Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11913
SECOND DIVISION Docket No. 11801
90-2-89-2-114

The Second Division consisted of the regular members and in addition Referee Donald E. Prover when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/Division of TCU
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(Northeast Illinois Regional Commuter Railroad Corporation

STATEMENT OF CLAIM:

1. That the Northeast Illinois Railroad Corporation be ordered to compensate Coach Cleaner Miguel Berrios for all time lost from September 16, 1988 through October 16, 1988 which resulted from his unjust suspension.

2. That the Northeast Illinois Railroad Corporation be ordered to make Coach Cleaner Miguel Berrios whole for all benefits he may have lost as result of his unjust suspension, such as vacation, seniority, insurance, as well as all other benefits which are a condition of employment.

3. That the Northeast Illinois Railroad Corporation be ordered to cease its violation of the controlling agreement wherein the carrier is substituting their unilateral Rule Q in place of proper Rule 14 contained in the Agreement.

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.

Claimant was regularly assigned as a Coach Cleaner at Western Avenue Coach Yard, with hours of 8:00 A.M. to 4:00 P.M. He was first employed on December 13, 1987.

On July 13, 1988, at about 8:10 A.M. there was an incident in the office of Division Manager, involving the Claimant, the Division Manager and the Shop Superintendent, following which the Claimant left NIRC property while still on duty.

On July 15, 1988, the Claimant was advised to attend a formal Hearing to develop facts and circumstances in connection with:

> "Charge 1 - Your alleged violation of the Northeast Illinois Railroad Corporation's Employee Conduct Rule N, Paragraphs 1 and 3 (6), which states, 'Courteous deportment is required of all employees in their dealings with the public, their subordinates and each other.' and 'Employees must not be: (6) Quarrelsome or otherwise vicious.' When on Wednesday, July 13, 1988, at approximately 8:10 a.m., you addressed Division Manager, G. A. Fuller, and Shop Superintendent - Car, T. N. Tancula, in an uncourteous and quarrelsome manner.
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> Charge 2 - Your alleged violation of the Northeast Illinois Railroad Corporation's Employee Conduct Rule Q, which states, 'Employees must report at the appointed time, devote themselves exclusively to their duties, must not absent themselves, nor exchange duties with, or substitute others in their place, without proper authority.' When on Wednesday, July 13, 1988, after approximately 8:10 a.m. you allegedly absented yourself from your assigned duties without proper authority...."

Hearing was held on September 8, 1988.

On September 16, 1988, the Claimant was informed he had been assessed a 10-day actual suspension for violation of Rule N and a 15-day actual suspension for violation of Rule Q, which activated a prior five-day deferred suspension, resulting in a total 30-day actual suspension. From our review of the Hearing we find it was conducted in a fair and impartial manner.

The Employees argue at great length that Carrier violated the Agreement by substituting Rule Q in place of Rule 14. Rule 14 reads as follows:

> "In case an employee is unavoidably kept from work, he will not be discriminated against. An employee detained from work on account of sickness or for any other good cause shall notify the Carrier as early as possible."

In comparing the two Rules we find no conflict between them. While Rule Q requires employees to report at the appointed time and not absent themselves, Rule 14 contains exceptions to these requirements where there is good cause. We do not consider the Employees argument in this case to be well founded. See Award 3 of PLB No. 4882.

The Employees also argue that the Claimant was not guilty and that he was unjustly dealt with. From our review of the Hearing (152 pages of testimony) we have concluded that the Claimant was guilty of the charges. However, we feel that there are circumstances surrounding this case that requires us to address in detail the Employees argument that the Claimant was unjustly dealt with.

