organization contends it has been past practice to call employees for overtime strictly from the overtime board. In addition, they direct attention to their assertion that a Carman Ham worked on his second rest day February 26, 1979, suggesting that the Claimant should have had similar treatment. They also direct attention to what they assert to be similar claims that have been allowed by the Carrier.

The Carrier argues that the claim has no rule support, therefore, it cannot be sustained. They believe that the Organization would have to show a rule that requires a specific action they contend should have taken place. In absence of such rule, the Carrier believes that the only applicable rule is Rule 8(b). Rule 8(b) states:

> "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."

They contend that there is no evidence that 8(b) was violated or that overtime was unequally distributed. Quite to the contrary, they contend that the purpose of calling Mr. Sultzer was to equalize the overtime between the two men. Had they failed to call Mr. Sultzer, they could have been liable for a claim from Mr. Sultzer. Moreover, the Carrier argues that the existence of an overtime board does not bind the Carrier to use only those on the overtime board or to use them on a rotating basis. In this respect, they direct attention to several awards involving the same parties and the same rule which they contend supports this position. They also assert that there is no proof of the past practice that the Organization contends exists. Lastly, the Carrier argues that little or no weight should be given to the previous settlements mentioned by the Organization for a variety of reasons but most notably because they are distinguished on their facts.

It is the Board's conclusion that the Organization has not sustained their burden of proof to show by contract language or past practice that the Claimant was entitled to be called for the overtime in question in lieu of Mr. Sultzer. The language of 8(b) certainly doesn't require such action. The only restriction on the Carrier's right to make overtime assignments in a manner most consistent with economy and efficiency is that they keep a record of overtime assignments and that overtime will be distributed equally. The language of the contract does not limit the Carrier to calling only employees on the overtime board or obligate them to call these employees first-in or first-out. In this regard, we note Second Division Award 7897 (Weiss) involving the same rule and parties.

> "***We find support in our position in a prior Award by this Division between these same two parties, Award No. 6613 (Lieberman), in whic' although the Board sustains the claim on other grounds, it agreed with Carrier's argument that 'the provisions of Rule 8(b) do not require a first-in first-out award of overtime in any given instance.'

In light of the above, we will deny the claim."

The lack of language in the contract is not a per se bar to the position of the Organization. The Board has sustained claims in other cases involving ambiguous language where the Organization had shown that the action of the Carrier had violated a consistent past practice. While a past practice may exist in this case, there certainly is no proof of it in this record. Previous settlements referred to by the Organization are materially distinguishable in several respects and the reference to Mr. Ham is not sufficiently developed to deserve much weight.

In summary, it is well established that all rights remain with management unless contracted away in writing or by practice. In this case, it cannot be concluded that the Carrier has contracted away the right to make the assignment of overtime in the manner in which they did in this case.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 28th day of July, 1982.