Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 14033
Docket No. 13909
10-2-NRAB-00002-090024

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

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
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(Metro North Commuter Railroad

STATEMENT OF CLAIM:

"1. That on August 8, 2008 at 50th Street Station, N.Y., the MTA Metro-North Railroad violated the Controlling Agreement and the established past practice when the Carrier unilaterally distributed overtime work to other employees instead of assigning the work to Claimants causing Claimant to suffer loss of earnings opportunity.

2. That accordingly, the Metro-North Railroad compensate Claimant twelve (12) hours pay each at the overtime rate of pay which they would have earned had the aforesaid Agreement not been violated."

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.

The Claimants are six Electrical Workers assigned to Section Gang No. 6 at the 50th Street Station on August 8, 2008. It is undisputed that when an overtime assignment involving the removal of third rail from Track 132 arose on that date, the Carrier assigned Section Gang No. 36 to perform the work, because that crew was already scheduled to report to work commencing at midnight. Thus, after being called in at 8:00 P.M., they received four hours' overtime pay and eight hours' straight time pay. Section Gang No. 6, whose fixed hours were 8:00 A.M. to 4:00 P.M., was not scheduled to work on August 8, so calling them for the disputed rail removal would have required payment of 12 overtime hours to the crew.

The Organization relies at the outset on Rule 4-B-2(d) of the Agreement, which in turn requires overtime distribution pursuant to Local Overtime Agreements. Rule 4-B-2(d) states:

> "In the assignment of employees to work overtime, due consideration shall be given to:
>
> 1. Their qualifications
>
> 2. Local Agreements covering the distribution of overtime
>
> 3. The regularity of their service on regular workdays, so that employees who display a clear pattern of absenteeism on regular workdays shall not be entitled to share in the work distributed."

The 50th Street Local Overtime Agreement (LOA) reads, in pertinent part, as follows:

> "Pursuant to the following rule all overtime is to be distributed as follows:
>
> Rule 5-E-1(b) - Records will be kept of overtime worked and men called, with the purpose in view of distributing the overtime equally among the employees in so far as their qualifications will permit subject to agreement between the local officer and the local union representative.

All planned Overtime occurring at Grand Central Terminal to the dividing line at 59th Street shall be assigned to the 50th Street day gang at C.C.T. (Gang 6), Saturday/Sunday, Sunday/Monday, rest days.

After any refusals this overtime will be assigned to C.C.T. gangs working in the Section Gang #26, 12/8 shift, Friday/Saturday, rest days: Gang 16, 4/12 shift, Monday/Tuesday rest days; Gang 36, relief shift, Wednesday/Thursday rest days.

Pending on days off and off time, after any refusals this overtime will be assigned to the Construction Gangs, Gang 9, Hastings, Saturday/Sunday, rest days, Gang 14, G.C.T. Friday/Saturday, rest days; and Gang 30, NWP, Sunday/Monday, rest days.

This Local Overtime Agreement has been made with the knowledge and agreement of all parties concerned. . . ."

In the Organization's view, the LOA grants the Carrier no discretion, i.e., the overtime at issue was to be assigned to Section Gang No. 6. The Carrier openly acknowledges that in bypassing Section Gang No. 6 for this four-hour assignment it may not have strictly conformed with the LOA. It states, however, that it had both the right and obligation to take into account considerations of economy and efficiency. Under the circumstances presented, a deviation was justified by compelling cost considerations. Even so, it contends, absent a showing of failure to distribute overtime equally, or evidence suggesting that it does not maintain accurate records to ensure the equal distribution of overtime over a period of time, this isolated effort to engage in economically efficient practices cannot be considered a violation of its responsibility to distribute overtime equally.

In the judgment of the Board, there are two considerations that drain the force from the Organization's position. First, the underlying facts (as in a number of the numerous Awards offered for consideration by both parties) highlight what appears to be possible tension between the terms of Rule 4-B-2(d) and the LOA. Specifically, although the Rule does not indicate the measuring period, the plain intent of Rule 4 is to make certain that available overtime is distributed as nearly as possible among qualified, reliable employees over some period of time. To help ensure that those objectives are realized, the Rule further pledges that management will give "due consideration" to Local Agreements addressing the specific manner in which overtime distribution will occur on a day-to-day basis.

Thus, Rule 4 commands equality over time, while the LOA suggests a sequence or order of distribution to achieve equal distribution. Said another way, on any day of the week, or at the end of any week, overtime imbalances may necessarily result. On its face, the LOA realistically is unlikely to ever equalize overtime on a day-to-day basis.

In all such cases, when faced by language that appears to be at least potentially conflicting, the Board is obligated to give the Agreement a construction that is best designed to reconcile competing sets of terms and give maximum effect to all terms. Applying that principle here, Rule 4 must be read as the overarching mandate. Reading a contractual obligation to equalize overtime distribution over time together with the provisions of the LOA, we conclude the latter should be understood as adjunct terms intended to set forth what the parties believed was the formula pursuant to which equality might be best achieved.

To construe the LOA regimen inflexibly barring departures under all circumstances, requiring penalties at punitive rates for deviations, would exalt the LOA formula to a position superior to that of the broader mandate of Rule 4. But the LOA exists only in service to Rule 4. So that theory is a case of tail wags dog.

The Board's interpretation of the relationship between Rule 4 and the LOA is buttressed by the explicit terms of the parties' understanding, which make it clear that the goal of equality is to be attained by giving "due consideration" to the LOA. Ranking right up with "best efforts," "due consideration" may be among the slipperiest standards among the family of like legal terms. Whatever it means, it stops a foot short of "shall" or similar mandatory commands. Had the parties intended that management have no flexibility in distributing overtime on a day-to-day basis, it is reasonable to assume they would have so stated, and would have avoided the weaker "due consideration" standard.

Accordingly, consistent with the Board's experience in this and numerous other industries, the likelihood seems strong here that when the parties addressed overtime distribution, they did so in recognition that achieving the task of equalizing overtime opportunities was not an hour-to-hour effort, but a goal to be achieved over time.

Based upon the foregoing, under the narrow facts presented the Board concludes that while a violation of Rule 4 might well be demonstrated by a showing of such persistent disregard of LOA terms so as to cause an imbalance of overtime among qualified employees over time, or by inadequate record keeping so as to not permit an accurate assessment of distribution, the Carrier here was not in violation of the Agreement by a

single, isolated assignment of the disputed overtime to employees already scheduled to work.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 3rd day of November 2010.