

CORRECTED

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13834

Docket No. 13688

05-2-03-2-9

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

(Brotherhood Railway Carmen Division

(Transportation Communications International Union

PARTIES TO DISPUTE: (

(Western Fruit Express Company

STATEMENT OF CLAIM:

“Claim of the Committee of the Union that:

1. The Western Fruit Express Company violated Rules 7 and 11 of the January 1, 1997 controlling agreement when they improperly assigned WFE Carman R. Gamby overtime duties on January 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 23, 24, 25 and February 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 19, 20, 21, 22, 25 and March 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 22, 25, 2002.
2. That accordingly, the Western Fruit Express Company be ordered to compensate Carman G. Klein forty nine (49) hours pay at the pro-rata rate of pay in effect at the time of the 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 employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

On the property, the representatives of the Carrier and Organization met over the assignment of work and the equal distribution of overtime. The Organization indicated that Carman Gamby was improperly being selected for overtime in violation of the Agreement. The record on the property indicates that the Carrier initially agreed to the equalization, but thereafter continued to utilize only Carman Gamby for overtime.

The Board finds that this dispute is clear. Carman Gamby was called to lock up the shop on a continual basis. The Organization attempted to distribute the overtime to other Carman on the overtime list and failed. The Organization provided the names of two volunteers with fewer hours of overtime. The Claimant was one of those volunteers who agreed to lock up the shop each night for the one hour of overtime.

The Rules applicable to this dispute are Rules 7 (Overtime and Holiday Service) and Rule 11 (Distribution of Overtime). Rule 7 states that, "All service performed outside of bulletined hours will be paid for at the rate of time and one-half until relieved, except as may be provided in rules hereinafter set out." Rule 11(c) states that, "Record will be kept of overtime worked and men called with the purpose in view of distributing overtime equally."

The Organization provided records of the overtime lists for January, February and March, 2002. The Organization notes that for the forty nine (49) days of this Claim, Carman Gamby performed one hour of overtime service as he was the only Carman called to perform the overtime work. The Organization maintains that over the three month period the Carrier refused to equalize overtime. It argues that its claim has merit and should be paid as presented.

The Board has carefully studied the on-property dispute over the merits of the claim and the remedy requested. The Board disagrees with the Carrier that locking up the shop does not fall within the Classification of Work Rule and therefore Rule 11 is inapplicable. Once the Carrier chose to call Carmen and assign Carmen to perform the work, the Rules of the Carmen's Agreement applied. We must hold that the Organization has presented sufficient probative evidence that the Carrier failed to abide by Rule 11. Clearly, the record presented indicates that there were eighteen Carmen in January, with sixteen in both February and March, 2002. It further indicates that on the forty nine dates listed in the Claim, Carmen Gamby was paid overtime as alleged and that the overtime was not equally distributed. Therefore, the Carrier violated Rule 11 and the issue at bar turns to the remedy.

Rule 11 is an equalization of overtime Rule. The Organization has not made a claim for the equalization of overtime. It has come to the Board for a remedy for Carman Klein (Claimant) with evidence that does not include all of the hours worked by Carmen, including even Carmen Gamby and Klein. What the Organization requests is that the Claimant be paid one hour for each day when the Carrier improperly assigned the overtime to Carman Gamby. It argues for this remedy due to the fact that the Carrier refused to equalize overtime and continued to assign only Carman Gamby until this Claim was filed.

The Carrier has denied the applicability of the Organization's remedy. It argued on property that if the claim were for the number of hours needed to equalize overtime between Carmen Gamby and the Claimant, the hours would only total twenty three hours over the three months to create equity.

Having found that Rule 11 (c) was violated, the Board can not agree with the remedy suggested by the Claim. The Carrier's violation and refusal in the three months to select the Claimant for the overtime assignment does not directly violate the Rule. The Rule is violated when the Carrier fails to fulfill the purpose of calling employees in an attempt at "distributing the overtime equally." The Rule carries no time frame and certainly there is no obligation on the part of the Carrier to adjust overtime weekly, monthly or even over the three months of this Claim.

However, the Board finds that the Carrier in the three months of this Claim did not properly adjust the overtime. There is no dispute on the property over any other Carmen desiring overtime, although one other volunteer was mentioned.

Only the Claimant was named and there was no challenge to his right to request equalization of overtime.

On property, the Carrier might have offered future available overtime to the Claimant for the duration of the year and thereby settled the claim. The Organization requests 49 hours of compensation; one hour for every hour the Carrier improperly assigned to Carman Gamby to be paid "at the pro-rata rate of pay."

The Board has reviewed the evidence of record and finds that the overtime lists indicate that Carman Gamby worked 46 more hours of overtime than the Claimant. Accordingly, the Claimant is to be paid in full at the pro rata rate for the twenty three hours lost due to the Carrier's failure to equalize overtime. This decision is based solely upon the particular circumstances present in this claim and is not to set any precedent for future claims.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 8th day of July 2005.