Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 12415
SECOND DIVISION Docket No. 12310
92-2-91-2-110

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
(
(CSX Transportation, Inc.
(Chesapeake & Ohio Railway Company)

STATEMENT OF CLAIM:

1. That the Chesapeake & Ohio Railroad Company (CSX Transportation, Inc.) (hereinafter referred to as "carrier") violated the service rights of Carman C. Rigsby (hereinafter referred to as "claimant") and the provisions of Rule 11 of the controlling agreement, when on October 1, 1988, the carrier worked Carman M. Hunt on overtime to operate the 33 punch in the Fabrication Shop. Carman Hunt was not on the machine operator's overtime call board and was ineligible for this overtime.

2. Accordingly, the claimant is entitled to be compensated for eight (8) hours pay at the applicable time and one-half rate for 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 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 October 10, 1988, a claim was filed on grounds that the Carrier was in violation of the operant Agreement when it worked the wrong Carman on October 1, 1988, to operate the 33 punch at Raceland Car Shop, Russell, Kentucky. According to the claim, the job was "...bid in and held by (the Claimant) yet he was not asked to work overtime that day." At issue here is an alleged violation of Rule 11. Upon denial of the claim, the Local Chairman argued that the "Fab Shop machine operators (were) on a separate overtime board" and that to be on the (call) board (in question) a machine operator (had to) have an operator's job bid in" and on the disputed date the Carman who worked the 33 punch "...was not bid in as a machine operator." Therefore, according to the Organization, the Carman who worked was "ineligible to work overtime as a machine operator."

According to the Carrier, it properly called the Carman in question in lieu of the Claimant in order to apply the distribution of overtime provisions of Rule 11.

The Rule at bar reads, in pertinent part, as follows:

"Rule 11

(c) Record will be kept of overtime worked and men will be called with the purpose in view of distributing the overtime equally.

(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 employees who volunteer for overtime service. Overtime call board will be kept under lock and key available to view of employees. Overtime call list will be kept under lock and key and made available to employees when necessary.

(4) There will be, as near as possible, an equal distribution of overtime between employees who voluntarily sign the overtime call lists.
.....

(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.

(10) It is understood that past practice will continue with respect to calling men for overtime who are assigned to special services, such as repairs to coal elevator and power plant machinery, etc."

The argument by the Carrier here is that it properly worked the Carman in question, and not the Claimant, in view of Rule 11 (c) (4), which calls for equal distribution of overtime. According to the Carrier, the Claimant had worked 50 hours and 20 minutes during October 1988, whereas the Carman who was called and worked on October 1, 1988 accumulated only 16 hours' overtime during that month. Response by the Organization is that the Carrier's argument in this case, on basis of overtime distribution provisions of Rule 11 "...is nothing but a 'smoke screen' to confuse the true issue, which is that the Carman called was ineligible to be called in the first place since he was not on the Fabrication Shops' overtime list."

It is clear that the parties are arguing past each other in this case. The position of the Organization is based on Rule 11(3). According to this argument there was a separate Fab Shop call list and the Carman called was not even on that list. Denial of the claim by the Carrier is based on Rule 11(4) which addressed the issue of equal distribution of overtime.

A number of recent Awards have been issued by the Board which deal with overtime disputes between these parties on this property and the proper application of Rule 11 appears to be an ongoing problem (See Second Division Awards 12291, 12292, 12294). The claim filed in Award 12291 alleged that the Carrier had "...failed to utilize (an) overtime call board to acquire the proper employee" to work an overtime opportunity, but instead "hand picked" an employee who was improperly offered a chance to work overtime. The Carrier did not deny, in that case, that the call board had not been used, but instead limited its arguments to the issue of remedy by stating that the remedy for the alleged loss of overtime opportunity should "...be to allow (the Claimant to that case) to equalize the hours" which the Carrier stated it had done after the claim had been filed. The Board denied the claim in that case on grounds that the Claimant had subsequently been treated equitably and that the "Rule simply does not call for the requested payment." The Board did put the Carrier on notice, however, in Award 12291 that Rule 11 does "...provide for use of a call board in overtime distribution...", that the use of such board is acknowledged at this location, and "...consistent failure by the Carrier to make use of the call board, if demonstrated, could well lead to a sustaining Award" by the Board. In Second Division Award 12292 a claim was also made that the Carrier had failed to use the proper call board for overtime purposes with this craft. But upon acknowledgment by the Carrier that such had been the case, and because of application by the Carrier of remedy in accordance with the equalization of overtime provisions of Rule 11, that claim was also denied by the Board, albeit the reasoning used in earlier Award 12291 was incorporated in the conclusions of Award 12292 "by reference." Award 12294 also deals with an overtime claim and with application of Rule 11, but it is less on point with the instant claim since it dealt with an allegation that a Foreman had made the overtime board list "unavailable" to employees so that they could not ascertain their overtime rights, and with conclusion by the Board that that claim was to be dismissed on grounds of "irreconcilable contentions" by the parties with respect to the facts of that case.

