

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25251

Docket No. 44876

01-1-99-1-S-6788

The First Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

(United Transportation Union
PARTIES TO DISPUTE: (
(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Formal appeal for 2' at pro rata rate of pay in behalf of various trainmen for 23 dates ranging from December 30, 1996 through February 28, 1997 account required to handle EOTD at Latta, Indiana where carmen are employed."

FINDINGS:

The First 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.

The Claimants, during the course of their duties, were required to handle end of train devices (EOTD) at Latta, Indiana. Their claims for two hours' pay were denied by the Carrier, asserting that Carmen were not available to perform this work. The Organization argues Carmen are available and proffers the following letter from UTU Local Chairman Soncrant:

"This letter is in regards to timekeeping continuously cutting Conductor's claim for putting Rear End Device's on own trains made up at Latta Yards, Jasonville, IN. Timekeeping denies the claims because they say no carmen available. I have attached a copy of a Air Ticket Slip that shows there is carmen at Latta. I know the slip is dated July 6, 1994, but this carman is still an employee in car department at Latta along with four other car department employee's and one Foreman at Latta Yards. There is Two Road Switcher Jobs that go to work in the A.M. #122 0600HR and #121 0730HR Road Switcher #123 goes to work at 1400HR. Car deparment hours are 0700HR to 1530HR."

Under Award 1 of Arbitration Board No. 419, Trainmen were relieved of the responsibility of handling rear end markers whenever other employees, such as Carmen, are on duty and available. That Board recognized that there may be times when it is not possible or practical to assign other employees to these duties. In such cases, Trainmen may be required to handle the devices. Award 1 of Public Law Board No. 5297, set out three factors that must be considered in determining whether other employees are available. The tests set out in Public Law Board 5297's Award are as follows:

"First. Availability must recognize certain time constraints. An employee is available only during the hours he is actually working. The rule does not require the payment of overtime or the extension of hours by an employee already working overtime. Thus, a carman who is about to end his shift and would go on overtime if he were used to handle an EOT, should be considered unavailable. Similarly, meal periods are also times of unavailability if the meal period is scheduled and unpaid. Questions of time will also consider when the departing train was made up and when the arriving train was first handled by yard forces. In other words, the entire time the train was standing on the departure or arrival track must be considered in the determination if another employee was available.

Second. Availability must recognize certain geographical constraints. The Board recognizes that some of CNWT's facilities are large terminals where it would be impractical to consider

every carman within the terminal as being available to service a departing or arriving train. Accordingly, and as a general rule subject to variances, an employee is available if working in the departure or arrival yard, whichever is appropriate. Generally, employees working in a shop will not be considered available.

Third. Availability must recognize the other duties of the employee. An employee whose duties have required him to leave the yard is not generally considered available during the time away from the yard. Duties, once begun, which may not be interrupted without risk of safety or loss of productivity may render an employee unavailable during the performance of those duties. An employee who is already engaged in expediting the movement of another train is not generally considered available." (footnote omitted)

The Organization will be deemed to have established a prima facie case when it has shown that a Carman or Mechanic-in-charge is employed at the departure or receiving yard at the relevant time. It is then the burden of the Carrier to show that the employee was not available for any of the reasons stated above, or for other valid reasons somehow not envisioned by the Board and articulated in this Award. The Carrier has the resources for obtaining this information and Claimants should not be expected to locate the other employees.

The Board notes that Public Law Board No 5297, Award 1 addressed the issue of burden of proof by requiring the Organization to establish a prima facie case that another employee was employed in the departure or receiving yard at the relevant time. Such proof, by necessity, would include a statement of when the work was performed, as well as proof of the fact that Carmen are employed at that time. In this case, the Organization has offered neither. The Board has no way to ascertain when the service was performed by the Claimants, or whether other employees were scheduled to be on duty at that time. The brake certification form, showing nothing more than the fact a brake test was completed at 2:00 P.M. on July 6, 1994, does not meet the standards envisioned by the above Award to show that Carmen were on duty at the relevant times (whatever they might be) on various dates two and one-half years later. Without

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knowing the time the work was performed, the Carrier is effectively barred from determining whether Carmen were truly available under the tests described above.

In light of the Organization's failure to present sufficient evidence to make a prima facie case, the claim must be denied.

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 First Division

Dated at Chicago, Illinois, this 30th day of July, 2001.