Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11085
SECOND DIVISION Docket No. 11057
2-AT&SF-CM-'86

The Second Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(The Atchison, Topeka and Santa Fe Railway Company

Dispute: Claim of Employes:

1. That the Atchison, Topeka and Santa Fe Railway Company violated the controlling Agreement, specifically Rule 32(b), when it abolished all the positions and furloughed all the carmen at Hurley, New Mexico. And then knowingly and arbitrarily instructed and/or allowed carmen from another seniority point to go into the seniority point of Hurley, New Mexico and perform carmen's work, even though the carmen who were furloughed at Hurley continued to hold seniority rights at Hurley, New Mexico point.

2. That accordingly, The Atchison, Topeka and Santa Fe Railway Company be ordered to compensate Carmen Manuel V. Martinez and G. L. Chip each in the amount of eight (8) hours at the pro rata rate of pay, for each day of November 12, 15, 16, 17, 21, 22, 29 and 30, 1983.

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 employes 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.

Claimants were employed as Carmen by Carrier at its Hurley, New Mexico point. As of the end of the shift on April 30, 1982, all Carmen positions at Hurley were abolished and the Claimants were furloughed. The Claimants thereafter maintained their seniority in accordance with the current Agreement. On November 12, 15, 16, 17, 21, 22, 29, and 30, 1983, the Carrier assigned Carmen from a seniority point other than Hurley to perform Carmen's work there. The Organization subsequently filed a Claim on the Claimants' behalf, challenging this assignment of work when Claimants were available, qualified, and willing to perform the work.

The Organization points out that Rule 32(b) of the current Agreement provides:

> "Seniority of employes covered by this Agreement shall be confined to the point or district in which employed."

The Organization contends that it is undisputed that the Carrier assigned Carmen from a seniority point and district other than Hurley to perform work there. The Organization further asserts that when Carmen's work must be performed at Hurley, only Carmen with seniority at Hurley are contractually entitled to perform the work. The Organization therefore argues that the Carrier violated Rule 32(b) by assigning Carmen from another point to perform Carmen's work at Hurley.

The Organization also maintains that this Board previously has held that seniority points continue to exist after the employes are furloughed; only craft employes holding seniority at a particular point may perform craft work at that point. The Organization asserts that the Claimants were available, qualified, and willing to perform the disputed work. Moreover, the reason for Claimants' furlough has no bearing on this matter; it is not relevant to the issue of whether the Carrier violated Rule 32(b).

The Organization further argues that neither Rule 16(a) nor Rule 24(d) applies; the disputed work was sporadic and of less than thirty days' duration so it does not meet the criteria warranting the bulletining of jobs. Moreover, Rule 36(b) also does not apply; the Carrier could not assign the Carmen's work at Hurley to mechanics of other crafts employed at the point because there were no mechanics of other crafts employed at Hurley. The Carrier cannot use the unavailability of Rule 36(b) to justify its violation of Rule 32(b). The Organization further asserts that there is no past practice that supports the Carrier's action; although there may be prior instances involving Carmen doing Carmen's work at points other than where they hold seniority, the Organization did not file challenges because there no longer were Carmen holding seniority at the point where the work was performed or because the incident occurred without the Organization's knowledge. The Organization argues that its failure to file exceptions in the past does not justify the Carrier's violation of Rule 32(b).

The Organization also argues that Rule 12, governing emergency road work, does not support the Carrier's action. The disputed work was not emergency road work, but routine inspection and repair. Moreover, Rule 12 does not authorize the Carrier to transfer Carmen from one seniority point to another to perform Carmen's work if there are Carmen holding seniority at the latter point. The Organization therefore argues that the Claim should be sustained; the Claimants each should be compensated in the amount of eight hours' pay at the pro rata rate for each day at issue.

The Carrier contends that the Claimants had the right to perform Carmen's work at Hurley when they were assigned to existing positions at Hurley; when those positions were abolished, Claimants no longer had the exclusive right to Carmen's work there. Moreover, nine of the thirty-seven hours of work at issue were performed at Deming, not Hurley; because neither Claimants or any other Carmen hold seniority at Deming, no Carmen have the exclusive right to Carmen's work at that point.

The Carrier also argues that neither Rule 32 nor any other Rule required it to utilize furloughed Carmen for the small amount of disputed work. Rule 32 is a seniority rule; it does not govern work assignments at a particular location, or who will perform work when there is not enough work to warrant retention of a position.

