

Award No. 4829
Docket No. 4661
2-CNO&TP-CM-'66

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson 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 & TEXAS PACIFIC
RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the carrier violated the controlling Agreement by furloughing Carman W. J. Kelly at Somerset, Kentucky, and transferring or sending Carmen from Danville, Kentucky to Somerset, Kentucky, to perform work formerly performed by Carman Kelly prior to being furloughed.

2. That the Carrier be ordered to discontinue said violations and pay Carman W. J. Kelly five (5) days pay for January 8, 1963; five (5) days for January 16-17, 1963; five (5) days pay for January 29, 1963; five (5) days pay for February 4, 1963; five (5) days pay for March 8, 1963; and five (5) days for each additional violation until said violations cease.

EMPLOYEES' STATEMENT OF FACTS: Carman W. J. Kelly, hereinafter referred to as claimant, was employed by the Southern Railway System (The Cincinnati, New Orleans and Texas Pacific Railway Company) hereinafter referred to as carrier, and established seniority in its Ferguson Shop, Somerset, Kentucky, April 1, 1925. Claimant was furloughed by carrier prior to January 8, 1962, leaving only one carman, namely Carman E. T. Bugg, Sr., employed at the point Somerset, Kentucky.

On January 8, 1963, a carman regularly employed and holding seniority at Danville, Kentucky, was sent by carrier to Ferguson Shop, Somerset, Kentucky, to assist E. T. Bugg, Sr. in applying wheels to car NYC 173350 and remove brake beam from SOU. 105557.

On January 16, 1963, a carman regularly employed and holding seniority at Danville, Kentucky, to assist Carman E. T. Bugg, Sr. in wheeling and making other repairs to Car MILW 22864. Also, on January 17, 1963, carrier sent a carman regularly employed and holding seniority at Danville, Kentucky, to Ferguson, Shop, Somerset, Kentucky, to apply wheels and make other repairs to Car L & N 15421.

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" within the meaning of Rule 26. Carrier was not 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.

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.

Following deiseling, the Ferguson Shop at Somerset was abolished in the early 1950's, and when this claim arose in 1963 carmen's work had so declined that only one carman was regularly assigned there. Prior to those changes point seniority had been the rule, but in 1952 seniority was extended to the territory under the jurisdiction of the Master Mechanic, which includes Somerset and many other points, with headquarters at Danville. The old seniority lists are still maintained for certain purposes; that for Somerset as of January 1, 1963 contained the names of 24 carmen, 20 of whom had been promoted or had transferred elsewhere, eleven of them to Danville. Claimant, second on the list, elected to accept furlough rather than exercise his seniority at another point under the Master Mechanic's jurisdiction.

Claimant was furloughed as of May 17, 1962. Carmen were sent out from Danville under Rule 163 on January 8, 16 and 17, February 4 and March 8, 1963, each time for the repair of one or two cars of other carriers in transit over Carrier's lines. Rule 163 is a special carmen's rule which has been in effect at least since 1937, and provides as follows:

"When necessary to repair cars on the road or away from the shops carmen will be sent out to perform such work. * * *"

Thus prior to the 1952 extension of the old point seniority, Rule 163 had authorized carmen to repair cars on the road or away from the shops when necessary, and had thereby expanded their seniority to that extent. By long established practice carmen have for many years been sent out under that rule to perform their work under these and similar conditions.

But the claim is that the Carrier's action under Rule 163 constituted a restoration of forces and thus violated Claimants recall right under the fourth paragraph of Rule 26. If so, Award 4013, *infra*, would be pertinent.

Rule 26 is entitled "Reduction of Expenses," and relates to reduction of regular forces for that purpose. In that connection the fourth paragraph provides how the men laid off in such force reductions shall be returned to duty when forces are restored. It provides as follows:

"In the restoration of forces, senior laid off men will be given preference of re-employment, if available within a reasonable time, and shall be returned to their former positions.

It clearly is not designed to apply to the necessary repairs of cars on the road or away from the shops, as contemplated by Rule 163. This is evident from the wording of the rule, including its proviso concerning availability within a reasonable time, and Note No. 2, which defines as a reasonable time for notice of availability five days if within town or vicinity, ten days if outside, and longer in case of illness. The incidents complained of clearly do not constitute restoration of forces within the meaning of Rule 26.

As persuasive of their contentions the Employees cite Awards 3818, 4013 and 4703, the last of which relates to these same parties. In Award 3818 carmen's positions at a point had been abolished as of February 13, 1958, but as the regular work of those positions had not been completed the carrier sent carmen out from another point to complete it on February 15 and 16; thus the two incidents were practically concurrent. The Carrier contended that this was emergency road service, which it clearly was not, and that the abolition of the positions at the point had abolished claimants' seniority there, which was equally untenable. Based upon the latter point, and without reference to any rule comparable to Rule 163, this Division reasonable sustained the claim. But the facts and issues of this case are entirely different from those there presented, and we do not consider Award 3818, or Award 4703, which is based entirely upon it, as persuasive here.

In Award 4013, under a rule recognizing the carrier's right to send carmen out to repair cars away from the shops, and a Rule 27(d) similar to the fourth paragraph of Rule 26 quoted above, this Division sustained the claim of furloughed employees. In that award it said:

"The right of the Carrier temporarily to transfer employes in appropriate instances is not challenged by the Claimants. But this right may not be exercised so as to violate or nullify the contractual recall rights of laid off employes under Rule 27(d)."

The facts of that case were that some six weeks after abolishing the claimants' car repair positions at St. Maries, the carrier started sending car repairmen out from Spokane every day but Saturday and Sunday, thus in effect restoring regular forces at St. Maries with regularly assigned Spokane carmen instead of recalling the claimants to regular assignments. Under these circumstances this Division properly concluded that the Claimants' recall rights had been violated. But this case is entirely different; here there was not a regular use of men from another point on a five-day week basis, but a bona fide use of carmen as needed for the repair of cars away from the shops on separate and unrelated occasions. Conse-

quently Claimants' recall rights under Rule 26 were not violated. For the reasons stated, we do not find Awards 3818, 4013 or 4703 persuasive here.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 11th day of March, 1966.