Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11102
SECOND DIVISION Docket No. 10069
2-B&O-CM-'87

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(The Baltimore and Ohio Railroad Company

Dispute: Claim of Employes:

1. That Carrier violated the rules of the controlling Agreement, specifically Rule 24 1/2, and Rule 8, when on the date of May 1, 1981, they arbitrarily utilized a furloughed employe, such employe called for work under the provisions of Articles IV, Rule 24 1/2, in lieu of calling J. Rose on an overtime basis as per Rule 8. J. Rose, a regularly assigned employed Carman at DeFiance, Ohio, was available and not called to perform the work in question, to inspect and measure an oversized flat car at Curtis Yard, west of Miller and/or Gary, Indiana, and furloughed employe utilized in his stead.

2. That accordingly, Carrier be ordered to compensate J. Rose for all monetary losses suffered account this violation, as follows: tne (sic) (10) hours pay at the time and one-half rate, which would include travel time from DeFiance, Ohio to Curtis Yard, Indiana, a distance of approximately 376 miles.

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 employes 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 is regularly assigned as a Car Inspector at Carrier's DeFiance, Ohio, facility with rest days of Friday and Saturday. Claimant maintains his personal residence in Willard, Ohio, which is approximately 75 miles east of DeFiance (Carrier contends that the distance between DeFiance and Willard is approximately 97 miles).

Friday, May 1, 1981, and Saturday, May 2, 1981, were the Claimant's regular rest days. Prior to his leaving work on Thursday, April 30, 1981, in order to spend his rest days at his home in Willard, the Claimant informed his Supervisor of his intended whereabouts during his scheduled rest days and further informed the Supervisor of his availability to work, if needed, on these days.

At 5:00 P.M. on May 1, 1981, the Claimant's Supervisor was informed that an oversized flat car, which was loaded with a large generator, was delivered from the E.J.& E. Railway to Carrier's Curtis Yard, and which required immediate inspection before being transported to its ultimate destination in Allegheny, Virginia.

The Claimant's Supervisor attempted to find an available, regularly assigned Carman to accompany him to Curtis Yard in order to measure and inspect the oversized load. Failing to locate a regularly assigned Carman at the DeFiance, Ohio facility or at any other of the Carrier's facilities enroute, the Supervisor called a furloughed Carman to make the trip and perform the inspection. In his effort to secure a Car Inspector, however, the Supervisor did not attempt to call the Claimant because he believed that the Claimant, who was at home in Willard, Ohio, was too far from DeFiance to promptly respond to the overtime call. Willard, as was noted previously, is located either 75 miles or 97 miles east of DeFiance, and it would have required Claimant to travel a minimum of one and one-half hours before he could begin the approximately 160 mile trip to Curtis Yard.

The Organization filed a Claim on July 2, 1981, alleging that the Carrier's action herein was a violation of Rule 24-1/2 and Rule 8 of the Controlling Agreement. Said Rules, in pertinent part, read as follows:

"Rule 8 - Distribution of Overtime

> There will be an overtime call list established for the respective crafts or classes at the various shops or in the various departments or sub-departments, as may be agreed upon locally to meet service requirements, preferably by employes who volunteer for overtime service.
>
> The Local committee of each organization and representatives of the Carrier will cooperate in determining the employes to be called from the overtime call lists.

* * * * *

Rule 24 1/2 - Use of Furloughed Employes to Perform Relief Work

(a) The Carrier shall have the right to use furloughed employes to perform relief work on regular positions during absence of regular occupants, provided such employes have signified in the manner provided in paragraph (b) hereof their desire to be so used. This provision is not intended to supersede rules or practices which permit employes to place themselves on vacancies on preferred positions in their seniority districts, it being understood, under these circumstances, that the furloughed employe will be used, if the vacancy is filled, on the last position that is to be filled. This does not supersede rules that require the filling of temporary vacancies. It is also understood that management retains the right to use the regular employe, under pertinent rules of the agreement, rather than call a furloughed employe."

In remedy of the aforestated infraction, the Organization requests that the Claimant be paid ". . . ten (10) hours of pay at the time and one-half rate, which would include travel from DeFiance, Ohio to Curtis Yard, Indiana."

