Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11936
SECOND DIVISION Docket No. 11684-I
90-2-88-2-171

The Second Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (G. W. Darnell & D. G. Pendleton, P. K. Stewart
(
(Norfolk and Western Railway Company

STATEMENT OF CLAIM:

Claim of Carmen G. W. Darnell, D. G. Pendleton and P. K. Stewart that the carrier violated the controlling agreement, and in particular Rule 30, when they allowed apprentices, upon completion of their respective apprenticeship, to back date their journeyman seniority date ahead of claimants on the seniority roster; and accordingly, the carrier be ordered to adjust the seniority roster wherein the apprentices would have the same seniority date as claimants, but be placed just below them on said roster. Roanoke, VA N & W.

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.

Claimants, journeyman Carmen, contend that the collective bargaining Agreement was violated when certain employees, upon completion of their Carman apprenticeship, were placed above them on the seniority roster. At the center of their complaint is the application of the July 10, 1980, Memorandum of Agreement on Apprenticeship Training. This Agreement provides that upon completion of a supervised training program, apprentices and helpers would be given 732 days retroactive seniority. The retroactive seniority feature could not be used to establish a date ahead of any journeyman employed on July 10, 1980. This proscription, though, by published interpretation, did not protect Carmen transferring from one point to another.

Between September 1, 1982 and October 26, 1982, five apprentices completed their training at Shaffers Crossing. All were granted 732 days retroactive seniority. This placed them ahead of Claimants who, when furloughed at Shaffers Crossing in early 1975, transferred to Roanoke Shops. In September 1975, Claimants were recalled at Shaffers Crossing, but declined, opting instead to remain at Roanoke. This resulted in a forfeiture of their Shaffers Crossing point seniority. In 1982 Claimants were furloughed at Roanoke. They displaced at Shaffers Crossing and established new seniority dates of August 2, 1982 at that point.

Carrier contends that the Claim is procedurally defective as well as lacking in merit. We agree on both points. There is no question that the time limits of the applicable Agreement were breached in the progression of this matter to the Board. However, what is perhaps more critical, is that the Claim is completely lacking in merit. From our review, the seniority provisions of the collective bargaining Agreement, the terms of the July 10, 1980 apprenticeship Agreement and the accepted interpretation were correctly applied in this instance. The fact that Claimants are displeased with this correct application does not vest this Board with authority to order modifications.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of November 1990.

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