Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 12385
SECOND DIVISION Docket No. 12350
92-2-91-2-148

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/Division of TCU
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(CSX Transportation, Inc. (formerly The Chesapeake and Ohio Railway Company)

STATEMENT OF CLAIM:

1. That the CSX Transportation (hereinafter "carrier") violated Rules 37 and 38 of the Shop Crafts Agreement between Transportation Communications International Union -- Carmen's Division and CSX Transportation, Inc. (Chesapeake and Ohio Railway Company) (revised June 1, 1969) when the carrier removed Painter C. Riggs (hereinafter "claimant") from service for alleged medical reasons on April 13, 1989.

2. That accordingly, the carrier be ordered to return the claimant to service; that he be allowed compensation for all time lost as a result of his unjust removal from service; that he be made whole for vacation rights; loss of health and insurance benefits; pension benefits including railroad retirement and unemployment insurance, and any other benefit of employment he would have earned during the period of his unjust suspension; and that the carrier allow claimant interest on said compensation and time lost at the prime rate now in effect.

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.

On March 21, 1989 a medical doctor signed a slip advising that the Claimant ought to "...work no longer than eight (8) hours' in a given day...." On April 12, 1989 the Chief Medical Officer of the Carrier informed the Claimant that since he was found to be "...medically unqualified to perform (his) job (because) of recently received information," his supervisor was being notified accordingly. The Chief Medical Officer stated that the Claimant was found to be medically "...unqualified to perform (his) full and unrestricted duties." The Chief Medical Officer further stated the following in his letter to the Claimant:

> "...While I understand that no restricted work is available to you at this time, I suggest that you maintain occasional contact with your supervisor, and should such work become available, you are asked to contact this office immediately so that further consideration can be given to your return to work at that time with appropriate restrictions...."

On the following day the Claimant was advised that he was being removed from service of the Carrier.

Shortly thereafter the Local Chairman of the Organization filed a claim on grounds that the Claimant had been removed from service for "unknown medical reasons," without a hearing and for "no other conceivable reason...." On April 24, 1989, the Claimant was advised by the Plant Manager as follows:

> "Due to recent changes effective Monday, April 24, 1989, wherein the Paint Shop will be operated during eight (8) hours shifts with no forced overtime, you are advised by this letter that you are to return to your regularly assigned position immediately...."

In his denial of the Claim the Plant Manager stated the following to the Local Chairman:

> "Claimant was removed from service in that his private physician had indicated he could not work in excess of eight (8) hours per day. At the time he was removed from service, the Paint Shop was working in excess of eight (8) hours a day and, thus, Claimant Riggs by his own doctor's directions, was not medically qualified to perform his duties. This was discussed with the Carrier's Chief Medical Officer and (the Claimant) was removed from service pending review of his medical condition by the Chief Medical Officer...."

In response, the Local Chairman argues that the Claimant's bid-in position only required eight (8) hours, with implication that even with the medical restriction he could have performed the duties of the position for which he had bid. In further handling of the claim the General Chairman argued that the posting of the assignment of Painter at the Carrier's Raceland Car Shop states that the assignment is for "...eight (8) hours per day, five (5) days per week with two (2) rest days...." The Organization argues that the actions by the Carrier appeared to be some type of retaliation against the Claimant because he indicated, with medical support, that he did not want to work overtime. As a factual matter, according to the Organization, the Claimant's feet ailments made it painful for him to work more than his regular assignment but that there was no medical evidence from either the Claimant's personal physician, nor from the Carrier, that this condition, known as "plantar spurring,"

created a safety hazard for either the Claimant nor fellow workers. Further, the Claimant should not have been subject to disqualification because he could have worked his regular assignment. According to the Organization, an employee does have the right to refuse overtime, or remove his name from a General Overtime list, under provisions of the General Overtime Rule and the Carrier was in violation of this Rule by attempting to force the Claimant to work more than his regular eight (8) hours. Further, the Organization alleges, the Carrier was also in violation of Rules 37 and 38 for disciplining the Claimant without benefit of a fair hearing since he had been in service of the Carrier for more than 30 days.