The Organization's basic contention in this dispute is that the Carrier had no right to bypass the Claimant on the overtime list and award the disputed overtime to a furloughed employee. According to the Organization, the Claimant complied with the contractual requirements to be considered for overtime in that, on Thursday, April 30, 1981, he informed the Carrier of his availability and his desire to work overtime. Moreover, the Organization further argues that it is not unusual for an employee to live many miles from his regular assignment and that mere distance alone should not exclude a Carman from working overtime. The Organization concludes, therefore, that regularly assigned Carmen, such as the Claimant in the instant case, are contractually entitled to be called to perform overtime before less senior furloughed employees are called.

The Carrier contends that the Organization has failed its burden of proving a contract violation in the instant case (Second Division Awards 6893, 7417; Fourth Division Awards 2314, 2348). Additionally, the Carrier further argues that the Organization's reliance upon Rule 24-1/2 as being controlling herein is misguided. In this regard, the Carrier directs the Board's attention to that portion of Rule 24-1/2 which reads as follows:

"It is also understood that management retains the right to use the regular employee, under pertinent rules of the agreement, rather than call a furloughed employee."

By referencing this particular portion of the disputed Rule, the Carrier maintains that said language constitutes a "right of retention" rather than a "mandatory requirement" which permits the Carrier discretion to use furloughed employes rather than using regularly assigned Carmen in such situations.

Regarding the applicability of Rule 8, the Carrier asserts that said Overtime Rule requires mutual cooperation which, according to the Carrier, is an element which is absent in the instant case since the Organization continuously insists that the Carrier delay its operations while waiting for distant, albeit senior employees to journey to a home point for subsequent overtime assignment purposes. The Carrier, in this regard, urges the Board to apply the same common sense approach to such situations as that which was adopted by the Third Division wherein it was determined that employees who resided anywhere from 33 miles (Third Division Award 12520) to 50 miles (Third Division Award 18247) away from work were "not available" for work for such purposes.

As an initial point of departure in this analysis, after carefully reviewing the complete record which has been presented herein, the Board finds that the Organization's reliance upon Rule 24-1/2 is irrelevant to the instant dispute. Relief work is not overtime work. Relief work speaks to absences of regular occupants, not to the distribution of extra, overtime work to Carmen who are regularly employed.

Having found Rule 24-1/2 to be irrelevant, however, we find that Rule 8 is controlling. Said Rule speaks to ". . . employees to be called from the overtime call lists." An "employee," in such cases, is a person who is currently employed, not a person who is currently on layoff status. Although Rule 8 cannot be read to exclude Carrier's permissive use of furloughed Carmen in such situations, the Overtime Rule requires Carrier to first exhaust the roster of currently employed Carmen before offering premium rate work (overtime) to their furloughed (unemployed) co-workers. Given that Rule 8 requires the Carrier to offer overtime opportunities first to current employees, and also given that Claimant is an "employee" as contemplated by said Rule, then Carrier was contractually required to offer Claimant the opportunity of performing the disputed inspection work at Carrier's Curtis Yard.

While the Board is sympathetic with the Carrier's position that it is inefficient to call the Claimant who lives 75 miles or more away to perform work which is approximately 160 miles further away from the point of call, the Carrier, nonetheless, has failed to cite evidence which would limit Rule 8 to Carmen who were "available" for service. The "available for service" language which was contained in Rule 17 in the Signalmens' Agreement, and which was found to be persuasive in numerous Third Division cases which were cited by Carrier (Third Division Awards 12519, 12520, 15339, 17080, 18247, 22234 and 22235), is not similarly contained in applicable Rule 8 which is at issue in the instant case. Absent such modifying language, we are bound by the dictates of Rule 8 which clearly provides that overtime work be offered first to currently employed Carmen. The Carrier, in the instant case, did not even

attempt to contact Claimant for such purposes. Therefore, we must sustain the Claim. While it is not our general policy to award overtime for time not worked, the instant Claim is a direct violation of the Overtime Rule. Consequently, we will award the Claimant ten (10) hours of pay at the applicable overtime rate which was in effect at the time of the filing of the Claim.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 7th day of January 1987.

