

PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NO. 46

Case No. 46

Referee Fred Blackwell

Carrier Member: J. H. Burton

Labor Member: S. V. Powers

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

CONSOLIDATED RAIL CORPORATION

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed to compensate Camp Car Cook Kimla for overtime service he performed on April 4, 5, 6, 7, 11, 12, 13, 14 and 18, 1988 (System Docket CR-3795).

(2) The Agreement was also violated when on the above-cited dates the Carrier required the Claimant to suspend work for the purpose of absorbing overtime.

(3) As a consequence of the violations referred to in either Part 1 and/or Part 2 above, the Claimant shall be allowed twenty-five (25) hours' pay at his time and one-half overtime rate of pay.

FINDINGS:

Upon the whole record and all the evidence, and after hearing on August 17, 1989, in the Carrier's Office, Philadelphia, Pennsylvania, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter.

OPINION

This case arises from a claim by a Camp Car Cook who alleges that the Carrier has improperly failed to compensate him

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for end-of-shift and pre-shift overtime service performed on nine (9) claim dates in April 1988. The requested remedy is that the Carrier be directed to compensate the Claimant for twenty-five (25) hours at his overtime rate.

The Organization asserts that the claim is governed by and is valid under the Scope Rule, and Rules 9, 10, 11, and 16 of the Agreement between Conrail and BMW.

The Carrier asserts that the claim is governed by Rule 24 (c) of the parties' Agreement; that the Claimant has been properly paid under that Rule for all wages due him for the service he performed on the April claim dates; and that on this basis, the claim should be denied.

The facts pertinent to the dispute arose in Altoona, Pennsylvania, whereat the Claimant held a Camp Car Cook position in Tie Gang 212 at all times herein pertinent. He was assigned by bulletin to a regular work week of ten (10) hours a day, Monday through Thursday, 7 A.M. to 5:30 P.M., with a thirty (30) minute meal period and with Friday, Saturday, and Sunday rest days. The claimed overtime payment is for time spent by the Claimant outside Gang 212's advertised tour, in the preparation of breakfast and dinner meals for the Gang on various dates between April 4 through 18, 1988.

The Claimant was informed by his Supervisor that he would have three (3) hours free time on each claim date, from 9 A.M. to 12 Noon. (The other Cook on the Gang was given three hours free

time, from 10 A.M. to 1 P.M.) The Gang did not work any overtime hours on the dates in question.

The Claimant received straight time pay for ten (10) hours per day for this service on the claim dates, which is the same pay basis as the one used to compensate the Gang to which he was assigned. His claim for overtime was denied on the ground that he had been properly compensated under Rule 24 (c) on the same basis as the Gang to which he was assigned was compensated; and that since the Gang was not paid overtime, Rule 24 (c) does not require overtime compensation to be paid to the Claimant Camp Car Cook.

* * * * *

After due study of the foregoing and of the whole record, inclusive of the submissions presented by the parties in support of their respective positions in the case, the Board finds that the claim is supported by the Rules cited by the Organization, particularly Rule 11. The Board therefore rejects the Carrier's contention that Rule 24 (c) supports the Carrier's refusal to compensate the Claimant at his overtime rate for his pre-shift and post-shift work of preparing meals on the dates in question. Accordingly, the claim is found to be meritorious and it will be sustained.

The facts from which the claim arises are clear and undisputed. The Carrier properly exercised its Rule 10 (i) authority to establish a four (4) day work week for Tie Gang 212, locat-

ed in Altoona, Pennsylvania, with tours of ten (10) straight time hours each day. 7 A.M. - 5:30 P.M., with a thirty (30) minute meal period. The Claimant prepared Gang meals before and after the ten hour tour of 7 A.M. - 5:30 P.M. on the various claim dates in April 1988; and the Claimant was allowed three (3) hours of unrestricted free time on each claim date, from 9 A.M. til 12 Noon. The Gang did not work more than ten (10) hours on any of the claim dates.

These facts entitle the Claimant to payment of overtime under Rule 11 for the time spent in the preparation of Gang meals on the claim dates, and Rule 24 does not negate such entitlement. Rules 11 and 24, in pertinent part read as follows:

"RULE 11 - OVERTIME

(a) Time worked preceding or following and continuous with a regularly assigned work period shall be computed on the actual minute basis and paid for at time and one-half rates, with double time computed on the actual minute basis after sixteen (16) continuous hours of work in any 24 hour period computed from the starting time of the employee's regular shift.

* * *

(i) An employee will not be required to suspend work for the purpose of absorbing overtime."