The Carrier contends that under Rules 16(b) and 24(d), it is contemplated that the Carrier will recall furloughed Carmen when there is full-time employment for Carmen on a regular basis. These Rules do not require the Carrier to recall furloughed Carmen for sporadic work. The disputed work was sporadic, averaging less than two hours per day; it does not qualify as full-time employment.

In addition, the Carrier argues that on several past occasions, it assigned active Carmen to perform work at other points where all Carmen had been furloughed because of lack of work. In such cases, the active Carmen have been compensated pursuant to Rule 12(a), governing emergency road work, whether or not the work was of an emergency nature. The Carrier points out that the Organization never challenged this handling on these past occasions. The Carrier therefore contends that the Organization acquiesced in the Carrier's handling. The Carrier asserts that on these past occasions, there were Carmen holding seniority at the location when the work was performed. Moreover, the Organization's assertion that it was unaware of these incidents is not believable. The Organization is aware that when the last Carman at a particular point is furloughed, there usually remains a small amount of Carmen's work at the point. Also, the Organization was aware of this past practice through two prior Claims, based on other grounds, that it made in incidents involving Carmen performing work at other points from which Carmen had been furloughed; the Organization did not object to this practice on either occasion. The Carrier argues that the Organization historically has recognized the Carrier's right to utilize active Carmen to perform work at other points where there are no regularly assigned Carmen due to lack of work.

The Carrier finally argues that even if the Claim has merit, the Claim for compensation is excessive. The Carrier points out that Deming is not part of any seniority point or district; the Claimants have no exclusive right to any of the disputed work performed there. Moreover, the Carrier would not be liable for any payment beyond the pro rata rate for the actual time spent performing the work; the Carrier would not be liable for eight hours' pay for any day on which less than eight hours' work was performed.

The Carrier ultimately argues, however, that the Claim is without merit and should be denied.

This Board has reviewed the evidence in the record, and we find that the Carrier had sufficient reason to abolish the positions because of the general decline in business to the point where it was no longer economically feasible to have Carmen assigned at Hurley. The decline in business was so great that the Organization has not even challenged the Carrier's right to abolish the positions for lack of work.

With respect to the Organization's challenge of the Carrier's practice of utilizing active Carmen from another point to perform the necessary car repair work at Hurley rather than using the furloughed Claimants, this Board finds that the Claimants' right to work was limited to work at Hurley when they were assigned to Hurley. Once their positions at Hurley were abolished, they no longer had the exclusive right to the work there.

Moreover, with respect to the work at Deming, the work there did not belong exclusively to the Hurley Carmen even when they were still in active service. Hence, once they were laid off, the Carrier had the right to assign that work to others.

This Board also finds that Rule 24(d) contemplates returning furloughed employes to service, but it does not apply to furloughed Carmen who are needed on a sporadic basis to perform an insignificant amount of work. In this case, the evidence reveals thirty-seven man-hours of work spread over a nineteen-day period. The Carrier is not in violation of the Rule for assigning employes other than the Claimants and not recalling the Claimants to perform the modest amount of work involved here.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 3rd day of December 1986.

LABOR MEMBERS DISSENT

TO

AWARD NO.11085, (DOCKET NO. 11057)

(Referee Peter R. Meyers)

The Majority grossly erred in their decision when denying the Claim of the Employes in this Award.

The Majority without Agreement support erroneously stated:

> "With respect to the Organization's challenge of the Carrier's practice of utilizing active Carmen from another point to perform the necessary car repair work at Hurley rather than using the furloughed Claimants, this Board finds that the Claimants' right to work was limited to work at Hurley when they were assigned to Hurley. Once their positions at Hurley were abolished, they no longer had the exclusive right to the work there.
>
> Moreover, with respect to the work at Deming, the work there did not belong exclusively to the Hurley Carmen even when they were still in active service. Hence, once they were laid off, the Carrier had the right to assign that work to others."

Contrary to this erroneous statement,the Agreement provides that seniority of the Employes is confined to the point employed and the fact that they are furloughed does not remove their seniority from them.

Previous Board Awards have upheld this position, as stated in Second Division Award 665 (Referee I. L. Sharfman)

> "Since, under the provisions of Rule 30, the Chicago carmen and helpers held no seniority rights at Des Moines, their performance of work at that point on August 15, 16, and 17, 1940, constituted a violation of the agreement."

in Second Division Award 3818 (Referee Mortimer Stone) held:

> "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."

The Majority obviously cannot find any precedent (other than his own previous Awards) that support this erroneous decision, therefore, does not cite any.

For these reasons, we vigorously dissent.

R. A. Johnson

M. J. Cullen

Charles D. Easley

D. A. Hampton

Norman D. Schwitalla