

Award No. 4703

Docket No. 4525

2-SOU-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. 21, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.-C. I. O. (Carmen)**

**THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC
RAILWAY COMPANY**

DISPUTE: CLAIM OF EMPLOYEES: 1. That the Carrier violated the controlling agreement by furloughing Carman W. J. Kelley at Somerset, Kentucky, and transferring or sending Carmen from Danville, Kentucky to Somerset, Kentucky, to perform the work in Somerset Shop which was performed by Carman Kelley before being furloughed.

2. That the Carrier be ordered to discontinue these violations and pay Carman W. J. Kelley for 5 days for June 6-7, 1962, 5 days' pay for June 15-19, 1962, 5 days' pay for June 20-22, 1962, 5 days' pay for July 21-24, 1962, and 5 days' pay for each additional violation until violations cease.

EMPLOYEES' STATEMENT OF FACTS: Carman W. J. Kelley, hereinafter referred to as claimant, was employed by the Southern Railway System (The Cincinnati, New Orleans and Texas Pacific Railway Co.) hereinafter referred to as carrier, and established seniority in its Ferguson Shop, Somerset, Kentucky, April 1, 1925. Claimant was furloughed by carrier prior to June 1, 1962, leaving only one Carman, namely, E. T. Bugg, Sr., employed at the point of Somerset, Kentucky.

On June 6 and 7, 1962 a carman regularly employed and holding seniority at Danville, Ky., was sent by carrier to Ferguson Shop, Somerset, Ky. to assist Carman Bugg in applying two (2) pair wheels to IC Car 15734 and NYC Car 76483.

On June 15, 1962, a carman regularly employed and holding seniority at Danville, Ky., was sent by carrier to Ferguson Shop, Somerset, Ky., to assist Carman Bugg in applying a coupler draft gear to Southern Car 285859. Also, on June 19, 1962, carrier sent two (2) carmen regularly employed and holding seniority at Danville, Ky., to Ferguson Shop, Somerset, Ky., to apply wheels to Car WRNX 6560.

On June 20 and 22, 1962, a carman regularly employed and holding seniority at Danville, Ky., was sent by carrier to Ferguson Shop, Somerset, Ky.,

Many more situations could be cited but the record will not be burdened by doing so.

Thus the evidence is conclusive that the controlling agreement was not violated and the claims which the Brotherhood here attempts to assert are not supported by it.

(2)

**THE BOARD IS WITHOUT AUTHORITY TO ORDER RESTORATION
OF THE POSITION OF CARMAN AT SOMERSET**

Under the Railway Labor Act authority of the board is restricted to deciding "* * * disputes between an employe or group of employees and a carrier or carriers growing out of grievances or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions, * * *" (Sec. 3. First (i)). In view of this limitation placed upon the board, it is without authority to order restoration of the former position of carman at Somerset formerly occupied by Carman Kelly. This conclusion is fully supported by prior board awards. For example in Second Division Award 4264, Referee Anrod, it was held:

"The Claimants have also requested that the Carrier be ordered to return the truck driving positions to them. Section 3, First (i) of the Railway Labor Act does not confer authority upon us to issue such an order. For this reason, we hereby deny said request. See: Awards 5572, 7168, and 7222 of the Third Division."

The conclusion is therefore inescapable that the board is without authority to order carrier to restore the former position of carman at Somerset.

CONCLUSION: Carrier has proven that:

(a) The controlling agreement was not violated and the claims are not supported by it. There was no "restoration of forces" at Somerset. Within the meaning of Rule 26—Carrier was not therefore under any contractual obligation to reemploy carman Kelly. The car force was neither increased nor reduced when carmen were sent to Somerset from Danville under Rule 163.

(b) No carmen have been transferred from Danville to Somerset as alleged by the Brotherhood.

(c) The board is without authority to order restoration of the position of carman at Somerset.

On the record only a denial award can be made. An award of any other type would be contrary to the agreement.

All evidence here submitted in support of carrier's position is known to employe representatives.

Carrier not having seen the Brotherhood's submission reserves the right after doing so to make response thereto and submit any other evidence necessary for the protection of its interests.

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.

Petitioner asserts that the Carrier violated the controlling Agreement when it sent Carmen from another seniority point (Danville, Ky.) to perform Carrier's work at Somerset, Ky., at a time when the Claimant, who holds seniority at Somerset, was furloughed.

