

The Second Division consisted of the regular members and in addition Referee Nicholas H. Zumas when award was rendered.

Parties to Dispute: (System Federation No. 7, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Burlington Northern, Inc.

Dispute: Claim of Employees:

1. That the Burlington Northern, Incorporated, violated Rules 27, 83 and 86 of the Controlling Agreement in effect on the Burlington Northern, Incorporated, when they assigned or permitted a Carrier's supervisor to operate the Superior wrecker at the Pengilly, Minnesota derailment on April 27, 1972.
2. That accordingly the Burlington Northern, Incorporated, be ordered to additionally compensate Carman A. Flagstad in the amount of sixteen (16) hours at the time and one-half ($1\frac{1}{2}$) rate for April 27, 1972.

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 waived right of appearance at hearing thereon.

The initial question that must be resolved in this dispute is whether Claimant was the "employee involved" as required by Rule 34 of the Agreement between the parties.

In the handling on the property Carrier by letter dated October 3, 1972 rejected the claim contending, among other things, that:

"Claimant Flagstad is not a proper claimant under any circumstances, as he was not carried on the overtime call list on the claim date and would not have been used for wrecker service." (Underscoring added).

By letter dated October 30, 1972 the Organization refuted Carrier's contention as follows:

"Contrary to your statement, Carman Flagstad is the proper claimant inasmuch as he is a qualified wrecking engineer and has been used as such at Superior. Mr. Flagstad is on the proper established current posted overtime list. He has been called for wrecking engineer off this list in the past."
(Underscoring added).

The claim date involved in this dispute was April 27, 1972 - approximately six months earlier. Despite the Organization's assertion that Claimant was on a current overtime list, there is no evidence of any probative value to show that Claimant was entitled to be called on the claim date. Once the question of the proper Claimant is raised by Carrier, the Organization has the burden of showing that Claimant was the "employee involved". The failure to meet this burden compels a dismissal of the claim.

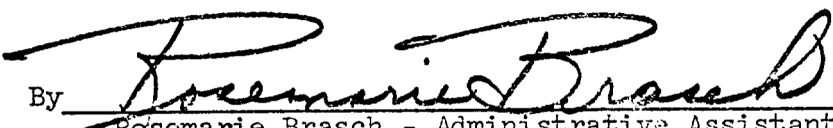
A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 16th day of May, 1975.

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G. M. YOUHN

*Noted
guy*

May 16

LABOR MEMBERS' DISSENT TO AWARD NO. 6861.

DOCKET NO. 6658

The majority stated the following as the reason for dismissing the claim:

"Once the question of the proper Claimant is raised by Carrier, the Organization has the burden of showing that Claimant was the 'Employee involved.' The failure to meet this burden compels a dismissal of the claim."

The opinion quoted above is not supported by Awards of this Division and other Divisions of the National Railroad Adjustment Board.

The Referee in panel discussion were furnished copies of Third Division Awards No. 1646, 3376, 9759 and Second Division Awards No. 1269 and 2214.

Referee Carter in Second Division Award No. 2214 stated in part:

"Carrier says Claimant was not entitled to the work because he had only point seniority at Fort Worth. The answer to this is that the violation deprived the Carmen of the work. The fact that there were no Carmen at Chickasha is not a defense that permits contract violation. Carrier is required to pay but once and will be protected against a second demand for the same violation. It is not a primary concern of the Carrier as to which of two or more Carmen the payment is made." (Emphasis ours)

Referee Blake stated in Third Division Award No. 1646:

"XXX. That the claim might have been urged in behalf of others having, as between themselves and North, a prior right to make it, is of no concern to the Carrier."

Referee Tipton stated in Third Division Award. No. 3376:

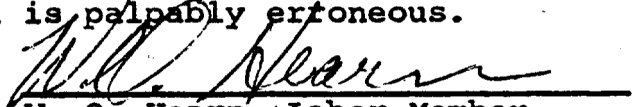
"XXX. But this claim is for a penalty and this Board has ruled that the petitioner may make the claim for compensation in the name of any employee, as it is only incident to the violation of the agreement."

While Third Division Award. No. 20190 was not furnished the Referee in the instant case, however, Referee Joseph A. Sickles stated:

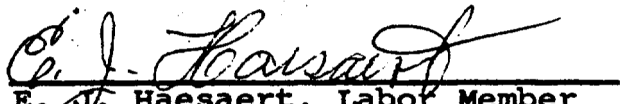
"This Board has noted on a number of occasions that the sole fact that another employee may have had a better right to a claim is of no concern to the Carrier, and does not relieve the Carrier of a violation of the Agreement when that right was not exercised. See for example Awards 19067 (Dugan), 18557 (Ritter), 17801 (Kabaker)."

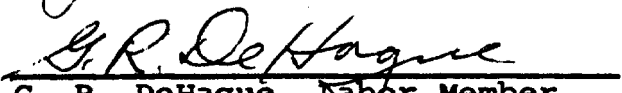
The majority has resurrected an issue that had been resolved by the several Divisions of the National Railroad Adjustment Board.

Therefore, Award No. 6861 is palpably erroneous.


W. O. Hearn, Labor Member


E. J. McDermott, Labor Member


E. J. Haesaert, Labor Member


G. R. DeHague, Labor Member


D. S. Anderson, Labor Member