

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13306
Docket No. 13110
98-2-96-2-1

The Second Division consisted of the regular members and in addition Referee Eckehard Muessig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen, Division of
(Transportation Communications International Union
(CSX Transportation, Inc. (former Louisville and
(Nashville Railroad Company)

STATEMENT OF CLAIM:

- “1. That the Louisville and Nashville Railroad Company, (now a part of CSX Transportation) was in violation of Montgomery, AL Carmen D. W. Long, et al., contractual rights to perform all carmen's work of maintaining freight cars per Rule 29, 104, Appendix 'B' Paragraph 15, and Rule 1, on seventeen (17) days, April 26, 1991 through May 12, 1991, when Carrier instructed and/or allowed two (2) Mobile, AL and three (3) Birmingham, AL carmen to make repairs on bad ordered freight cars at Montgomery, AL.
2. Carrier should now be ordered to compensate Claimants eight (8) hours at time and one-half rate of pay for each day, as outlined in the initial claim of June 5, 1991, when claimants were qualified, available, and had contractual rights to perform such work from April 26, 1991 through May 12, 1991.”

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

During the period April 26 through May 12, 1991, the Carrier utilized two Carmen who were employed at Mobile, Alabama, and three Carmen who were employed at Birmingham, Alabama, to perform Carmen's work at Montgomery, Alabama.

The Organization's claim is that the Carrier violated Rule 29 of the controlling Agreement when it assigned the five Carmen to work at Montgomery, because Montgomery is a separate and distinct seniority point. Rule 29, in pertinent part, provides:

"29(a) Seniority of each employee covered by this agreement will begin from the date and time the employee starts to work.

29(b) Seniority of employees in each craft covered by this agreement shall be confined to the point employed for those who perform work as per special rules of each craft in the various departments of the railroad as follows:"

Simply stated, the Organization submits that because seniority is confined to the point at which each Carman is employed, all work at a given point belongs to the Carmen on the seniority roster at that point. In this case, Carmen with seniority at Montgomery should have been called to perform the work.

The Carrier's primary position, as presented on the property, is that there were no furloughed employees and that all Carmen at Montgomery who wanted to work had the opportunity to do so. However, because sufficient employees were not responding to its call to work overtime and because extremely urgent ("special circumstances") work had to be performed, the Carrier had no choice other than to utilize the five Carmen (who had volunteered for the service) to work at Montgomery.

The Board, after careful review of the record established on the property, finds the Organization has met its burden of proof.

The Carrier's basic argument that no Carmen employed at Montgomery were available for the work is not supported by the record. The Organization, in addition to identifying the available Montgomery Claimants in the claim which it filed on June 5, 1991 on several occasions on the property listed the Claimants and insisted that they were "available and qualified" to perform the claimed work. If this assertion was not totally factual, the Carrier should have provided evidence on the property to refute it. The Carrier did not.

With respect to the amount of damages, there is no Agreement support for the overtime rate of pay. The Board affirms again that, if a violation is proven, the pro rata rate is the proper rate of compensation for work not performed, even if it was performed on overtime.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 6th day of August 1998.