

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 13510
Docket No. 13362-T
00-2-98-2-50**

The Second Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

**(Brotherhood Railway Carmen Division
(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Delaware and Hudson Railway Company**

STATEMENT OF CLAIM:

“Claim of the committee of the Union that:

- 1. That the Delaware and Hudson Railway Company violated the terms of our current Agreement, in particular Rules 43.2, 49.1 and 49.3 when they failed to call Carman John Kinsey, on Monday, Memorial Day Holiday, May 26, 1997. Instead, allowing or otherwise ordered transportation employees to perform such work as coupling, testing of air brakes and mechanically inspecting freight cars on Train SC-1, work accruing specifically to the Carmen craft in accordance with above cited rules.**
- 2. That, accordingly, the Delaware and Hudson Railway Company be ordered to compensate Carman John Kinsey for 2.7 hours at overtime rate (64.19). This is the amount he would be entitled if properly called by the Carrier.”**

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.

As Third Party in Interest, the United Transportation Union was advised of the pendency of this dispute, but it chose not to file a Submission with the Board.

The Claimant is a Carman at Kenwood, New York, on Position KW-C-1. His assignment is 7:00 A.M. to 3:00 P.M., Monday through Friday, with rest days of Saturday and Sunday. On Memorial Day, 1997 the Claimant was off work. This was a Monday. At or about 7:00 A.M. Train SC-1 needed an air brake inspection and test and hoses coupled. The consist had 12 cars, an engine and a caboose. The Carrier did not call the Claimant to do the brake work and the coupling. Instead, the train crew did this work.

There is some dispute of fact over how long it took the train crew to perform the work in question. The position of the Local Chairman is that the work took 50 minutes to do. According to the Carrier, the work in question took no longer than about 20 minutes. After an exchange of data and correspondence, the Organization ultimately concludes, in its handling on the property, that although it is "... highly unlikely that untrained employees could perform a satisfactory inspection and air test in the same amount of time it would take a qualified Carman . . . " the real issue in this case, irrespective of "... (w)hether it takes 20 minutes or 50 minutes . . . " is that "... the Claimant should have been called to perform his regularly assigned duties . . . " on the day in question. In accordance with Rules 5.1 and 4.7, according to the Organization, the Claimant should have been paid four hours straight time pay, or 2.7 hours overtime. An analysis of the data of record by the Board leads to the conclusion that the work in question most likely took more than 20 minutes, but probably less than 50 minutes, to perform.

The Rules cited by the Organization in filing the instant claim are the following.

"43.2 - CARMEN'S WORK

Carmen's work shall consist of building, maintaining, dismantling (except all-wood freight train cars), painting, upholstering, and inspecting all

passenger and freight cars, both wood and steel, planing mill, cabinet and bench carpenter work, pattern and flask making and all other carpenter work in shops and yards; carmen's work in building and repairing motor cars, lever cars, hand cars and station trucks, building, repairing and removing and applying locomotive cabs, pilots, pilot beams, running boards, foot and headlight boards, tender frames and trucks, pipe and inspection work in connection with air brake equipment on freight cars, repairing and assembling car and coach triple valves, applying patented metal roofing; operating punches and shears, doing shaping and forming; work done with hand forges and heating torches in connection with carmen's work; painting with brushes, varnishing, surfacing, decorating, lettering; cutting of stencils and removing paint (not including use of sand blast machine or removing vats); all other work generally recognized as painter's work under the supervision of the locomotive and car departments, except the application of blacking to fire and smoke boxes of locomotives in engine houses; joint car inspectors, car inspectors, safety appliances and train car repairers, steam derrick engineers, oxy-acetylene, thermit and electric welding on work generally recognized as carmen's work; and all other work generally recognized as carmen's work.

RULE 49 - COUPLING, INSPECTION AND TESTING

In yards or terminals where carmen in the service of the carrier operating or servicing the train are employed and are on duty in the departure yard, coach yard or passenger terminal from which trains depart, such inspecting and testing of air brakes and appurtenances on trains as is required by the carrier in the departure yard, coach yard, or passenger terminal, and the related coupling of air, signal and steam hose incidental to such inspection, shall be performed by the carmen.

* * *

49.3

If as of July 1, 1974 a railroad had carmen assigned to a shift at a departure yard, coach yard or passenger terminal from which trains depart, who performed the work set forth in this rule, it may not

discontinue the performance of such work by carmen on that shift and have employees other than carmen perform such work (and must restore the performance of such work by carmen if discontinued in the interim), unless there is not a sufficient amount of such work to justify employing a carmen."

There is no doubt that the work of performing air brake tests and coupling hoses is work done by Carmen under Rule 49.1. That having been said, the issue here is whether there are circumstances when such work can be performed by members of other crafts without violating of the Carmen's Agreement.

The Board's study of the record before it fails to warrant conclusion that the Organization met the burden of proof with respect to exclusive jurisdiction over air brake and coupling work under all circumstances, albeit as a general matter it is clear that this is work that accrues to this craft under Rule 49.1. The Carrier argues that "... coupling and air testing of cars is not exclusive to the car department ..." and that members of other crafts, under idiosyncratic circumstances, have performed work of this kind on the property. The Board observes that the existence of such prior practice, as a matter of fact, has never been factually rebutted by the Organization. The Organization's response has consistently been that the Carrier "... cannot ... assign other employees to perform ..." work done by Carmen, not that the Carrier has never done this. For example, in commenting on what it calls the qualifications of train crews to do air brake work on freight cars, in the handling of the claim on property, the Organization did not argue that train crews have never done such work in the past. Rather, the Organization argues only that "... Carmen are the properly trained employees to perform this work and not the trainmen. ..." The Organization lastly argues, in this respect, that a "... past practice argument does not estop the Organization from enforcing a contractual provision. ..." While such may be true, it also curiously attempts to reverse the burden of proof in the instant case.

Lastly, although every case involving jurisdiction over small amounts of work must be considered on its own merits, there is no question that the instant claim, involving about 30 minutes' work as far as the Board can determine, reasonably falls under what abundant arbitral precedent in this industry calls the de minimis doctrine (Second Division Award 7587, 8360, 10875; Public Law Board No. 3840, Award 5 inter alia). Because this is so the Board is unable to conclude, on these grounds also, that the

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Carrier violated the Carmen's Agreement in this instance when a train crew did the particular work at bar on the Memorial Day holiday in 1997.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 17th day of April, 2000.