Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 12117
SECOND DIVISION Docket No. 12030
91-2-90-2-266

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

PARTIES TO DISPUTE: (Sheet Metal Workers International Association
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(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

1. The Carrier violated the provisions of the current controlling agreement when they improperly withheld Sheet Metal Worker C. E. Brown from service June 9, 1989 pending the results of an investigation.

2. The Carrier violated the provisions of the current controlling agreement when they improperly dismissed Sheet Metal Worker C. E. Brown from service effective July 31, 1989 as a result of an investigation conducted July 7, 1989.

3. That accordingly, the Carrier be required to compensate Mr. Brown for all time lost in addition to an amount of 6% per annum compounded annually; remove impairment of his seniority, if any; make Mr. Brown whole for all vacation rights; reimburse Mr. Brown and/or his dependents for all medical and dental expenses incurred while Mr. Brown was improperly with held from service; pay Mr. Brown's estate whatever benefits he has accrued with regard to life insurance for all time he was improperly held out of service; pay Mr. Brown for all contractual holidays; pay Mr. Brown for all jury duties and all other contractual benefits to which he is entitled.

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, a Sheetmetal Worker, with a seniority date of May 28, 1975, was dismissed on July 31, 1989, as a result of an Investigation held on June 19, 1989, for violation of Safety Rules and also using vicious and abusive language toward management personnel.

The Carrier argued there was no dispute over the occurrence. The Claimant was riding a Carrier ATV and was observed by two Supervisors. The Carrier appropriately investigated this incident utilizing the appropriate channels and the Claimant stormed into the Assistant Superintendent's office and used abusive language toward a General Foreman. The Claimant's story was that he was talking to individuals regarding safety issues and a fishing trip, and even if the Claimant is to be believed, this was not work related. The Claimant was obviously aware that he was in trouble, and this type of language and abusive treatment cannot be condoned. When taking into account the Claimant's past record, the discipline is appropriate considering the fact that the Claimant was not working and lied about his activity.

It is the Organization's contention that this is an improper dismissal, and the Organization raised several procedural issues. The Claimant was not given clear notice of which Rules he was charged with and, therefore, the Organization was at a disadvantage. Also, the Claimant was withheld from service, and this was an unwarranted withholding. The Investigation was improperly held in that the Claimant was pre-judged guilty by the Hearing Officer and failed to properly rule on objections. With respect to the merits of the case, there were no threats to any individuals, the Claimant did not engage in any threatening behavior in general, and even if the Carrier's case were proven, the discipline is excessive since the prior record may have been considered by the Carrier, but it is not part of the record. In any event there is a consent decree which prohibits considering disciplinary activity through 1980.

Upon complete review of the evidence, the Board finds that the Organization has not proven any procedural defects that would preclude the Board from considering the merits of this case. It was clear to both the Organization and the Claimant as to the circumstances of the incident which gave rise to the Investigation held on July 19, 1989. Whether or not it was proper to withhold the Claimant from service is permitted by Rule 35 which also provides for compensation if exonerated, and, therefore, it does not preclude a review of the merits. A review of the transcript shows that the Organization was able to make lengthy and substantial arguments on behalf of the Claimant. The Claimant was given a full opportunity to present his case and make a complete record, and the alleged failures and predisposition by the Hearing Officer were not sufficiently clear to overturn the decision based on a procedural argument.

Regarding the merits of the case, the Board finds that the Carrier did prove the essential elements of the case in that the Claimant did not sufficiently explain his use of the ATV and more importantly his unseemly behavior in the Assistant Superintendent's office subsequent to his being observed utilizing the ATV.

Regarding the appropriateness of the penalty, this Board does not have any jurisdiction over the consent decree, which covers disciplinary actions through 1980; however, the Claimant was suspended for 30 days on August 3, 1987, for violations of Rules 564 and 576 of the controlling Agreement. Even considering this prior 30 day suspension the Claimant is charged with violations that do not warrant dismissal. The Board finds that dismissal

in this case in unwarranted and an abuse of discretion on the part of the Carrier. The Board finds that the appropriate penalty in this case would be to return the Claimant to service with seniority rights unimpaired but without back pay. All other Claims are denied. The Board admonishes the Claimant to conduct himself properly in the future.

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 21st day of August 1991.

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