

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Form 1

Award No. 12543
Docket No. 12304-T
93-2-91-2-93

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

(International Brotherhood of Electrical
Workers
PARTIES TO DISPUTE: (
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

- "1. That in violation of the governing Agreement, Rules 28 and 76 in particular, the Burlington Northern Railroad Company arbitrarily assigned a Machinist, acting as a Supervisor, to perform work belonging to the Electrical Craft.
2. That accordingly the Burlington Northern Railroad Company should be ordered to compensate Mechanical Department Electrician C.L. Zost of Galesburg, Illinois in the amount of four (4) hours at the punitive 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 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.

As Third Party in interest, The International Association of Machinist and Aerospace Workers; The Sheet Metal Workers International Association; The Brotherhood of Locomotive Engineers; The Brotherhood of Maintenance of Way Employees; and The International Brotherhood of Boilermakers and Blacksmiths, were advised of the pendency of this dispute. The International Association of Machinists and Aerospace Workers; The Brotherhood of Locomotive Engineers, The Sheet Metal Workers International

Association, and the International Brotherhood of Boilermakers and Blacksmiths filed responses with the Board. The Brotherhood of Maintenance of Way Employees chose not to file a submission with the Board.

On December 23, 1989, the on-duty Electrician at Carrier's Galesburg Diesel Facility was dispatched to Rome, Iowa to work on a locomotive that was blocking a main line. The Electrician left the Diesel Facility at 4:15 PM and did not return until 9:15 PM. While on the road assignment no other Electricians were on duty at Galesburg and none were called in. During the absence of the Electrician, several tasks he would have normally completed were performed by the on-duty Foreman, a Machinist temporarily working that assignment. These tasks involved placing a Radio Pack on the lead unit of Train No. 141, called for service at 5:00 PM, changing Head End Monitors on Trains 160 and 65 WD, called for 7:15 PM and 7:30 PM. The Organization contends that this work should have been performed by an Electrician and filed a claim for an available Electrician who was not on duty at the time.

Carrier defends against payment of the Claim on a variety of grounds. First, it argues that the Organization failed to utilize available procedures to settle "the underlying craft jurisdictional controversy with the organization's representing other employees who routinely perform work of the type in question; that is, Machinists, Sheet Metal Workers, Brotherhood of Maintenance of Way Employees and Blacksmith and Boilermakers." Second, it maintains that the Claim has no merit because Electrician's do not possess an exclusive right to perform the work involved. Third, it notes that the tasks were simple, did not require any special skills and collectively took less than five minutes to complete. Fourth, it argues that any monetary penalty would be akin to assessment of damages and that the Board does not possess authority to assess penalties nor employ sanctions.

With regard to Carrier's first defense, an allegation that the Organization failed to follow procedures of Rule 93 Jurisdiction, reading:

"Any controversies as to craft jurisdiction arising between two or more of the organization's parties to this agreement shall first be settled by the contesting organizations, and existing practices shall be continued without penalty until and when the Carrier has been properly notified and has had reasonable opportunity to reach an understanding with the organizations involved."

The Board concludes that Carrier is simply attempting to obfuscate the issue. The work complained of was not performed by an employee assigned under one of the Shop Craft Agreements subject to Rule 93. It was performed by an employee assigned as a Foreman at the time. The fact that the individual working as a Foreman was doing so on a temporary basis and had been recruited from the rolls of the Machinist Craft does not throw the matter within the confines of Rule 93. The Claim is simply an allegation that a supervisor was performing Craft work and Carrier is not privileged to rely on Rule 93 to make it a jurisdictional dispute between Crafts.

Even if this single instance of Electrician's claiming that their work was performed by strangers to its Craft, involved members of other Craft's, rather than an employee temporarily assigned as a supervisor, the case would still not fall within the purview of Rule 93. In this regard see Award 7200 of this Division, wherein the Board concluded:

"... A jurisdictional dispute normally deals with the introduction of a new operation or procedure or a continuing dispute between crafts where classification of work rules either do not refer specifically to the work in question or where there is reasonable grounds to show that two or more rules cover the work involved. A single instance of assignment of work to one craft, where it is clearly shown that it belongs to another craft, can hardly be relegated to the jurisdictional dispute procedure. Rather, such specific and provable miss assignment may surely yield to the regular dispute procedure and/or resolution of this Board. To hold otherwise would mean that a Carrier could assign any work at any time to any craft without being responsible for damages for such error. As examples, see Awards Nos. 4547 (William), 4725 (Johnson), 5726 (Dorsey) and 6762 (Eischen)."