CARRIER MEMBERS' DISSENT
TO
AWARD 11102, DOCKET 10069
(Referee John J. Mikrut, Jr.)

We have stated many times that the purpose of a Dissent is to contructively criticize an award where the Majority has misstated the facts, erroneously misinterpreted the rules or ignored controlling principles established by this tribunal as the "law of the shop" over the past fifty-two years.

The Board has often held that except insofar as it has restricted itself by the collective bargaining agreement, or as it may be limited by law, the assignment of work necessary for its operations lies within the Carrier's discretion.

Both statutes and contracts should be interpreted with the realization that reasonable results were intended. It is well known that many of the issues presented to the Board are of the peripheral variety; and, in these cases, there is no requirement that common sense be disregarded in contractual interpretation. In other words, where a contract may be susceptible to alternative constructions, one of which would lead to a reasonable or sensible result and the other to an absurd result, the contract should be construed in the light of the former.

In concluding that Rule 8 - Distribution of Overtime is controlling, the Majority held:

> "...Although Rule 8 cannot be read to exclude Carrier's permissive use of furloughed Carmen in such situations, the Overtime Rule requires Carrier to first exhaust the roster of currently employed Carmen before offering premium rate work (overtime) to their furloughed (unemployed) co-workers." (Emphasis added)

The facts, as discerned by the Majority, reveal that the car in question "...required immediate inspection...." One common definition of "immediate" is "occurring or accomplished without delay."

The Majority observed that:

> "The Claimant's Supervisor attempted to find an available, regularly assigned Carman to accompany him to Curtis Yard in order to measure and inspect the oversized load. Failing to locate a regularly assigned Carman at the DeFiance, Ohio facility or at any other of the Carrier's facilities enroute, the Supervisor called a furloughed Carman to make the trip and perform the inspection." (Emphasis added)

It makes little sense to require the Carrier to postpone the performance of work requiring "immediate" attention to wait and see if the Claimant who just concluded his tour of duty would be willing to drive 97 miles from Willard to DeFiance on a Friday evening (after driving the 97 miles home), make the 160 mile trip to Chicago, make the 160 mile return trip, and then repeat the 97 mile trip to his home in Willard. Of course this assumes the Claimant drove straight home and assumes he or a member of his family was in a position to accept the call for service at 5:00 PM.

When these facts and circumstances are coupled to the Majority's decision, it seems appropriate to comment that a reasonable person would have concluded that Carrier's Supervisor could have justifiably made the inspection in the absence of any Carman.

As it stands, the Carrier is required to pay twice for performance of the disputed work because it elected to play the role of the "nice guy" and call in a furloughed employee.

To add insult to injury, the Majority knowingly disregarded the general direction of prior Awards of this Board concerning compensation for time not actually worked which dictates that if a violation is proven, the Claimant

is entitled to the straight time rate of pay; the overtime rate is applicable only to time worked while the pro rata rate is the measure of value of work lost.

The Majority held:

> "While it is not our general policy to award overtime for time not worked, the instant Claim is a direct violation of the Overtime Rule. Consequently, we will award the Claimant ten (10) hours of pay at the applicable overtime rate which was in effect at the time of the filing of the Claim."

Ironically, in Award 10881 involving a similar dispute between these parties, this Referee denied that portion of the Organization's January 24, 1982 claim seeking compensation at the time and one-half and double time rates by concluding:

> "According to the Board's practice of awarding straight time for time not actually worked, Claimants are entitled to be compensated only for the various hours claimed at a straight time rate."

With a single stroke of the pen this Referee "resolved" one dispute and planted seeds for future disputes involving an issue he himself had once laid to rest on this property.

This Award is palpably erroneous and serves to exact a penalty from the Carrier which is neither supported by the Agreement nor based upon precedent of this Board. Accordingly, we must register our vigorous dissent.

Michael C. Lesnik
M. C. Lesnik

P. V. Varga
P. V. Varga

M. W. Fingerhut
M. W. Fingerhut

James E. Yost
J. E. Yost

Robert L. Hicks
R. L. Hicks