

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/ A Division of TCU  
(  
(The Louisville and Nashville Railroad Company (CSX)

STATEMENT OF CLAIM:

1. That the Louisville and Nashville Railroad Company hereinafter referred to as the Carrier, was in violation of the Agreement when on January 19, 1987 they called and used a foreman as a wrecking crew member.

2. And accordingly, the Carrier should be ordered to additionally compensate Carman H. O. Zinsmeister hereinafter referred to as the Claimant, for sixty-nine (69) hours at the rate of time and one-half as the result of said violation.

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.

It is the position of the Organization that Carrier violated Rule 19(e) when they utilized Mr. Connell from the miscellaneous overtime board to fill a wrecking crew position. The Organization argues that at 7 A.M. on January 18, 1987, Mr. Connell began work as a Foreman which under established pay and working conditions is a twenty-four (24) hour day. On January 19, 1987, at 2:30 A.M., Mr. Connell was improperly called to accompany the wrecker. As Claimant was the next available man on the overtime board, the Agreement was violated when Foreman Connell was called in place of the Claimant.

The Carrier denies that Mr. Connell works as a Foreman. Carrier argues that he is paid as a Carman and that the Supervision comes under the departure yard Foreman. Since Mr. Connell was not working as a Supervisor on January 18, 1987, he was properly called to accompany the wrecker.

This Board must take special note of the fact that the Carrier has failed on the property to rebut most of the Organization's assertions or raise any issues with the stated Agreement provisions.

The Organization argues a violation of Rule 19(e) which states:

"Should an employee be assigned temporarily to fill the place of a foreman, the established rate for the position, and the rules and working conditions that are attached thereto, will apply during such temporary assignment."

The Organization argues without rebuttal that the working day for temporarily assigned Foreman is twenty-four (24) hours. The Organization states that Claimant was paid as a Carman, but received "extra time off with pay to compensate for the difference in carman's pay and foreman's pay (in non-compliance with the Agreement...)." Again, there is no rebuttal by the Carrier. This Board has often held that when there is ample opportunity and no rebuttal, such assertions must be accepted as fact.

In addition, the Organization produced a signed statement by twelve Carmen to the fact that "Carman J. W. Connell has worked as a Foreman on Sunday's for over a year" and that they received orders from him. The Organization further provided forms from that January 18, 1987, date ("Cars Released From Shop" and "Original Record of Repair") listing Mr. Connell as Foreman and Supervisor. This is strong evidence which overweighs the Carrier's assertion that he "was not working in a supervisory capacity"; an assertion without supporting fact.

Nowhere did the Carrier deny on property the Organization's argument that:

"On Sundays Mr. Connell assigns all Carmen to their jobs, fills out payroll sheets, he gives orders on all work that comes in on Sunday, he delegates his authority on all decisions on cars that need a Foreman's authority and all other duties of a Foreman. He does not have any assistance or Supervision with his Foreman duties from the departure yard Foreman."


In this instant case, the Carrier has raised numerous new arguments before this Board. By long established precedent they come too late for our consideration. These arguments and evidence include among others, the use of Carman Sapp's name, the seniority roster, the rebuttal to the above quote on Connell's duties, the applicability of Rule 19 (e), and the failure of the Organization to Claim Foreman's pay for Mr. Connell.

Based on this record as developed on property, the Carrier has violated Rule 19 (e) when they assigned Carmen Connell to the temporary vacancy of Foreman on Sunday, January 18, 1987, and then used him in place of the Claimant as a wrecking crew member. The Claimant's rights were violated. Finding no objection raised on the property to the requested compensation, the Claim is sustained as presented.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:   
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of October 1989.