On July 11 the Claimant returned to service following an on-duty injury. It was his understanding from a discussion he had with his doctor that he was to do work of a light duty nature. On July 11 and 12 for one reason or another he performed services of a light duty nature, leading him to believe this was his medical work status. Carrier officials were of the understanding the Claimant could perform his regular duties. On July 13 upon reporting for work the Claimant was informed by his boss that he was to perform the regular duties of his assignment. The Claimant protested that he should still be performing light duty work. Subsequently he went to the Division Manager's office where a heated discussion took place with the Division Manager and Shop Superintendent regarding his work status. This discussion lasted for five minutes. Testimony given at the Hearing reveals that at no time did the Claimant make threats of bodily harm, swear or engage in name calling. While it is true the Claimant raised his voice it was done to vehemently protest the change in his work status. Certainly an employee who is returning to service from an injury is going to be unduly concerned and excited when he is told he is to do heavy duty work when he understands he is to do light duty work. Following the discussion the Claimant left the property and went to the Clinic to see the doctor that had approved his return to service on July 11. When the Claimant returned to the property one hour and twenty minutes later the previous medical restrictions had been changed and he was placed on light duty and remained in that status until July 19.

It is our conclusion that the Claimant in this case was unjustly dealt with. Our conclusion is based primarily on the fact that the Claimant's argument was sustained, i.e., it was intended by his doctor that when he returned to work on July 11 he was to be restricted to light duty. This is borne out by the fact that the Claimant, when he returned to work on July 13 (day of the incident), performed light duty work for the remainder of the day and for several days thereafter. The decision in this case is not to be construed in any manner that this Board approved of employees being uncourteous and quarrelsome with their superiors or with employees absenting themselves from duty without permission. However, with every rule there are exceptions. We believe this case to be an exception. We believe this incident could have been prevented from getting out of hand had the Carrier officials involved simply sat down and called the Clinic to clarify the Claimant's status. Their do-nothing action in this respect left the Claimant with little or no choice but to take matters into his own hands. As it turned out the Carrier is fortunate that he did. Otherwise if he had not gone to the Clinic but rather knuckled down to his superiors he could have been injured again doing heavy duty work when in reality he was supposed to be doing light duty work.

For the reasons stated above this Claim will be sustained to the extent that the Claimant shall be compensated for wages lost during period of suspension involved in these charges.

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 1st day of August 1990.

CARRIER MEMBERS' DISSENT
TO
AWARD 11913, DOCKET 11801
(Referee Prover)

It is self-evident in this case that Claimant did leave the property without permission and that he was quarrelsome. The Majority concluded at page 3 of the Award:

"...that Claimant was guilty of the charges."

Despite that finding, the Majority mitigates away ALL of the discipline because Claimant did not,

> "...make threats of bodily harm, swear or engage in name calling."

and that,

> "...this incident could have been prevented from getting out of hand had the Carrier officials involved simply sat down and called the Clinic to clarify Claimant's status."

The facts of record substantiate that Claimants' July 11, 1988 report from the Clinic was that he could work with the following limitation - "No heavy lifting 50 lbs. maximum." Coach cleaner duties have a maximum weight lifting requirement of 30 lbs. Claimant was specifically advised at the time and such is unrebutted in the record. For all intents and purposes, Claimant was medically cleared to perform all normal coach cleaner duties. Even the second medical report that Claimant secured when he left the property without permission on July 13th stated "No heavy lifting 35 lbs maximum."

The Majority's finding that it was "fortunate" that Claimant did violate the rules since Claimant, "could have been injured again..." manifestly ignores the facts of record. The record in

this case clearly substantiates that Claimant was NOT BEING INSTRUCTED TO PERFORM ANY WORK FOR WHICH HE WAS NOT PHYSICALLY QUALIFIED.

In view of the foregoing and the MAJORITY'S CONCLUSION THAT CLAIMANT WAS GUILTY, the award of wage loss here is neither justified nor is it supported by the record.

We Dissent.

P. V. VARGA

M. W. FINGERHUT

R. L. HICKS

M. C. LESNIK

J. E. YOST

CARRIER MEMBERS' DISSENT
TO
AWARDS 12122 - 12130, DOCKETS 11905, 11913, 11914,
11934, 11936, 11990, 12037, 12116, 12117
(Referee Fletcher)

In 1986, the Contracting Parties entered into a National Agreement providing for a specific rate of pay for those involved in Intermodal Service. The purpose for negotiating such a provision was to enable the railroads to compete with trucks and other modes of transportation handling Intermodal traffic. It was never the intent of the contracting parties that such ability to compete with other modes of transportation would fluctuate on a day to day basis but was to provide a level and stable platform from which the railroads could confront the other transportation modes.

