Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11634
SECOND DIVISION Docket No. 11309
89-2-86-2-111

The Second Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen of the United States
(and Canada
(
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

1. Carman Brent W. Lambrecht was deprived of work and wages to which he was entitled when the Chicago and North Western Transportation Company failed to properly distribute overtime work in accordance with Rules 7, 9, and 58 of the controlling agreement for the period of July 13, 20, 22, 23 and 29, 1985 at Council Bluffs, Iowa.

2. Accordingly, that the Chicago and North Western Transportation Company be ordered to compensate Carman Brent W. Lambrecht in the amount of twenty-nine and one-half (29 1/2) hours at the time and one-half rate of pay.

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.

The Claimant was assigned to a repair track position, 8:00 PM-4:30 AM. On August 12, 1985 an overtime pay Claim was filed by the Local Chairman on behalf of the Claimant on grounds that the Carrier had been in violation of Rule 9 of the Agreement. This Rule is the overtime equalization rule. The Claim for seven days was later amended to five days. The dates are July 13, 20, 22, 23 and 29, 1985.

The Rule at bar reads as follows:

"At shops, enginehouses, repair tracks and inspection points, overtime will be distributed as equally as possible between the men of such craft or trade at each shop, enginehouse, repair track or inspection point.

Record will be kept of all overtime worked and men called with purpose of distributing the overtime equally.

Distribution of overtime as set forth herein covers work payable under Rule 7(c), (d), (e) and (f). It does not apply to work performed under 7(b), nor to work performed under 7(a) in completing work started during assigned hours. It would apply in cases of employees 'doubling' under 7(a) whether for a full eight hours or for four hours.

NOTE: This rule is not a seniority rule."

The Claimant argues that the Carrier had not properly applied Rule 9 because it had permitted three other employees to work overtime on the days in question instead of himself. Two of these fellow employees, at least, had over twice as much cumulative overtime prior to the overtime assignments on the disputed dates. At the time, the Claimant has accumulated 20.5 hours. Fellow Carman LaScala, who was assigned to work July 13 and 20, 1985 had accumulated 51.9 hours. Fellow Carman Harrill, who was assigned to work July 22 and 30, 1985 had also accumulated over 50 hours. The third Carman was assigned to work July 23, 1985. There is no information of record on this Carman except that he was not on the overtime list. It is unclear, however, that he did not have overtime rights. Since the instant case deals with cumulative comparisons, the Board will not rule on the Claim for this latter date because of insufficient information of record. The total overtime involved is 16 hours (July 13, 20) and 9 hours (July 22, 29), or 25 hours. July 13 and 20, 1985 were Claimant's rest days.

Prior to ruling on the merits of the Claim the Board must resolve a threshold issue raised by the Carrier. It argues that the overtime did not belong to the Claimant, because the work did not belong to him. It states on the property that it had employed "a practice at Council Bluffs for some time of calling only car inspectors for overtime inspection work and car repairmen for overtime repair work." The work was inspection work. The Claimant was a repairman. After study of the full record the Board must conclude that while it appears that what the Carrier argues was generally true, it is also true that such practice was not supported by the language of the Agreement with respect to the issue at bar and that the Claimant was fully qualified as member of the craft to do the inspection work on the days in question. There is also undisputed evidence of record that the work practice in question was not exclusively followed by the Carrier. The Local Chairman also states that the Organization had never agreed to this bifurcated arrangement between repairmen and inspectors with respect to application of Rule 9 and that it was contrary to the intent of the same. The Board observes that this Rule only references craft. Absent further distinctions, as well as evidence on any exclusive past practice, the objection raised by the Carrier is dismissed. The instant dispute must be resolved by a ruling on the merits of the Claim.

The Carrier argues that arbitral precedent rules against sustaining a Claim such as the instant one. It cites a number of Awards from this Division on Claims filed on the basis of Rule 9's predecessor which was Rule 11 of the Federated Crafts' Agreement.

Award 8488 found that the Carrier, in that case, "...may have stretched the bounds of equality" because it granted one employee some 70 hours of overtime while providing no overtime at all to eight others. Nevertheless that Award refused to sustain the Claim, albeit the appearance of "inequality exist(ed)", by applying conclusions about inequality from the figures presented "to a single incident." Awards 4917 and 8065 both ruled that the language specifying distribution of overtime as "near as possible" could not be limited to any time-frame. The language of Rule 9 here at bar differs slightly from old Rule 11 because it speaks of overtime distribution as "equal as possible", and it incorporated into the language of the Rule, whereas old Rule 11 had only an "Understanding " (No. 4) which Award 4917 states was not part of the Rule itself and appears to have flavored the conclusion in that ruling.

The language of Rule 9 clearly imposes an obligation on the Carrier to both make efforts to distribute overtime "as equally as possible," as well as to keep a record of such efforts. While it is true, as Award 8488 underlines, that no single incident can determine whether a Carrier's officers are following the requirements of a Rule such as this or not, it is also true that the cumulative data presented in this case (and it appears, also in the record associated with Award 8488) point to an indisputable "trend" in granting overtime by management. This trend is not the result of one incident, but of a series of incidents. The trend established in the record before the Board is clearly contrary to the requirements of Rule 9 which states that distribution be as equal "as possible." The Board is hesitant to impose an equality solution in a Claim such as the instant one. But absent evidence that management had voluntarily applied the Rule in a manner consistent with the language found therein, it has no other alternative.

The Claimant shall be paid at overtime rate for 25 hours which is that worked by his two fellow Carmen on the dates of July 13, 20, 22 and 29, 1985. All other relief requested in the Claim is denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 18th day of January 1989.