Award No. 5169
Docket No. 4982
2-KCS-FO-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Harold M. Weston when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 3, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Firemen & Oilers)

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement, Laborer Allen E. West, employed at Beaumont, Texas, was denied and deprived of his seniority and attached service rights and compensation when the position of laborer at Beaumont, Texas, was abolished, resulting in the furlough of Laborer West effective September 22, 1964, and the work attached thereto was transferred and assigned to employes of other Crafts and Classes not holding seniority under the Firemen and Oilers Agreement.

2. That accordingly the Carrier be ordered to re-establish the position of laborer Allen E. West at Beaumont, Texas, and compensate him for all time lost effective with September 23, 1964.

EMPLOYES' STATEMENT OF FACTS: Immediately prior to Septem ber 22, 1964, the carrier maintained a shop force of 1 foreman, 3 carmen and 1 position of laborer at Beaumont, Texas. The 1 position of laborer was held by Allen E. West, hereinafter referred to as the claimant, who entered the service as such on September 9, 1953, remaining in continuous service as a Class C laborer at Beaumont up to and including September 22, 1964.

Accordingly, the claimant, by such employment and subsequent service, did establish a "Class C" laborers date of September 9, 1953, continuing to hold and accumulate such seniority to date under the specific terms of the current agreement governing this class of employes.

On September 18, 1964, bulletin notice was posted at Beaumont, Texas, reading as follows:

"All Concerned:

At the completion of the shift September 22, 1964, the job held by A. E. West is abolished.

S. E. Troegel"

resulting in the claimant being furloughed as of that date.

Claim denied."

Also see Second Division Awards 1596, 2059, 2215, 3136 and 3305 for similar findings.

As indicated previously herein, the firemen and oilers' agreement contains no classification of work rule. The scope rule does not describe the work covered by the agreement, but simply lists the job titles. Said rule reads in part:

> "These rules govern the hours of service, working conditions and rates of pay. * * *" (Job titles omitted.)

Claim should be denied for the following reasons:

1. No rule, practice, or probative evidence is cited by the employes in support of claim.

2. The work of cleaning cars, cleaning up around shop buildings and supplying diesel locomotives has never been contracted to any class or craft of employes exclusively, particularly laborers.

3. Continuous practice for more than 20 years of employes other than laborers performing work of the nature involved in this case does not support the Organization's contention that the exclusive right to the performance of said work rests exclusively with the class or craft of laborers.

4. Continuous practice, absence of complaints or protests and awards of this board sustain the carrier's position in this case.

All data contained herein are known or have been made known to representative of claimant by correspondence or in conference.

(Exhibits not reproduced.)

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 waived right of appearance at hearing thereon.

The gist of this claim is that Carrier breached its Agreement with Petitioner by using Carmen as well as their foreman to perform the work of the Laborer position at Beaumont, Texas, after it had been abolished on September 22, 1964. Prior to that date, the shop force at Beaumont consisted of a foreman, three carmen, and a laborer.

Carrier possesses authority to abolish positions and redistribute work, but it must do so within the framework of applicable agreements and with due regard to its contractual commitments. It is not at liberty to transfer work that belongs within the Agreement to positions outside its scope. The critical point is whether or not the duties in controversy actually belong to the abolished position, and the burden of proof in that regard rests on Petitioner. In the case of a position coming within well defined traditional craft lines, the situation is quite clear. The problem of proof is more difficult, however, in that shadowy area where work is capable of being performed by a number of different job classifications.

Petitioner has listed the duties it contends belong to the abolished position, and points out that Claimant has performed them for many years. It also emphasizes that the number of switch engines at Beaumont has been increased since September 22, 1964, and that Carrier rejected Petitioner's request for a joint check of the work performed at Beaumont since that date.

Carrier states that there has been no material increase in overtime or additions to the shop force at Beaumont since the Laborer position was abolished. It also maintains that the foreman and carman have always placed supplies on diesel locomotives as an incident to their regular work and that that is the only principal duty performed by Claimant that still remains.

We have been referred to no rule that is helpful to the claim. The Agreement contains no classification of work provision and its Scope Rule is general in form and content. The seniority rules pertain, of course, to highly important rights, but do not come into play until it is established that the disputed work belongs to the abolished position.

Viewing the record in its entirety, the Board does not find that the evidence establishes that the work in question belongs to the abolished position. It is for Petitioner to substantiate its claim, and mere contentions, references to suspicious circumstances and Carrier's failure to cooperate in a joint survey are not enough in this situation.

The claim must be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 25th day of May, 1967.

LABOR MEMBERS' DISSENT TO AWARD NO. 5169

Nowhere in the record can we find any real evidence that would remotely tend to sustain or justify the Majority's erroneous conclusion that the work in question did not belong to the abolished position. The evidence as ascertained in the record clearly establishes that the duties and work listed falls squarely within the scope of Rule 1 of the controlling agreement cited in the

record; is synonymous with the classes of employes set out therein; and is verbatim with Rule 17, the Seniority Rule.

The record is replete with indisputable evidence that claimant, the occupant of the abolished position, had been originally employed for and assigned to these specific duties and work as a Class C laborer for more than eleven years. That accordingly he established and accumulated seniority as such under the express provisions of Rule 17. The record firmly establishes that these same duties and work continued to exist in an amount commensurate with a full day's work following the abolishment of the position. Thus it becomes clear that the abolished position as owned by the claimant was founded on and owed its existence to these same specific duties and work for more than eleven years, and the majority is grievously in error to hold at this late date that the work in question does not belong to the abolished position.

Accordingly, we are compelled to conclude that the majority sought to avoid their responsibility in treating with the pertinent issue of "Seniority" and "rights to service" of the Claimant. This Division previously held in Award No. 2910, and we quote:

> "Seniority rights should not be so lightly overlooked. Seniority, properly established, is an increasing equity in a right to preference. It cannot be secured by gift or inherited, nor can it be taken away or cancelled without just cause. It is an asset immune from civil judgment, and a guard against discrimination, favoritism, or nepotism."

In Awards numbered 4312 and 4314 it was held:

> "While seniority does not guarantee permanent employment, it does, nevertheless, assure a worker of preference for jobs and work **if and when they are available.**" (Emphasis ours.)

In reviewing the record, it becomes abundantly clear that the duties and work in question belonged to the abolished position for more than eleven years, and that said abolished position and the work attached thereto, was owned and worked by the claimant for more than eleven years, endowing him with specific rights to such service. By no stretch of the imagination or contract construction can fueling, sanding, cleaning, and otherwise supplying locomotives be considered as "incidental" to Carmen's work.

The majority in arriving at their decision does great violence to the basic and fundamental principles of Seniority, attendant rights to service, and the Agreement as a whole.

The claim should have been sustained.

We dissent.

D. S. Anderson
E. J. McDermott
C. E. Bagwell
R. E. Stenzinger
O. L. Wertz

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