Carrier's second point, the work was not exclusive to that of the Electricians Craft, is found to be without merit. The Galesburg Diesel Facility is a location where members of the Electrician's Craft are assigned. Electrician's would normally be on duty in the facility at the time the work was accomplished. Electrician's would normally perform the tasks performed by the Foreman. In such circumstances allegations and/or tests of exclusivity are misplaced because the tasks performed by the

Foreman were clearly those normally and routinely performed by Electricians. Carrier has not offered a scintilla of evidence that anyone but Electricians have performed the tasks involved in this Claim at the Galesburg Diesel Facility at any other time.

Carrier's third point, that the tasks were simple, one being no different than plugging in a radio or television in ones home, is disputed by the Organization. It argues that calibration functions must be performed and that certain test are required to determine if the equipment is functioning properly. While the tasks may be characterized as requiring less skill than other Electrician's work, the Board concludes that they do involve more responsibility than suggested by Carrier. In any event, the work was normally performed by Electrician's and even though it may require less skill than other work of the Craft, Carrier is not licensed to have it performed by supervisors simply for this reason.

Carrier's final point, contending that the Board is without authority to assess penalties or employ sanctions is perplexing. Carrier seems to have based this on the decision in Brotherhood of Railroad Trainmen v. Denver and R.G.W.R. Company, (10th Cir.) 338 F.2d 407 (1964). The decision in that case was short lived. Two years after that case was decided the same court in a dispute involving the same Organization and Carrier, Brotherhood of Railroad Trainmen v. Denver and R.G.W. Company, (10th Cir.) 370 F.2d 866 (1966), effectively negated its earlier holdings. These two 10th Circuit decision, which have become to be known in the Industry as DRGW-I and DRGW-II, have been exhaustively reviewed in a number of other district and appeal court decisions as well as in Awards of all Divisions of this Board. In this regard see Third Division Award 15689, which has been frequently cited.

The Claim of the Organization has merit. It will be sustained as presented.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: 
Nancy J. Dever - Secretary to the Board

Dated at Chicago, Illinois, this 21st day of July 1993.

CARRIER MEMBERS' DISSENT
TO
AWARD 12543, DOCKET 12304-T
(Referee Fletcher)

Dissent to this decision is required because it has ignored the facts of record and the precedent of this Board.

First, the Majority finds that there is no jurisdictional matter because "a supervisor was performing Craft work." This conclusion is predicated on the Majority's interpretation of Rule 93, to wit, a supervising employee and his representing Organization are not "parties to this agreement." However, while the question of whether a mechanical supervisor is covered under the Shop Crafts agreement was NEVER raised in the on-property handling or before this Board, the fact is that this Board issued Third Party Notice to several Organizations including Shop Craft Organizations, i.e., Machinists, Sheet Metal Workers and Boilermakers, Blacksmiths. As is noted on pages 1-2 of Award 12543, all the Organizations except the BMW made responses. One of the responses, from the Boilermakers, Blacksmiths clearly advised the Board:

"...that the work in question is not exclusive to the International Brotherhood of Electrical Workers, is performed by Boilermakers on the Burlington Northern Railroad..."

In Carrier's initial denial of the claim on the property, it was unrefuted that:

"Furthermore, members of various crafts have handled these devices in the past on this property, a task which requires less than 10 minutes to perform.

Attached is a copy of Public Law Board 4260 verifying the fact that engineers have performed this function in the performance of their duties."

Award 13 of PLB 4260 stated, in part:

"The Position of Employees in this case states: 'While this Committee agrees that engineers should and will accept responsibility for operating the pulse electronic train link device when the locomotive is so equipped, it is not the engineer's responsibility to install and/or remove the device from the locomotive cab.' The Employees rely upon BLE Agreement Article 2, Section A and Article 17, Section A.

* * *

The work in question is compatible with the performance of the Engineers' duties. Much of the same information displayed by the device was previously furnished to an engineer via radio by a Conductor or Rear Brakeman when they were stationed at the rear of a train. The black box is simply a new method of supplying the Engineer with information which is vital to proper, safe and more efficient train handling techniques. The device facilitates the Engineer's routine duties. Clearly, the work in question is incidental to the Engineer's duties.