The issue in this case is not discipline, as the Carrier correctly argues. Rather, the issue centers, first of all, on whether the Carrier has the contractual right to require mandatory overtime on a bid-in assignment, and secondly, if it does whether it can medically disqualify an employee from working his normal assignment if the employee offers a medical opinion barring him from working overtime. Evidently, if all overtime work is subject to the pure discretionary choice of employees, an employee may refuse to work overtime for whatever reason, medical or otherwise. The contractual provision applicable to this case is found in Rule 11 of the Shop Crafts' Agreement which reads as follows, in pertinent part:

> "Rule 11
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> (3) There will be an overtime call list (or call board) established for the respective crafts or classes at the various shops or in the various departments or subdepartments, as may be agreed upon locally to meet service requirements, preferably by employes who volunteer for overtime service. Overtime call board will be kept under lock and key available to view of employes. Overtime call list will be kept under lock and key and made available to employes when necessary.
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> (4) There will be, as near as possible, an equal distribution of overtime between employes who voluntarily sign the overtime call lists.
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> (5) It is not intended that an employee, who is not fully qualified, will put his name on the overtime call list, but it is expected that a sufficient number of competent men will volunteer to properly take care of the work.
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> (6) Should there not be sufficient number of employes volunteer to properly take care of the work, any employe who may be called must respond at the time called unless there is some good and sufficient reason why he cannot respond.
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(9) An employee refusing call in his turn will lose the turn the same as if he had responded. An employee called for work for which he is not qualified will retain his place on the call board or list."
(Emphasis added)

This Rule clearly establishes that there will be an overtime call board, that it is preferable that it be made up of qualified volunteers, but if there are not enough volunteers "...any employee who may be called must respond at the time called unless there is some good and sufficient reason why he cannot respond." From this language the Board must conclude, as has been concluded in other arbitral forums in this industry, and on this property, that the employer has mandatory overtime rights (See PLB 4859, Award 2). The record also shows that the Claimant had put himself on the overtime board at the Carrier's Raceland Car Shop in Russell, Kentucky when this facility had a surfeit of work in its Paint Shop during the first few months of 1989. During that period the Carrier was in the process of accommodating its coal carrying customers with a suitable fleet of hopper cars and these cars needed to be painted, stenciled and generally updated. It is true, as the Organization argues, that the Agreement defines also hours of service and the work week, at Rules 1 and 2, as consisting in an eight (8) hour day and a forty (40) hour week and although it is not specifically cited in the record, reference to the bulletined position of painter for which the Claimant had bid apparently was consistent, which is customary, with these contractual provisions. Such does not negate, however, the rights of the employer to require overtime of its employees on an as-needed basis. Rule 11, nevertheless, also provides certain privileges to employees when called for overtime as Rule 11(4), (6) and (9) make clear. Rule 11(6) states that an employee must respond to the overtime call unless "...there is some good and sufficient reason why he cannot." Clearly, Rule 11(9) envisaged that employees could not always respond by imposing a penalty with respect to losing a turn at call which would affect the calculations of the overtime distribution formula to be applied to Rule 11(4). Was there good and sufficient reason why the Claimant could not work overtime at Raceland Car Shop's paint shop after March 21, 1989? On basis of evidence of record, the reasonable answer to that is: yes. If the Carrier was not sufficiently convinced of the Claimant's personal doctor's statement, it could have corroborated the Claimant's position in this matter with a second examination. Contractually, however, the Carrier had insufficient grounds for laying the Claimant off because of medical or physical disability. The Claimant never claimed he could not work his regular work week, nor did the Carrier have any medical evidence to show that such was not the case. The Carrier, therefore, acted improperly in removing the Claimant from service on April 13, 1989. The Carrier argues that it properly suspended the Claimant for reasons of health and welfare and cited First Division Award 23989 and Third Division Award 29008 to that effect. Such precedent is not on point with this case since these Awards do not deal with an overtime issue and there is no evidence that the Claimant could not have properly performed his normal work assignment. Likewise, cited by the Carrier of Second Division Awards 10255 and 11542 and Third Division Award 20772 are equally misplaced since there is no showing, in those Awards, that overtime issues were at stake. Nor was there ever request by the Claimant to this case that the Carrier provide

special accommodations for him, during normal working hours, because of any handicap. The three Awards cited in the immediate foregoing dealt with employees who suffered specific impairments which included an injured finger, inability to lift over 50 pounds, and acrophobia, respectively, which prohibited their ability to perform their normal assignments.

The claim must be sustained. The Claimant shall be paid at straight time rate for all time lost because of the actions by the Carrier. Interest on monies awarded is not commonly granted in cases such as this. Such conclusion is supported both by lack of language addressing this issue in the Agreement, and by arbitral precedent (See Third Division Awards 18433, 24710, 28178).

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 8th day of July 1992.