The Carrier contends that acting pursuant to Rule 26 ("When it becomes necessary to reduce expenses the force shall be reduced") work had diminished to such an extent that there was not enough left to justify employing two carmen and consequently the force was reduced by laying off Carman Kelly, the Claimant in the instant case. The last paragraph of Rule 26 provides that "in restoration of forces, senior laid off men will be given preference of reemployment, if available within a reasonable time, and shall be restored to their former positions". The crux of the Carrier's argument is that laid off carmen are to be recalled only as specifically provided in Rule 26, i.e., "in the restoration of forces". There was no restoration of forces at Somerset on the dates complained of at which time carmen employed at Danville were sent to Somerset to perform or assist in performing two-man jobs.

Petitioner argues that the work done on the dates complained of was performed not on the road or away from shops but took place in the Carrier's shop at Somerset. Claimant's seniority as a Carman, from which his right to work flows, is confined to Somerset, and it clearly grants him prior rights to perform work of his craft at Somerset if and when it exists in accordance with his seniority.

Petitioner cites Award 3818:

"Claimant carmen were employed in the Car Department at Franklin, Missouri. On February 13, 1958 all carmen's positions at Franklin were abolished and the Car Department discontinued at that point. On February 15 and 16 two carmen were sent from the Parsons Car Department to make repairs to cars at Franklin. Claimants held seniority at Franklin and Employees assert that they should have been used for that service.

"* * *.

"While claimants' seniority was 'confined to the point employed' it was not conditioned on maintaining a car department there and it gave them the seniority right to perform the work of their craft if and when it existed at that point, as furloughed employes. No contention is made that claimants were not available and they were entitled to be called for the work here claimed."

Applying the reasoning of the above quoted Award, Claimant's seniority was not conditioned on maintaining a car department at Somerset; it gave him the seniority right to perform the work of his craft if and when it existed at that point as a furloughed employe. Since no contention is made that Claimant was not available he was entitled to be called for the work here claimed.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April, 1965.

DISSENT OF CARRIER MEMBERS TO AWARD 4703

The dispute in this award involves the issue of the seniority rights of the claimant as provided for by Rule 30 (revised effective May 1, 1952) in the controlling agreement.

The Organization contends that Carrier violated Rule 30 on June 6, 7, 15, 19, 20, and 22, and July 21 and 24, 1962, when the claimant was not called and used to perform carmen's work at Ferguson Shop, Somerset, Kentucky, and carmen from Danville, Kentucky, were improperly used by the Carrier at Somerset, Kentucky, to do claimant's work.

The undisputed facts show: (1) that there is no Ferguson Shop in existence—Ferguson Shop passed out of existence many years ago along with the steam locomotive; (2) that the claimant elected to remain furloughed when his job was abolished, even though he could have transferred to another location; (3) that Somerset and Danville are under the Master Mechanic's jurisdiction at Danville; (4) that under Rule 30 the seniority of employes is confined to the Master Mechanic's jurisdiction in which employed; (5) that the work involved was emergency jobs intermittently performed and was not a continuous performance; (6) that Rule 163 provides that when necessary to repair cars on the road or away from the shops, carmen will be sent out to perform such work; and (7) that sending carmen from Danville to Somerset pursuant to Rule 163 was in accordance with the established and recognized practice in existence throughout this Carrier's system.

Rule 30 in pertinent part to the instant dispute reads:

"(a) Except as otherwise provided, seniority of employes in each craft covered by this agreement shall be confined to the Master Mechanic's jurisdiction in which employed * * *"
(Emphasis ours.)

The majority has erroneously followed as the controlling precedent our Award 3818, which involved the same craft but a different Carrier (Missouri-Kansas-Texas) and a different rule, which is quoted below:

Rule 24. Assignment of Work

"(b) Seniority of employes covered by this agreement shall be confined to each department (locomotive back-shop; car back-shop; rip track, train yard and inspection forces; roundhouse) at point employed in each of the classes embraced herein. * * *"
(Emphasis ours.)

It is quite apparent a great difference exists between Rule 30 of this Carrier and Rule 24 of the Carrier involved in our Award 3818, and for this reason alone Award 3818 has no precedent value to this case.

The Board's opinion demonstrates conclusively that it failed to give due consideration to the facts of record and also that it failed to give judicial examination to Rule 30 of the controlling agreement.

It is obvious that the instant award does not constitute an interpretation of Rule 30, and the award cannot hold that Carrier violated Rule 30; therefore, the award is a nullity to the parties, and we dissent.

P. R. Humphreys

H. F. M. Braidwood

F. P. Butler

H. K. Hagerman

W. B. Jones