Absent an agreement rule to the contrary, Engineers may properly perform duties that are incidental to their routine duties as an engineer, without additional compensation. See Public Law Board 2789, BLE v. N&W, Award 20 (Van Wart); also, Public Law Board 2341, BLE v. N&W, Award 15 (Zumas)."

Thus the Board had evidence before it that at least two other Organizations handled these devices.

Furthermore, unlike Second Division 7200, cited by the Majority, this case does not involve a "...single instance of assignment of work to one craft where it is clearly shown that it belongs to another craft..." (Emphasis added)

Carrier's action is no attempt at obfuscation but the legitimate invocation of Rule 93. Organization had argued that the handling of such radio packs was exclusively reserved to them by the language of Rule 76. And the record substantiates that other crafts have handled these radio packs on locomotives.

This Board has uniformly found that the determination on intercraft jurisdiction is a matter contractually reserved to on the property handling and not this Board. See Second Division Awards 6962, 7482, 7963, 11931, 12223 and 12255 involving these same parties under Rule 93. Also see Second Division Awards 11486, 11837, 11933, 11964, 11965, 11966, 12086, 12232, 12304, 12376, 12482 and 12485 in which this Board has decided that failure to apply contractual procedures requires that the matter be dismissed by the Board.

In dismissing the claim in Award 11837 (3/90), the Board stated:

"Resort to such procedures are mandatory in jurisdictional claims, accordingly, we are left with no

alternative but to dismiss the Claim before us as procedurally defective. See Second Division Awards 11472 and 11486."

Secondly, the Majority concluded that:

"...the tasks performed by the Foreman were clearly those normally and routinely performed by Electricians."

There is no support for this statement. Rule 76, Organization's Classification of Work rule, does not reserve this work. In addition to Award 13 of PLB 4260 (BLE), First Division Award 24150 (UTU) involving this Carrier, PLB 2789 Award 20, PLB 2341 Award 15, PLB 5093 Award 11 and Second Division Awards 11922 (EW), 12238 (EW), 12239 (EW), 12458 (EW) and 12476 (EW) have also dealt with this matter. In Award 12238 (1/92), a dispute involving very similar facts to that in Award 12543, we find the following:

"The basic facts of this case are set forth as follows: On June 4, 1988, Carrier assigned a Machinist to apply the Rear Display Unit (RDU) to Locomotive 6638. The Machinist removed the 'RDU' from another nearby locomotive and placed same onto Locomotive 6638 which was being dispatched.

* * *

Carrier contends that it would indeed be ludicrous if train operations had to be halted because an Electrician who was not available needed to be called to change out an RDU. It points out that said work took only five minutes and did not require technical skills. It maintains that other employees, including Road Foremen performed this work on a routine basis and referenced several Awards with respect to the De Minimis Rule's application. (See Second Division Awards 9155, 7587, 7529, 10369, and Third Division Award 26631.)

In considering this case, the Board concurs with Carrier's position vis a vis the De Minimis Principle's application. In Second Division Award 9155 the Board upheld the De Minimis Principle's application where the work involving the placement of a radio in a locomotive took five minutes. The Board held:

'The record of this case reveals that the work performed in this instance was by all standards de minimis. As such, it does not constitute a scope violation that would warrant a four-hour claim be paid. See Second

Division Awards 7587 (Eischen) and 7529
(Scearce).'

In Third Division Award 26671 involving the changing out of a radio power pack which was claimed to be Signalmen's work the Third Division held in pertinent part:

'The work was of a de minimis variety - even if only for a 'few minutes' as stipulated by Carrier, and does not warrant delays in dispatching trains and an overtime call.'

Since the instant work took only five minutes and was performed to avoid a train delay, the Board finds the above referenced Awards applicable here. The simplicity of the task, the limited skill involved and the brief time to perform this work brings it within the defining parameters of the De Minimis Principle." (Emphasis added)

Award 12458 (10/92):

"On June 25, 1989 the Carrier assigned a Supervisor to remove a two-way radio from Locomotive 6034 and to apply the radio to Locomotive 6109 as its Locomotive repair facilities located at Cumberland, Maryland.

* * *

In companion cases involving the same parties and virtually the same issues, the board denied the claims, partially on the grounds that the contested work, which also included an RDU unit as well as a Track Star Radio, was de minimus in nature. See Second Division Awards 12238 and 12239. In the present case the Board finds nothing in the facts and circumstances and the arguments of the parties to justify a different conclusion." (Emphasis added)

Award 12476 (11/92):

"The events which led to the filing of the instant claim are not in dispute. The Carrier assigned a Machinist to apply a Rear Display Unit (RDU) and Track Star Radio to Locomotive 6068 at its locomotive repair facilities located at Cumberland, Maryland.