In the instant claim, the Carrier does not deny that the proper call board was not used. Nor does it even respond to the Organization's contention that "...the established practice at the Fab Shop...(was that)...machine operators are called from a separate overtime board" in accordance with "locally" agreed upon custom per Rule 11(3). Absent denial of such practice by the Carrier the Board accepts this contention by the Organization as unrefuted fact in accordance with arbitral precedent set in Second Division Awards 8907, 11332, 11934 and Third Division Awards 28459, 29213, 29225 inter alia. Nor is there evidence here of post claim equalization remedies applied by the Carrier as was the case in claims filed in Awards 12291 and 12292 cited above.

Given the full record in this case, and in view of the Carrier's continuing pattern of improperly applying, in the first instance, provisions of Rule 11 of the operant Agreement, the Board must conclude that the application of potential sanctions against the Carrier, as outlined in Award 12291, and in Award 12292 by reference, is here appropriate and the Board now so rules. The claim is sustained. The work which would have been done by the Claimant would have been performed at the overtime rate. Relief requested shall be paid at that rate.

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 2nd day of September 1992.

CARRIER MEMBERS' DISSENT
TO
AWARD 12415, DOCKET 12310
(Referee Suntrup)

Second Division Award 12415 sustained the claim for eight hours pay at the time and one-half rate for a specific claim date of October 1, 1988. The following obvious errors in the Award render it meaningless for future guidance; the Award:

1. imposed a penalty which the parties had not negotiated;

2. failed to confine itself to the record;

3. applied sanctions against the Carrier retroactively; and

4. awarded pay at the time and one-half rate for time not worked.

* * * *

1. A review of Rule 11, the only Rule on which the claim was based, readily reveals that the parties did not negotiate a penalty to apply in instances when the employee first out on the overtime list was not called. Instead, they negotiated a remedy exactly as the Second Division found in Award 5136 in resolving a 1964 dispute between the same parties to this dispute:

> "The many Awards that have considered Rule 11 quite consistently hold that it does not restrict overtime distribution to a first-in first-out basis or any precise formula but is properly observed if the work is distributed substantially equally over a reasonable period of time. See Awards 2035, 2040, 2123 and 4980.
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> * * * *
>
> The remedy of an employe, who believes that he is being unjustly treated with respect to overtime distribution, is to bring a claim based on a reasonable period of time rather than on an isolated incident."

The claim in Award 12415 was for overtime pay for work the Claimant was not called to perform on a specific date, October 1, 1988. Although it was shown without contradiction that the Claimant later obtained 50 hours of overtime during the month of October, the Majority imposed a penalty which the parties had not negotiated by paying the Claimant for the work he did not perform on October 1.

The Majority's concern, that its own brand of industrial justice should be dispensed because an employee who was not on the same overtime list was called in lieu of the Claimant, was misplaced and overlooked the fact that Rule 11 makes no distinction as to the reasons why the Claimant was not called. The negotiated remedy was the same, regardless of whether the Claimant was not called (1) because another employee who <u>was not</u> on the same overtime list was called, or (2) because another employee who <u>was</u> on the same overtime list was called. Thus, the parties who negotiated the Rule plainly intended that regardless of the reason for not being called, the remedy was to distribute the overtime work as nearly equal as possible over a reasonable period of time. As stated, this remedy was applied in this case. The Organization never disputed that Claimant obtained 50 hours of overtime during the same month; it merely referred to the fact as a "smoke screen."

It is difficult to understand how the Majority can justify its decision in view of the many Awards which hold that where the

parties, themselves, have fashioned a remedy, the Division is not empowered to substitute a penalty of its own making.

2. The Majority failed to confine itself to the record in this case. At page 3 the Majority discussed Awards 12291 and 12292 which were rendered on this property and which had interpreted the same Rule 11 which is at issue here. The Majority acknowledged that these two Awards dealt with claims that were identical to the claim in Award 12415. Referring to Award 12291, the Majority cited that part of the Award which held that the Carrier had properly applied the remedy in Rule 11:

> "The Carrier did not deny, in that case, that the call board had not been used, but instead limited its arguments to the issue of remedy by stating that the remedy for the alleged loss of overtime opportunity should '...be to allow (the Claimant to that case) to equalize the hours' which the Carrier stated it had done after the claim had been filed. The Board denied the claim in that case on the grounds that the Claimant had subsequently been treated equitably and that the 'Rule simply does not call for the requested payment.'"

