

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13359

Docket No. 13245

99-2-97-2-22

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood Railway Carmen, Division of
(Transportation Communications International Union
PARTIES TO DISPUTE: (
(South Buffalo Railway Company**

STATEMENT OF CLAIM:

- "1. On June 1, 1996, the Company violated the Agreement, particularly, but not limited to Special Rules 2 and 5, and Rule 23(a), and is continuing said violations by allowing supervisory personnel to perform work contractually belonging to Carmen at Buffalo, New York.**
- 2. Accordingly, the Company shall now compensate the senior furloughed Carman for eight (8) hours pay at the straight time rate of the Acting Car Foreman's position per day, five days per week, commencing on June 1, 1996, and continuing until said violation ceases. In the event that all Carmen are recalled to service, the claim will then revert to the first out available Carman on the overtime board for time and one-half rate for each successive day thereafter (to be determined by the Company's records)."**

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 were given due notice of hearing thereon.

This claim stems from Carrier's abolition of the position of Acting Car Foreman which, although not appearing as a classification within the Agreement, had been assigned to various Carman over the course of some 30 years. The job duties included, among other things, the performance of certain billing functions. After the position was abolished in January 1995, the job duties were transferred to the Car Foreman, a supervisory position.

In this claim the Organization protests the assignment of the work previously performed by the Acting Car Foreman to a Supervisor, contending that the long-standing past practice of the assignment of these duties to a Carman supports the conclusion that this is Carman's work which cannot be removed from the bargaining unit under the provisions of Special Rules 2 and 5 and Rule 23(a). It differentiates this case from the one resolved by Public Law Board No. 5813 in Award 1 by asserting that the other claim protested only the abolition of the position, while this claim deals with the ownership and assignment of the work. The Organization relies upon Public Law Board No. 5685, Award 4, Public Law Board No. 5015, Award 68 and Second Division Award 8146 in support of its argument that while Carrier may be entitled to abolish this position, as found by Public Law Board No. 5813, Award 1, it may not remove the work from the bargaining unit.

Carrier's repeated response to this claim on the property and before the Board is that the same issue has already been presented to, and resolved by, Public Law Board No. 5813, Award 1, and that its conclusions are res judicata and stare decisis, citing Second Division Awards 12473, 12499, 12671; Third Division Award 29108; Fourth Division Award 4860. Carrier points out the fact that the Organization did not limit its argument in the prior case to the abolition of the position, but repeatedly asserted that the work belonged to its craft. It notes that the decision in Public Law Board No. 5813, Award 1 was a denial Award, which is a decision on the merits, and did not merely rest upon a lack of jurisdiction finding concerning the scope of the bargaining unit. Carrier argues that Public Law Board No. 5813, Award 1 held that the work in issue was not covered by the Organization's Classification of Work Rule, and that it is therefore permitted to assign the work to other supervisory personnel.

A careful review of the record, which incorporates the prior file, reveals that the Organization's Submissions, arguments, documents attached and cases cited are substantially the same in both cases, and it is clear that the Organization asserted in the prior case that the work in issue here belonged to the Carmen and could not be removed from their bargaining unit. In fact, the Organization requested that the disputed work be returned to the Craft, and protested its improper assignment to management employees.

Public Law Board No. 5813, Award 1 denied the Organization's claim, finding that it had no jurisdiction to determine whether the Acting Car Foreman position properly belonged within the bargaining unit, that power being reserved to the National Mediation Board. It also concluded that Carrier was entitled to abolish the position without negotiation since it had been created by Carrier without reference to the Agreement. With respect to the Organization's contention that this claim is distinct because it deals with the assignment of the work, the following passages from the Labor Member's Dissent to Public Law Board No. 5813, Award 1 are telling:

"... Simply because the position was not created through negotiations by the Organization and the Carrier does not change the fact that the work encompassed by that position was work which contractually belonged to and was being performed by employees within the craft. . . .

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. . . It is not the abolition of the position that gave rise to this dispute, but rather, the reassignment of the duties related to that position to a supervisor. Thus, removing the work from the craft and assigning it to those outside the craft and, at the very least, circumventing a long standing past practice that had been acquiesced to by both parties and had risen to the same level and effect as a provision of a CBA.

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. . . If that issue was not going to be decided by the Board, then the Neutral was obliged to dismiss the claim. However, he chose to rule on it and ignored all prior precedential arbitral ruling."

These comments reveal that the Organization understood the import of the prior ruling with respect to the assignment of work outside the craft. Since the prior case involved the same parties (albeit a different named Claimant), and rendered an Award on the merits of substantially the same issue and arguments as those raised here, the Board is obliged to conclude that we may not reach a decision on the merits but must dismiss this claim on the basis res judicata. See Third Division Award 29108; Second Division Award 12671.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 20th day of January 1999.