Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11173
SECOND DIVISION Docket No. 10749
2-DM&IR-EW-'87

The Second Division consisted of the regular members and in addition Referee Eckehard Muessig when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
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(Duluth, Missabe and Iron Range Railway Company

Dispute: Claim of Employes:

1. That the Duluth, Missabe and Iron Range Railway Company violated Rule 15G of the current Shopcraft Agreement and past policies and practices, set forth on the property of the railroad and accepted by this Organization and the Duluth, Missabe and Iron Range Railway Company, when it wrongfully assigned a Two Harbors Electrician to perform work on a computer run wheel lathe at the Proctor Car Shop, from July 11, 1983 to August 11, 1983.

2. That accordingly, the Duluth, Missabe and Iron Range Railway Company be ordered to pay Electrician David Dewsbury for 176 hours at the straight time rate of pay.

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 employes 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 Claimant herein is employed by the Carrier at its Proctor, Minnesota Maintenance Shop in the Electrician classification. The instant grievance arose after the Claimant was removed from his assignment which essentially consisted of working on a computer associated with a wheel lathe. The Carrier assigned another Electrician junior to the Claimant from its Two Harbor area dock facility to do the work. The Claimant contends that the work, in effect, is a temporary assignment and, in accordance with Rule 15(G) of the parties' Agreement, he was entitled to perform the work.

The Board notes at the outset that the essential facts from which this dispute arose are not in contention. However, arguments have been presented, primarily in the Submission of the Carrier, that were not brought forward on the property and, accordingly, these may not be considered in view of the long-established practice of this Board.

The parties in this dispute have a systemwide Seniority Agreement and we agree with the Carrier that assignment to a bulletined position in a specific Shop does not, as such, create a separate Seniority District. However, that is not the point that the Organization, from the outset of its Claim, has pursued. Specifically, the Organization cites portions of Rule 15(G) which it contends have been breached under the facts and circumstances of this Claim. We agree. While it is apparent that there are reasonable arguments on both sides of this issue, with respect to the construction of Rule 15(G), we conclude that the weight of the record properly before us supports the Organization. We have reached this conclusion primarily on the basis that the Carrier never substantively countered the Organization's arguments concerning its Rule 15(G) contentions on the property. Moreover, while there may be a difference between "a position" and "work" as argued by the Carrier, it has not substantively applied the distinction as to the application of Rule 15(G) to the facts and circumstances of this Claim. Clearly, the Carrier in this case utilized an Electrician from another Shop to do Electrician work. Absent another explanation, this would reasonably lead to a conclusion that there was more Electrician work in the Proctor Shop than the Electrician assigned to the Proctor facility could perform. After five days, the Claimant made an application for the position as provided by Rule 15(G). This Rule clearly recognizes "temporary service" and situations that such service or work would be of less than thirty (30) days and hence, need not be bulletined.

With respect to damages claimed, the Board is aware of and has considered the many arguments on both sides of this issue. Under the specific circumstances herein, and noting that the Claimant was not financially harmed, we hold with the Carrier and deny Part 2 of the Claim.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of February 1987.

CARRIER MEMBERS'
CONCURRING AND DISSENTING OPINION
TO
AWARD 11173, DOCKET 10749
(Referee Muessig)

We concur with the Majority's holding that Claimant was due no compensation since he was not financially harmed. We further concur with the Majority's holding that the parties have a systemwide seniority Agreement and that assignment to a bulletined position in a specific shop does not create a separate seniority district.

The Majority held:

> "...arguments have been presented, primarily in the Submission of the Carrier, that were not brought forward on the property and, accordingly, these may not be considered in view of the long-established practice of this Board."