"RULE 24 - MEAL ALLOWANCE

* * *

(c)...Camp Cooks and Camp Car Attendants shall receive their daily rate as compensation for each day their gang works eight (9) hours (ten (10) hours for four (4) day gangs). Except as stipulated in note below, on any day that their gang works more than eight (8) hours or ten (10) hours for four (4) day gangs, Camp Cooks and Camp Car Attendants shall be paid for time over eight (8) hours, or ten (10) hours, worked by their gang at the time and one-half rate, with double time computed on

actual minute basis after sixteen (16) continuous hours of work in any twenty-four (24) hour period, computed from starting time of the gang.

NOTE: The intent of this section is that if a gang works only eight (8) hours the Camp Cooks and Camp Car Attendants will receive only eight (8) hours' pay, but if the gang works ten (10) hours the Camp Cooks and Camp Car Attendants will receive two (2) hours' overtime the same as the gang. If the gang completes its day's work and has its evening meal, and the Camp Cooks and Camp Car Attendants are not required to remain on duty and prepare an additional meal, their time will be stopped. On the other hand, if the Camp Cooks and Camp Car Attendants are required to remain on duty and prepare other meals during the night for part or all of the gang which works during overtime hours, then the Camp Cooks and Camp Car Attendants will be paid overtime to the time of their release."

In analyzing these rules it is readily apparent that Rule 11 (a), by specific unambiguous language, sets out a requirement that time worked preceding or following and continuous with a "regularly assigned work period" shall be paid for at time and one-half rates. The fact that the Claimant prepared Gang meals before and following his regularly assigned ten (10) hours daily work period comes within this requirement, so as to entitle the Claimant to overtime pay for the pre and post-shift preparation of meals.

It is also readily apparent that Rule 11 (i), by specific unambiguous language, sets out a prohibition against an Employee being required to suspend work for the purpose of absorbing overtime. This prohibition, as applied here, nullifies the Carrier's attempt to swap or offset the declared allowance to the Claimant

of three (3) hours of unrestricted free time, 9 A.M. to 12 Noon, for the time he was required to prepare meals outside the hours of his assignment. To permit the allowance of such free time to dis-entitle an Employee to overtime payments, is exactly what Rule 11 (i) is intended to prevent; because, otherwise, the Carrier would be in position to exact work time from an Employee without his consent and without making contractually required payments there-for. Rule 11 (i), in sum, requires the Claimant's work day on the April claim dates to be viewed as being comprised of the Claim-ant's regular ten (10) hour straight time day, plus whatever addi-tional time he spent preparing Gang meals before or after his ten hour tour.

The Carrier's contrary arguments on the claim, as pre-viously noted, have been considered by the Board and found unper-suasive. The Carrier submits, for example, that the Claimant did not suspend work as contemplated by Rule 11, because the nature of his duties in preparing meals was such that the work did not exist continuously. The apparent reasoning here is that because food preparation work is performed on a non-continuous basis, the al-lowance of three hours of free time daily to the Claimant, had the effect of cancelling out a like amount of claimed overtime by the Claimant, without running afoul of the Rule 11 (i) prohibition against suspending work to absorb overtime.

One of the flaws in this proposition is that the Claim-ant's regular work assignment was in no way tied to whether the

work of preparing meals exist continuously or non-continuously. Since ten (10) hours daily, four (4) days a week, is the bulletined tour of duty of the Claimant, this fact is the governing consideration under Rule 11 (i), i.e., he cannot be required to suspend work during this ten hour daily tour of duty for the purpose of absorbing overtime. The manner in which the cooking tasks meld with one another during the ten hour period, has no bearing on whether a prohibited suspension of work occurs. The three (3) hours of designated unrestricted free time, from 9 A.M. to 12 Noon, self-evidently was used by the Carrier as a basis for denying the Claimant overtime pay for preparing Gang meals before and after his regular tour and as such it is interdicted by Rule 11 (i).

The Carrier's contention that the Claimant was properly paid under Rule 24 (c), is also rejected. Analysis of Rule 24 (c) reveals that it is a method of pay rule which requires that Camp Car Cooks and Camp Car Attendants shall be paid at their overtime rate for the time over eight (8) hours or ten hours worked by their Gang at the time and one-half rate. This provision for overtime payments to Camp Car Cooks and Camp Car Attendants is not geared to the overtime hours worked by the Cooks and Attendants, themselves; it is geared to the overtime hours worked by their Gang. The rule, on its face, does not purport to prescribe, either expressly or by implication, the method of payment for overtime hours worked by the Camp Car Cooks and the Camp Car At-

tendants. In addition, there is nothing in the text of the rule which negates the application to Camp Car Cooks and Camp Car Attendants of the overtime payment provisions in Rule 11 (a) and (i), or which could be read as excepting Camp Car Cooks and Camp Car Attendants from the requirements of Rule 11 (a) and (i).

In conclusion, the Board observes that the alleged acquiescence for a long period of time by the Organization in the Carrier's treatment of Rule 24 (c) as governing the compensation of Camp Car Cooks and Camp Car Attendants, does not serve to bar the instant claim. The rules relied upon by the Organization, and found supportive of the claim by the Board, are specific and unambiguous and as such they merit enforcement at this time.

