

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31381
Docket No. MW-31784
96-3-94-3-43

The Third Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned junior employee M. Fagen to perform overtime service (connecting plumbing on camp cars) at N. Berger, New Jersey on July 25 and 26, 1992 (System Docket MW-2780).
- (2) As a consequence of the violation referred to in Part(1) above, Claimant P. Rybczynski shall be allowed eight(8) hours' pay at the plumber's time and one-half rate."

FINDINGS:

The Third 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 waived right of appearance at hearing thereon.

The Petitioner before this Board bears responsibility to prove every aspect of its case. It must not only cite Rules and/or Agreements that have been violated, but it must establish how the Rules and/or Agreements were violated.

In this instance, on two consecutive rest days Carrier utilized a junior plumber at the overtime rate. A claim was filed alleging violation of Rules 4 and 11(d). Those cited Rules remained constant during the two appeals.

Before this Board, the Rule cited by the petitioner is Rule 17. Rules 4 and 11(d) are not quoted, cited or referred to.

Any and all references to, citing of and arguments based upon Rule 17 by the Organization in its Submission is too late. Circular 1 precludes this Board from considering new material.

Since the Organization did not base its case before the Board on either of the two Rules cited on the property and since this Board is precluded from considering new material, this Board has no other option than to dismiss this dispute. Without a contractual Agreement upon which to base a decision, this Board lacks jurisdiction to resolve the dispute before it.

AWARD

Claim dismissed.

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 Third Division

Dated at Chicago, Illinois, this 29th day of February 1996.

LABOR MEMBER'S DISSENT
TO
AWARD 31381, DOCKET MW-31784
(Referee Hicks)

The Majority's error in dismissing this case for lack of jurisdiction is egregious and requires dissent. While the Majority correctly characterized the dispute as involving the assignment of rest day overtime to a junior employee, both of the parties involved had clearly understood and had taken no issue with respect to the nature of the case. The Majority erred when it held that it was "*** Without a contractual Agreement upon which to base a decision....", that it lacked jurisdiction and that it had "... no other option than to dismiss this dispute. ***" Plainly, the Majority's conclusions were based on its finding that the Organization's citation of Rule 17 and arguments based thereon were presented for the first time before the Board and were precluded from consideration by Circular 1.


However, even a cursory review of the **on-property** correspondence reveals the basis of the Majority's fundamental error under date of April 27, 1993. Within the opening paragraph thereof, Senior Director Labor-Relations L. J. Lipps, *the Carrier's highest designated officer*, clearly acknowledged discussions in conference that:

"... the claim in behalf of P. Rybczynski that the Carrier violated Rule 17, when Claimant was not called for overtime on July 25 and 26, 1992." (Carrier's Exhibit No. 6 and Employees' Exhibit "A-7")

Labor Member's Dissent
Award 31381
Page Two

A review of the above-cited denial from the Carrier's highest designated officer clearly establishes that the claim cited herein was rooted in the Carrier's violation of Rule 17. Inasmuch as the Carrier took no exception to Rule 17 and/or the Organization's arguments made in connection therewith **during the handling of this dispute on the property** and such were plainly not "new" issues, the Majority should have decided this dispute on its considerable merits. Obviously, the Majority did not reach the merits in its rush to dismiss a valid overtime claim and rendered findings which are palpably erroneous. Therefore, I dissent.

Respectfully submitted,


Roy C. Robinson
Labor Member