

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 12893
Docket No. 12870
95-2-94-2-10

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

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PARTIES TO DISPUTE: (
(Norfolk and Western Railway Company (NKP)

STATEMENT OF CLAIM:

- "1. That the Norfolk Western Railroad Company and/or its Corporate Parent, the Norfolk Southern Corporation, violated the terms and conditions of the current Agreement on December 18, 1992 when Carman Leader position #124 held by D.G. Rayls was abolished. Also, on this same date the Company advertised Position #102, which had the same identical duties, rest days, and hours of assignment. However, this position did not have the title of Carman-Leader.
2. That accordingly, the Norfolk Western Railroad Company and/or its Parent, the Norfolk Southern Corporation, now be ordered to provide the following relief: That the Carrier be ordered to rescind Bulletin FL-07-92, dated December 18, 1992 at Frankfort, Indiana, and re-advertise the Carman-Leader Position #124, as it was prior to December 26, 1992; and that the Carrier further be ordered to afford the senior applicant with the proper compensation (Carman-Leader differential rate) that was in effect prior to December 26, 1992. Also, that Claimant D.G. Rayls receive the Carman-Leader rate of pay that was in effect prior to December 26, 1992, for every hour he receives compensation from the Carrier until this matter is resolved."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

According to the Organization, there has been a position of Carmen Leader at the trainyard and repair track facility in Frankfort, Indiana, since the Norfolk and Western - NKP - ACY-Wabash - PWV merger on October 16, 1964. The incumbent, D.S. Crum, retired on May 31, 1989. The assertion that since the 1964 merger, the Carmen Leader has received a pay differential is unrefuted in the record.

On June 1, 1989, Carrier posted Carman-Leader Position #124. The primary duties listed were "Performing carman duties as outlined in the current working agreement. To include inspecting and writing-up according to current AAR rules." The position was awarded to Carman D.C. Fleischhauer. Thereafter, Mr. Fleischhauer was displaced by J. King, Jr., who in turn was displaced in September 1990 by Claimant, D.G. Rayls. Carrier acknowledged on the property in March 1993 that "At Frankfort...the number of shop employees has been reduced considerably since 1964 thus reducing the need for a Leader position. In fact, having such a Leader position has not been necessary for a number of years based on the number of employees working." Carrier points out that it has a Mechanical Supervisor who is responsible for the work of Carmen under his control at Frankfort.

On December 18, 1992, Carrier issued a bulletin indicating that "due to the reassignment of forces," the position held by Claimant would be abolished effective December 25, 1992. By the same date, Carrier posted a Carman's position with the same hours and rest days. It was ultimately assigned to Claimant on December 30, 1992. As noted by the Organization in its claim, the new position had the identical duties of the old, but without the title of Carman Leader. Consequently, Claimant was not given an hourly pay differential.

It is the Organization's contention that while incumbents in the previous position had held the title of Carman Leader, they were compensated for their write-up work. It points out that the job was commonly referred to as a "write-up" position. Claimant's former position was comparable to one held by a Wabash contract employee, a position which bears the title of Carman Write-up, for which a differential is paid. The Organization alleges that Carrier abolished Claimant's job and rebulletined a new Carman's position for the sole purpose of avoiding the payment of the differential, which it was anticipated would be increased in the near future.

The Organization alleges a violation of Rule 17 (Working Leaders), Rule 92 (Retention of Rate), and Rule 14 (Preservation of Rates). It also argues a violation of a long-established past practice of paying a differential for write-up work.

In addition to a preliminary argument concerning what it believes to be an inappropriate request on the part of the Organization for a declaratory judgment (to the effect that Carrier was in violation of the cited rules) and for injunctive relief, Carrier maintains that it has the right under Rule 17 (Working Leaders) to make a determination as to whether a Carman Leader is required. It exercised that managerial right in this instance based on its conclusion that the needs of service had changed and that a Carman Leader, with the responsibility of supervising other Mechanics, was no longer required. There is no evidence that Claimant is now performing any leadership function that would entitle him to a differential.

In addition to the applicability of the Rules cited by the Organization, Carrier also addresses Rule 16 (Bulletining New Jobs and Vacancies) and Rule 118 (Classification of Work). It does not believe that any provision of the Agreement mandates that it create or maintain a Carman Leader position at Frankfort.

In the final analysis, Carrier seeks justification for its decision here based upon a literal reading of the parties' Agreement. If, in fact, one were dealing with a bona fide Carman Leader position, there can be no doubt that Carrier would be well within its contractual right to abolish a position whose leadership function was no longer required. The record, however, is devoid of any evidence that supervisory responsibilities were performed by the individual holding this title, whether on a routine basis or on occasion. As late as 1989, the position was bulletined indicating that it was a Carman's position with special write-up responsibilities.

Mr. Fleischhauer, as well as at least one prior and two subsequent incumbents, held the position on this basis. The position was bulletined in this manner when, according to Carrier, there had been no need for a Carman Leader for a good number of years, due to a steady decrease in personnel since 1964. Despite this fact, Carrier continued to pay a differential for a Carman's position whose only distinguishing characteristic from other general Carman jobs was the responsibility for write-up work. This act on the part of Management lends support to the Organization's contention that the differential was provided for work other than that normally performed by a Carman Leader and that it was understood that this was the purpose of the differential. (Carrier's argument in regard to the Organization's alleged failure to prove that write-up work accrued exclusively to Carman is not relevant to a determination as to whether a practice exists because there is no question in this dispute about shifting the work to other crafts or supervisory personnel.

Thus, it appears that a long-term practice was in effect in regard to the payment of a differential for write-up work, regardless of the title of the individual assigned to the job. A question remains, however, as to whether this was a binding practice (that is, one that could be altered only through negotiation between the parties) or one that could be changed unilaterally because significant conditions underlying the practice had changed that justified a modification.

In another case addressed by this Board involving the same issue and the same parties (Docket 12854), the Organization also claimed that a long-standing practice of paying a differential had been violated. In that instance, however, there was considerable discussion on the part of Carrier about the underlying conditions that had changed since the introduction of the Computer Aided Reporting System (CARS) Program on the property in 1987. Carrier was persuasive in its argument that this new technology effectively eliminated a step in the process and that duplicate efforts were no longer required. It was also convincing in its contention that "the old bill writer's position and function has disappeared." A strong case was thus made in regard to Management's inherent right to control the "means of production" and to dispense with functions that are no longer needed.

Similar contentions have not been raised in this case. Although mention was made about "the needs of service" changing in regard to retaining a working Leader's position, the record does not contain support for the conclusion that there was a bona fide basis for altering the compensation for write-up work that continues to be performed. Given that conclusion, deference must be paid to the tacit understanding that the parties had over the years in regard to the level of compensation warranted for this work.

Carrier's arguments concerning the appropriateness of the remedy sought have been considered. While portions of the requested remedy are not justified, it is apparent that the Organization is seeking restitution for Mr. Rayls for the harm that it believes he suffered as the result of Carrier's action. That portion of the remedy is warranted.

Claimant is to be compensated for the difference in differential between the rate he received after December 26, 1992, and that which he would have received were it not for Carrier's decision to abolish the Carman-Leader's position.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 5th day of June 1995.