

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Paul N. Guthrie, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
BOSTON AND MAINE RAILROAD**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated the agreement when it failed to call Section Foreman J. F. Delorey and his crew to perform necessary work on their assigned section on August 13, 1949;

(2) Section Foreman J. F. Delorey and Trackmen Robert Boyce, Sam Mieli, Leo White, Wm. Cobleigh, Jr. and George Westcott, be compensated for five (5) hours each at their respective time and one-half rate of pay because of this violation of the agreement.

EMPLOYES STATEMENT OF FACTS: Section Foreman J. F. Delorey and his crew are regularly assigned to the territory identified as Section No. 15 on the Boston and Maine Railroad.

Section Foreman Delorey and his crew had a regularly assigned work week—Monday through Friday.

On Saturday, August 13, 1949, the Carrier assigned Extra Crew Foreman William Cobleigh and his crew to perform work on Section No. 15. The work performed consisted primarily of gauging stock rails.

Extra Crew Foreman Cobleigh and his crew worked five hours each on Section No. 15 on August 13, 1949.

Section Foreman Delorey and his crew were available and willing to perform this work had they been called.

Claim was filed in behalf of the employees regularly assigned to Section No. 15, and claim was declined.

The agreement in effect between the two parties to this dispute dated May 15, 1942, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts. (Reprinted January 2, 1951.)

POSITION OF EMPLOYES: Rules 1, 2 and 3-A of the effective agreement read as follows:

"RULE 1 Seniority—Effective Date—Seniority begins at the time the employees' pay starts in the class in the sub-department

trackmen of regular extra crews) is to permit each group to **retain** their right to "certain work" which they have consistently performed for more than thirty years under the same rule. This Carrier did in the instant case.

It is also a fact that Petitioner has offered no proof whatsoever that claimants were "available", in fact, he has not even **asserted** that they were. Claimants in any claim must prove "availability" or claims are not valid. See Award No. 13502 of the First Division in which Referee Wenke says:

"... each extra yardman making claim must show that on each day for which he makes such claim that he would actually have been available if he had been called."

This is a reasonable principle in line with the theory that claimant must **establish** his claim if he is to prevail. Claimants in this docket were undoubtedly unavailable, even if Carrier were obligated to use them, which Carrier emphatically denies, in any event, no proof has been adduced that they were available.

Of course, Award 615 has already clearly set forth that "the right to work is not to be found in either the scope or seniority rules". Apparently Referee Robertson does not agree.

There is no justifiable reason in rule or practice to sustain the claim and it should be denied.

All data and arguments herein contained have been presented to the Employees in conference and/or correspondence.

OPINION OF BOARD: This case is concerned with a claim of the System Committee of the Brotherhood on behalf of Section Foreman J. F. Delorey and his crew for five hours pay at time and one half rates for August 13, 1949 on which date they were not called to perform necessary work on their assigned section.

This docket is a companion docket of Dockets 5687 and 5688 on which Awards 5950 and 5951, respectively are made this day.

There is no material disagreement between the parties with respect to the facts involved. The issue posed for determination is the same as the issue involved in Dockets 5687 and 5688. Therefore it is unnecessary to repeat here the discussion in those cases as stated in Awards 5950 and 5951, since it is equally applicable to the instant case.

Prior Awards 4700 and 5261 are controlling in this case, since no showing has been made which would justify a reversal of the Division's conclusions stated in those awards.

Under these circumstances an affirmative award is justified. Payment should be made at pro rata rates.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and Employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Claim sustained at pro rata rates.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 7th day of October, 1952.