* * *

The RDU is a receiving device, similar to size and shape to a radio. It displays a signal from the rear car, which serves to communicate air pressure data, to the Engineer.

The Track Star Radio is a voice communication device located in the lead locomotive. the purpose of the radio is to have voice contact, for example, with the Dispatcher, Brakeman and tower personnel.

Both the RDU and the Track Star were swapped from one locomotive to another locomotive, namely, Locomotive 6068. Both the RDU and the radio slide into a clean cab mounting rack that had been installed permanently on the locomotive console to hold the RDU and the two-way radio. The mounting rack contains the connectors for the power and antennae of the RDU and radio. The radio slides into the top of the rack and the RDU slides into the rack, directly under the radio.

Upon sliding the radio into the mounting rack, the power cable and the antenna cable flowing from the rack are connected. The poser supply is connected by an amphenol connector and a coaxial cable connector lead [also flowing from the mounting rack] that connects the radio to the antenna.

The RDU also has an antenna cable and a power cable in addition to an axle connector. Bayonet connectors are used on standard units for the purpose of connecting the system.

* * *

The work involved in changing out radios and RDU's is routine in nature and requires no particular skill of any craft. The work consists of the uncomplicated task involving the placement or removal of the equipment, and the plugging in or unplugging of the equipment from the mounting rack on the locomotive console. The work takes no more than ten minutes to perform. Thus, 'the simplicity of the task, the limited skill involved and the brief time to perform this work brings it within the defining parameters of the De Minimus Principle.' Second Division Awards 12238, 12239." (Emphasis added)

It should be noted, that the Majority's statement of facts on page 2 of the Award stated:

"...the on-duty Electrician...was dispatched...to work on a locomotive that was blocking the main line."

There is no dispute that this action was proper. Compare these facts with Award 12238 quoted at page 3 hereof. Organization has asserted and the Majority in this matter has swallowed the bald assertion that the supervisor's handling of the radio packs was work reserved to Electrical Workers Craft. However, Carrier in its initial denial stated:

"...the work claimed is not work belonging to electricians by the scope of the agreement or by practice, there was no installation, testing, repair wiring or the removal of equipment requiring the skills of a journeyman electrician."

In response, the Organization stated:

"The amount of skill required to change out or remove and install a monitor, is really not relevant in this instance in that the Carrier has contractually awarded this work to the Electrical Craft through the Rules of the Controlling Agreement."

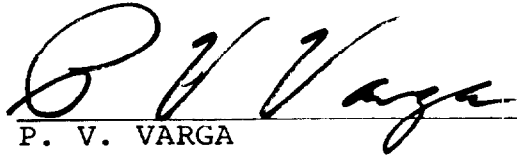
Again, reference is made to PLB 4260, Award 13 and First Division Award 24150 involving this Carrier and the handling of ETD monitors. The work has not been shown to be assigned to Electricians. Further, the so-called calibration asserted by the Organization and relied upon by Majority here was pointed out to the Organization on the property that:

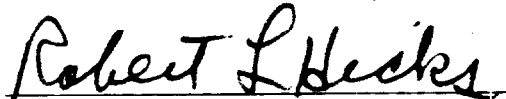
"...is no longer required when changeouts are made."

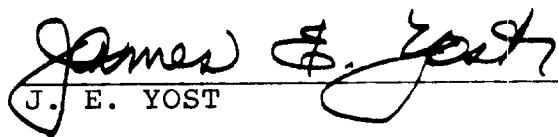
It must be obvious from the above on-property references and prior Awards that such work was NOT "...normally performed by Electrician's." And the Organization did not rebut the Carrier's position with evidence on the property.

As noted in Second Division Awards 12238, 12458, 12476, PLB 4260 and First Division Award 24150, the action complained of was minimal and required no special skill. At best it took no more than ten minutes. Under the circumstance, there is no basis for providing a penalty. Even Third Division Award 15689, cited by the Majority, only allowed straight time pay for its perceived violation. See Carrier Members' extensive dissent to that Award in this regard.


We vigorously dissent.


P. V. VARGA


R. L. HICKS


J. E. YOST


M. W. FINGERHUT


M. C. LESNIK