Moreover, the Board notes that the last paragraph of Rule 29 (c), contains an express prohibition against overtime payment to Camp Car Cooks and Camp Car Attendants where some of the Gang may work after regular hours, and after the evening meal is served, unless the Camp Car Cook and Camp Car Attendants are in fact required to perform service. In view of this express exception to the rule requirements of overtime payments to Camp Cooks and Camp Car Attendants, the Board observes that the overtime prohibition urged by the Carrier in this case could have readily been included in that same paragraph of Rule 29 (c), if such had in fact been the parties intention. The Board therefore finds that there is no basis for finding that the Camp Car Cook in this case is barred by Rule 24 (c) from receiving overtime pay for preparation of Gang

meals before and after his regular tour of duty.

In view of the foregoing, and for the reasons indicated,
the claim will be sustained.

AWARD:

Claim sustained as per the Opinion.

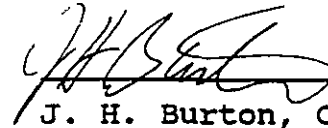
BY ORDER OF SPECIAL BOARD OF ADJUSTMENT NO. 1016



Fred Blackwell, Neutral Member



S. V. Powers, Labor Member



Dissent attached

J. H. Burton, Carrier Member

Executed on 4/19, 1991

ADDENDUM BY REFEREE BLACKWELL

Despite extensive discussion of foregoing proposed Award No. 46, Case 46, in the Executive Session conducted by the Board in Carrier's offices, Philadelphia, Pennsylvania, on August 22, 1990, nothing presented in that discussion provides a persuasive basis for changing any of the findings in the proposed Award.

The Carrier, for example, suggested that the Award's compensatory remedy, which is based on current liability for payment thereof, should be changed to an award geared to prospective/future liability for overtime claims of the type in dispute. Although prospective liability may be warranted in appropriate circumstances, there is no basis in the confronting record for changing the herein award to an award that seeks to impose prospective liability in regard to the disputed claims.

The Carrier also objected to the Board's application of the rules to the overtime claims, with particular emphasis on Rule 24 (c) and Rule 11.

In this regard the Opinion in proposed Award No. 46 found that Rule 24 (c), the Rule relied upon by Carrier in denying the Camp Car Cook's claim for overtime payment, speaks to circumstances in which Camp Car Cooks are entitled to overtime pay when their Gang works overtime or works more than eight (8) or ten (10) hours. The Opinion further found that Rule 24 (c) is not geared to overtime hours worked by the Cooks themselves and that Rule 11 cannot be read as excepting Cooks from the provisions of Rule 11 (a) which require overtime pay for work before or after, and contiguous with a regular shift, or from Rule 11 (i) which prohibits an Employee from being required "to suspend work for the purpose of absorbing overtime."

The Opinion thus made findings that Rule 11 (i) nullified the Carrier's attempt to make the unilaterally provided three (3) hours of free time to the Claimant-Cook, an offset against the time entailed in meal preparation outside the hours of his assign-

ment; and that the time so spent in food preparation, outside the hours of his regular assignment, was encompassed by the Rule 11 (a) overtime pay requirements.

The Board thus found no conflict between Rule 24 (c) and Rule 11; both rules require overtime pay to Cooks and Camp Car Attendants but in different circumstances and conditions under each rule. Furthermore, although Rule 24 (c) may have been applied by the Carrier in some similar situations in the past, when confronted with the clear, concise, and unambiguous language of the text of herein Rule 11, such prior application must give way to the specific text of Rule 11 that requires payment of the disputed overtime by clear, unambiguous language. Indeed, the principle that a rule that is clear and unambiguous may be invoked by either party at any time notwithstanding any alleged practice to the contrary, is so well settled that citation of authority is not necessary. Accordingly, since the Board has found that the applicable provisions of Rule 11 are not in conflict with Rule 24 (c) or any other Agreement provision cited of record, it is therefore proper for the Board to sustain the Organization's request for enforcement of the specific requirements of Rule 11.



Frederick R. Blackwell, Chairman/Neutral
Special Board of Adjustment No. 1016

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SBA NO. 1016 - AWARD NO. 46
CARRIER MEMBER'S DISSENT:

The majority's error is its belief that the involved rules are "readily apparent" or "unambiguous." They are neither. In Carrier's view, the parties to the agreement intended that Rule 24, paragraph (c), cover the basis of overtime pay for the unique position of camp car cook. This intent was amply borne out by the long standing practice on this property and the predecessor rule under the Pennsylvania Railroad Schedule Agreement. This Board's decision to ignore the parties' actual intent and apply literally two overtime rules results in an unintended windfall to one class of employees. I therefore **DISSENT.**



J. H. Burton
Carrier Member

April 19, 1991