The Majority then referred to Award 12292 and similarly cited that part of the Award which found that the Carrier had properly applied the remedy in Rule 11.

> "In Second Division Award 12292 a claim was also made that the Carrier had failed to use the proper call board for overtime purposes with this craft. But upon acknowledgment by the Carrier that such had been the case, and because of application by the Carrier of remedy in accordance with the equalization of overtime provisions of Rule 11, that claim was also denied by the Board...."

After citing the above Awards involving the parties to this dispute, wherein the Board ruled that the appropriate remedy in

Rule 11 had been applied by the Carrier and that no payment was called for by Rule 11, the Majority went on to make this outlandish statement:

> "Nor is there evidence here of post claim equalization remedies applied by the Carrier as was the case in claims filed in Awards 12291 and 12292 cited above."

Here the Majority clearly failed to confine itself to the record. The record showed without contradiction by the Organization that the Claimant, after he was not called on October 1, went on to obtain 50 hours of overtime during that same month of October. Contrary to denying that Claimant had been afforded the remedy of Rule 11, the Organization admitted that fact in the record by calling it a "smoke screen." The Organization did not even challenge the sufficiency of the 50 hours of overtime obtained as an appropriate application of the remedy set forth in Rule 11. The remedy applied in Award 12415 was exactly the same as that in Awards 12291 and 12292.

While it is unclear where the Majority obtained the idea that there was no evidence of a post claim equalization remedy applied by the Carrier in this case, it is patently clear that such notion did not come from the record.

3. The Majority applied sanctions against the Carrier retroactively. Award 12291 denied the claim for payment to a Carman who was not called for overtime on February 14, 1989 by finding that this Carrier had properly applied the negotiated remedy in Rule 11.

> "Rule 11 does mandate the use of an 'overtime call board,' and there is an implied local practice here that overtime distribution is governed by the use of such call board. Remedy for failure to do so is less precisely stated -- 'as near as possible, an equal distribution of overtime.' In this instance, and in accord with many previous Awards, the failure to offer the Claimant his proper overtime opportunity was remedied immediately thereafter. The Rule simply does not call for the requested payment."

Although it denied the claim as shown above and thereby resolved that dispute, Award 12291 went on to add the following dictum:

> "The Board notes, however, that the Rule provides for use of a call board in overtime distribution and that the use of such board is acknowledged at this location. Consistent failure by the Carrier to make use of the call board, if demonstrated, could well lead to a sustaining Award.".

This caution was obviously intended to be prospective only, and could in no way be viewed as a precept to be applied retroactively. Yet, that is exactly what the Majority did in Award 12415. It converted dictum into a sanction and applied it to a claim that predated the claim that gave rise to the dictum. Without weighing the common sense of its actions, the Majority reached the misguided conclusion that this dictum in Award 12291 concerning an event that occurred on February 14, 1989 should be applied retroactively to an event that had occurred in the previous year on October 1, 1988. The Majority based its sustaining decision in Award 12415 solely on the dictum in Award 12291, which was rendered on April 1, 1992.

Moreover, the Majority took two claims that occurred in 1989 (Awards 12291 and 12292), coupled them with one claim that occurred

in 1988 (Award 12415) and inexplicably found a continuing pattern of improperly applying the agreement." They totally ignored the fact that the two claims in 1989 had been denied!

4. The Majority awarded pay at the time and one-half rate for time not worked. Not content to leave any wrong turns untaken, the Majority concluded its folly by sustaining the claim at the time and one-half rate. In this industry the arbitral decisions preponderate overwhelmingly against paying the punitive rate for time not worked. This is so evident that in its Submission the Carrier felt it was sufficient to quote from only three such precedential Awards and to refer to numerous others. On the other hand, the Organization, in its Submission, did not cite any Awards of any kind, let alone Awards supporting the payment of time and one-half. In fact, the Organization did not put forth any argument for payment of the time and one-half rate, either in its Submission or in the handling on the property. The only reference at all to pay at the time and one-half rate appeared in the statement of claim. The Majority's willingness to overlook the Organization's failure to support its claim for pay at the time and one-half rate is yet another indication that the Award failed to confine itself to the record.

In sum, the Majority should have followed that part of Award 12291 which denied the claim in that case on the grounds that the Claimant had subsequently been treated equitably under the Rule and that the "Rule simply does not call for the requested payment."

Instead, the Majority rendered a decision in Award 12415 for which there was no support anywhere in the record. It was illogical, bereft of explanation and useless, except to de-stabilize certain well-settled principles of contract construction.

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