Ordinarily, we would not find fault with such reasoning, but here the on-the-property record, particularly the December 22, 1983 declination letter signed by Carrier's Director of Personnel and Labor Relations, identified four distinct theories which were presented by the Claimant and the Organization, and all four were specifically responded to by the Carrier in such letter. The essential logic of rebuttal for each theory was made in the record as evidenced by the following excerpt from the above-mentioned December 22, 1983 letter which appeared as Employees' Exhibit J:

> "...Mr. Dewsbury is an electrician assigned to the Proctor Electric Shop, who takes issue with the Carrier's recent action in utilizing an electrician assigned at Two Harbors, to perform maintenance work at Proctor Car Shop.
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> "In this claim, Mr. Dewsbury implies that the Carrier was incorrect in the way the work was assigned in at least four ways. First, he implies that, because of an alleged historical practice, only electricians assigned to the Proctor Electric Shop may perform electrical work in the Proctor Car Shop. Second, he implies that the system

"seniority agreement was violated. Third, he alleges that he was arbitrarily disqualified from performing the work. Fourth, he contends that a temporary position existed for trouble-shooting the lathe computer, and that he was the senior applicant and should have been assigned under Rule 15.

"I will respond to these contentions in the order listed above. First, there is no agreement which guarantees that certain work within certain geographical boundaries must be performed by Proctor Electric Shop employees. The shop does not, in fact, have any special status under the contract; it is merely a convenient and efficient place to headquarter electricians. Being assigned there does not create a 'seniority district,' which in effect is what Mr. Dewsbury is suggesting.

"Second, since no prior right employees were furloughed during the time the work was performed, there was no violation of the system seniority agreement.

"Third, Mr. Dewsbury was not disqualified or discriminated against. It appears simply that he began a job, and another employee completed it. I am sure that happens every day, and I don't think it needs to be taken as disqualification or discrimination. I believe both employees held electrician positions, at the identical rate of pay. Under those circumstances, the carrier may decide which electrician to assign to which task on a given day.

"Fourth, there is a difference between 'a position' and 'work.' When Mr. Olson worked on the lathe control, he was working on his own regular position. He was performing work away from his headquarters, which is permitted under the rules, and it was work which is assignable to an electrician, the position he held." (Emphasis added)

Granted, in Carrier's Submission each point was further explained in detail, by examples and Award citations. To conclude that such procedure represents the use of "...arguments...that were not brought forward on the property..." amounts to a level of technicality which is new to our collective experience on the Second Division.

Secondly, the Majority condenses the claim to a Rule 15 (g) issue. This rule allows senior employees to express their preference for "new positions or vacancies" of less than thirty days but more than four days duration. The logic of the Award is that when Electrician "A" holds a position at Proctor, and Electrician "B" is temporarily sent there from another point (Two Harbors) to do work for, say ten days, there is an ipso facto "new position," and senior employee "A" may demand it.

Apparently the Majority places no importance on the fact that "A" and "B" hold identical Electrician positions, and that "B" was assigned to "temporary work away from home point or shop," under Rule 3 (d) which was cited in Carrier's declination letters dated September 8 and November 3, 1983, and in the General Chairman's rejection letter dated December 13, 1983. Evidently, the key to the Majority's reasoning is that the two Electricians were performing different items of work; thus if "A" was assembling batteries and "B" was cleaning light fixtures, "A" could claim the light fixture work if it was of more than four but less than thirty days' duration. Never mind that "A" and "B" already hold identical bulletined positions, the only difference between them being their assigned headquarter points.

What this Award does is ignore the time-honored distinction between "positions" and "work." The Majority equates the two, contrary to many prior Awards which hold that the Carrier decides who does what <u>work</u>, where two employees hold identical <u>positions</u>.

In this regard, it is interesting to note that in Claimant's August 12, 1983 letter he stated his complaint as follows:

> "...I was replaced by a junior electrician who is holding and still holds a bid position, across division lines, in Two Harbors, Minn."
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> * * * * *
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> "I understan (sic) it would be considered picking and choosing my own work had a junior employee who held a bulletined position in the Proctor Electric shop been assigned to this work. This is not the case as the employee assigned to this work continues to report to Two Harbors and drives daily, across division lines, to do this work which has been, until this case, the work of the Proctor Electric Shop."

Likewise, at Page 6 of its Submission the Organization acknowledged:

> "...An electrician cannot necessarily choose his assignment at a particular location, but can choose the location where he wishes to work, by the bidding process."

As evidenced by the Award, the Organization did not point to an Agreement provision prohibiting an Electrician headquartered at Two Harbors from performing work at Proctor. The Majority ignored the time-honored principle that except insofar as it has restricted itself by the Agreement, or as it may be limited by law, the assignment of work necessary for its operations lies within the Carrier's discretion.

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