In these cases, the Majority has correctly found that Barstow, California, one of nine locations on this railroad performing Intermodal work, was covered by Section 1(b) of Article IV of the November 19, 1986 Agreement. All of the Claimants held positions that were engaged in work in connection with Intermodal equipment and they had been compensated in accordance with Section 2 of Article IV almost two years prior to the filing of the first case here involving December, 1988. The Majority also properly concluded that the language, "preponderantly engaged" does not, "limit employees such as Claimants to work exclusively in connection with intermodal service."

The only issue in these cases was:

> "...at what point is the Carman no longer working on a position 'preponderantly engaged in work in connection with the operation of intermodal facilities.'"

While the Majority states as a fact that:

"The Agreement gives us no guidance..."

as to how to evaluate "preponderantly engaged" it has nevertheless concluded that such is to be done on a daily basis. This conclusion is wrong for the following reasons.

First, as noted above, there is NO CONTRACTUAL BASIS for such a conclusion. The positions involved were bulletined and were awarded as INTERMODAL POSITIONS having a regular five day work week. As the Majority has noted, "Unless it is demonstrated the work on a particular intermodal position is not somewhat consistent..." (Emphasis added), said position is an intermodal position compensated at the intermodal rate. Therefore, in order to assert entitlement to other than the intermodal rate, it must be demonstrated that the work of a position is sufficiently erratic to warrant it NOT being included under the rubric of "preponderantly engaged." In these cases there is no evidence of any position being shown as being such an erratic position that it was not entitled to be identified as an intermodal position.

Furthermore, the Majority's conclusion that, "when more than half the work day...is spent in connection with intermodal service," identifies an intermodal position, does severe violence to the concept of assigning positions by bulletin in this industry. One example will prove the point. An intermodal worker who spends 3 1/2 hours each work day of his assignment in other than intermodal service is an intermodal worker since, "more than half the work day" is in intermodal service. However, an individual who

spends the same amount of time on non-intermodal work but only on Monday and Tuesday of the work week is not an intermodal worker on two days of his work week. The same time, effort and work is expended, yet there are two different results. Such is not what the Parties intended and such action certainly does not provide a stable means to compete against the other modes of transportation.

Secondly, on the assumption that these nine claims represent the actual incidence of intermodal workers performing non-intermodal work at this location, we have a total of 51 dates consuming 587 hours, 40 minutes in just over 48 weeks (December 12, 1988 - November 14, 1989 - 240 work days). If just one Carman worked 3 1/2 hours each work day during these same 48 weeks in non-intermodal work he would have expended 840 hours in non-intermodal work for which he would be compensated only at the intermodal rate. It just does not make any rational sense that an individual could work 43% more than the total represented in these nine claims on non-intermodal work and be within the guidelines of these Awards. Yet, these multiple Claimants working far less hours in non-intermodal work are found here to be entitled to the other than intermodal rate.

In Award 12122, involving the largest number of Claimants (13), the largest number of dates claimed (18) and the most time (290 hours) over a six week period (December 12, 1988 - January 20, 1989) we find that the 290 hours claimed is less that 16% of the time worked by these Claimants (13 Claimants x 8 hours x 18 dates = 1872 hours). If we look at the time worked by these same 13

Claimants over the six week claim period (13 Claimants x 8 hours x 5 days/week x 6 weeks = 3120 hours) the total claimed is less than 10% of the time worked. By any calculation, other than on a daily basis, it is self-evident that Claimants were "preponderantly engaged" in intermodal work and were so engaged not just the majority of the time but the vast majority of time employed. Had the Parties desired to require that the determination of the status of the position being intermodal or not to be made on a daily basis it would have been a simple matter to have so stipulated. However, as the Majority has properly noted, there is no Agreement provision that supports such a conclusion.

