Award No. 4670
Docket No. 4523
2-C&O-CM-'65

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Bernard J. Seff when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Carmen)

CHESAPEAKE & OHIO RAILWAY COMPANY (SOUTHERN REGION)

DISPUTE: CLAIM OF EMPLOYES:

1. That the Chesapeake and Ohio Railway Company violated the provisions of the current agreement, particularly Rules 29, 31 and 32, when it assigned J. G. Nelson as a temporary carman employed at Cane Fork, W. Va., May 14, 1962.

2. That accordingly, the Chesapeake & Ohio Railway Company be ordered to compensate Opie R. May, the regularly assigned Carman at Cane Fork, W. Va., eight (8) hours each day May 14, 15, 16, 17, 1962, at the car inspector's time and one-half applicable rate of pay account of said violation.

EMPLOYES' STATEMENT OF FACTS: The Chesapeake and Ohio Railway Company, hereinafter referred to as the carrier, employs a number of carmen at Cane Fork, W. Va. at which trains arrive and depart from the transportation yard. Carmen inspectors are assigned around the clock and work three shifts inspecting and repairing freight cars. On May 14, 15, 16 and 17, 1962, the carrier had extra work at Cane Fork, W. Va. A carman, Mr. J. G. Nelson, holding no seniority at Cane Fork as carman, was utilized and assigned to perform the extra work at Cane Fork, W. Va. Such extra work had normally been performed by the regularly assigned carmen at Cane Fork. J. G. Nelson is employed at Handley, W. Va. as carman, a separate seniority point and holds seniority at Handley as a carman. No new position or vacancy existed at Cane Fork as per Rule 29 of the shop craft's agreement on May 14, 1962.

This dispute has been handled in accordance with the agreement with the carrier up to and including the highest designated officer authorized to handle such disputes, with the result that the carrier has declined to adjust the matter.

The agreement effective July 21, 1921, as subsequently amended, is controlling.

It should be remembered that overtime is paid at so-called "punitive" rate and is a penalty imposed on the employer for working an employe more than 8 hours per day or 40 hours per week. It logically follows that the carrier may, and should, avoid such penalty payments when possible to do so under the applicable rules. This is what occurred in the present case.

Furthermore, Rule 11 prohibits the participation of differential rated employes in overtime on positions paying the so-called standard rate for employes of the various crafts. Had it been necessary to augment the force by using overtime, May would not have been eligible for such overtime in preference to other employes at Cane Fork inasmuch as he was on a position paying a differential rate and the position used to augment the force was a regular rated position and any overtime as a result thereof would have been performed by regular rated employes, not differential rated Claimant May.

It has been clearly shown by the carrier that Rules 29, 31 and 32, cited by the Employes, do not support the claim. It has been further shown by reference to arguments advanced by the employes in their handling of the case covered by Docket 3723, resulting in your Award 3972, that by the employes' own statements the handling in the instant case was in complete conformity with the agreement rules and Carrier therefore urges that the claim of the employes be denied in its entirety. Furthermore, claim for time and one-half rate is without justification since it is well established that pay for service not performed is at straight time rate even if due, which it is not in this case.

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 employe 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 Organization claims the Carrier is obligated to assign a carman at Cane Fork, W. Va. to perform certain extra work at time and one-half rates at a time when it is not disputed that all carmen at the location in question were fully employed.

In order to sustain this claim the Organization must be able to point to an applicable provision of the Agreement or a well accepted past practice which has been violated by the Carrier.

The Carrier takes the position that in line with the long established application of applicable agreement rules on this property, a furloughed employe was permitted to work on a four day basis relieving the Carrier of the burden of paying overtime and permitting a furloughed carman from a nearby point to secure four days of employment.

In the instant case the Carrier violated no provisions of the Agreement and relieved itself of the burden of paying overtime rates at a time when all the carmen who hold seniority at the point in question were fully employed.

The principle was well stated in Third Division Award No. 4969 (Carter) as follows:

"An employe has no right to perform overtime work as such except where the Agreement so provides. When necessary work can be performed only on overtime hours, the senior available employe then has a valid claim to it by virtue of his seniority. But where the Carrier can get the work done at straight time rates without violating the Agreement it is within its province to do so. It is the function of management to arrange the work, within the limitations of the collective agreement, in the interests of efficiency and economy."

The majority of the Board subscribes to the above statement of principle as it applies to the instant case.

The Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: William B. Jones
Chairman

E. J. McDermott
Vice-Chairman

Dated at Chicago, Illinois, this 26th day of February, 1965.

DISSENT OF LABOR MEMBERS TO AWARD NO. 4670

J. G. Nelson, a furloughed employe from another seniority point, had no seniority rights at Cane Fork, W. Va. A furloughed employe can be used only at the point where he holds seniority. Rule 31 specifically states "Seniority of employes in each craft covered by this Agreement shall be confined to the point employed * * *"

The majority in subscribing to the so-called principle of Third Division Award 4969 ignored the fact that the Award states " * * * where the Carrier can get the work done at straight time rates without violating the Agreement it is within its province to do so * * *". However here, since under the provisions of Rule 31 J. G. Nelson held no seniority rights at Cane Fork, W. Va., his performance of the work at that point constituted a violation of the agreement and the claimant who held seniority rights there could and should have been used to perform the work on an overtime basis.

E. J. McDermott

C. E. Bagwell

T. E. Losey

Robert E. Stenzinger

James B. Zink