Third, the Majority itself has noted the lack of contractual basis for making daily determinations when it acknowledges the need to provide an exception:

> "The Board recognizes that there may be circumstances, due to factors such as traffic patterns, when it is appropriate to measure the work over a somewhat longer period of time, e.g., a work week."

Obviously, the recognition, "that there may be circumstances" in which a daily determination would not apply, upholds and confirms the fact that there is no contractual provision to support the conclusion reached in these Awards. Furthermore, what are the traffic patterns that would entitle the Carrier to, "measure the work over a somewhat longer period of time..."? What other circumstances might be "appropriate"? To acknowledge the need for exceptions warrants the conclusion that an evaluation on a daily basis was not the intent of the Parties in negotiating Article IV.

The result made in this matter is a disposition made on perceived equity and not on any contractual support.

In Award 16 of PLB 4170, involving the application of the intermodal rate, we find the following:

> "If Claimants' positions are not primarily in intermodal service, they are not subject to Article IV. In resolving this dispute, we can consider only the evidence presented to us. The Carrier has furnished a computer generated report for the fourth quarter of 1988 which shows the number of man hours charged to various functions for each intermodal employee at Inman Yard. According to this report, Claimant Bailey worked 479.7 hours in intermodal equipment repair and 28.3 hours in shop maintenance. Claimant Tatum worked 388.7 hours in intermodal equipment repair and 8.8 hours in ship maintenance....The Organization, on the other hand, has submitted bulletins describing the jobs in question. Because maintaining pig cranes is only one of three duties listed on the bulletin, the Organization concludes this work constitutes only one-third of the job. In light of the Carrier's more precise time records, we cannot accept the Organizations's conclusion. Based upon the Carrier's records, it is evident that Claimants' jobs are primarily in intermodal service." (Emphasis added)

Here, the review was over a thirteen week period; not daily.

Again, there is no support either in Article IV of the November 19, 1986 Agreement or in Letter No. 3 for the conclusion that bulletined and assigned Intermodal positions are to be reevaluated and reclassified on a daily basis.

The Majority, in support of its conclusion has noted that this Board historically, "...has examined the nature of an employee's work on a daily basis" and that there is nothing in the 1986 Agreement that would change that view. However, such a conclusion can only be reached if the basic purpose of the Intermodal provisions are ignored. No railroad can compete with other less

costly transportation modes when its ability to compete is restricted by an artificially imposed barrier.

The Majority also relies on rules 20 and 38 to support its position of daily review. However, Rule 20 applies to the rate of pay for the filling of vacancies and there is no dispute that these cases DO NOT INVOLVE THE FILLING OF A VACANCY. It is a fact of record that the Claimants were assigned at the time to intermodal positions by bulletin and assignment. There was no issue raised concerning the filling of vacancies. And certainly there is no dispute that Claimants properly could be required to perform non-intermodal work so long as they were "preponderantly engaged" in intermodal work. Thus, there were no other positions nor were there any vacancies to be filled. Concerning Rule 38, it was NEVER raised on the property but was first raised by the Organization in their Submission to this Board. Even though such argument should have been excluded as being in violation of this Board's Circular No. 1, the fact is that the parties by agreement in that rule did make a specific contract provision, detailing when and how there would be a change in the rate paid for welding. The Majority has noted the fact here that there is NO SUCH RULE PROVISION in Article IV.

Finally, it was the Organization that asserted a violation of Article IV on the property. Thus, it was the Organization's burden to prove with substantial evidence that the National Agreement adopted on November 19, 1986, DID PROVIDE for the application of the intermodal rate to be made on a daily basis. The Majority has

correctly concluded that the National Agreement DOES NOT contain such a provision and in fact, the Agreement provides NO GUIDANCE in this regard. The Organization's claims should have been denied on their failure to support their claims with evidence. Whatever the Parties meant by the term "preponderantly engaged" it is clear on these records that Claimants, at all times relevant, were "preponderantly engaged" in intermodal service and it was contractually proper to compensate them at the intermodal rate.

We dissent.

P. V. VARGA

M. W. FINGERHUT

R. L. HICKS

M. C. LESNIK

J. E. YOST