Award No. 6949

Docket No. MW-6682

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, that:

(1) The Carrier violated the effective agreement when they assigned an employe holding no seniority rights under the effective agreement to perform relief pumper and treating plant work on February 22, 1951 and on subsequent dates thereto;

(2) Water Service Helper and Pumper D. O. Wilt be allowed pay at his respective time and one-half rate of pay for an equal number of hours as was consumed by employes outside the scope of the agreement between the Brotherhood of Maintenance of Way Employes and the Chicago, Burlington & Quincy Railroad Company, in performing the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Claimant, Mr. D. O. Wilt, holds seniority under the effective agreement as follows:

Pumper .....September 16, 1939
Water Service Repairman .....March 11, 1950

Mr. C. D. Benson is regularly employed for five days per week as a clerk in the General Superintendent's office at Galesburg, Illinois, and holds no seniority under the effective agreement. However, on February 22, 1951 and on dates subsequent thereto, Clerk C. D. Benson was assigned to perform the duties of a relief pumper at Lake Bracken and Galesburg on Thursdays, Fridays and Saturdays of each week which was in addition to his regular 40 hours clerical work and during hours which did not conflict with the performance of his regularly assigned clerical duties for 40 hours per week.

When the claimant learned of the assignment of a clerk to perform work covered by the Maintenance of Way Agreement, he immediately protested the assignment to his superior, Mr. A. Gunther on May 15, 1951, and simultaneously filed a suitable claim for all Maintenance of Way work performed by Clerk Benson.

(1) The claimant was assigned to and was working a regular position as Water Service Repairman Helper during the period involved in the claim, and he had no right under the rules to perform service in another classification, in addition to his regular assignment.

(2) Rule 5(a) and the letters of June 21 and June 28, 1949, cited by the Employes, clearly support the Carrier's position that the claimant's service was confined to five days of work in the group of the sub-department in which he was employed.

(3) The characteristics of his regular assignment precluded the claimant from making himself available to perform the service in dispute. The awards of the National Railroad Adjustment Board cited by the Carrier clearly and decisively support Carrier's position that an employe who is not available or in a position to perform service is not entitled to claim for time lost because of his non-availability.

(4) With these irrefutable facts and circumstances present, Petitioner's claim is totally lacking in contractual substance and must, therefore, in all things be denied.

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The Carrier affirmatively states that all of the data herein and herewith submitted has previously been submitted to the employes.

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(Exhibits not reproduced).

OPINION OF BOARD: At Galesburg, Illinois, the Carrier maintains a Water Station and a Water Treating Plant on a 7-day per week basis. There are four regular pumper positions assigned on a 5-day week basis and one regular 5-day relief position. On February 22, 1951, Carrier assigned a clerk to perform the duties of relief pumper on the three tag end relief days in addition to his regular assigned position as a Clerk. The Organization contends that the Carrier violated the Agreement in assigning a clerk to perform the relief work. The Carrier contends that Claimant was not entitled to the work in any event and asserts that the claim should be denied for that reason.

It is fundamental that Carrier violated the Agreement when it used a regularly assigned clerk to work the rest days of regularly assigned pumpers who hold seniority under a different agreement. This is so conclusive that the citation of awards would be superfluous.

Claimant was assigned as a Water Service Repairman Helper, a Group 1 position under Rule 2 (c), current Agreement. Claimant also held seniority as a Pumper, a Group 2 position under Rule 2 (c). While assigned to a Group 1 position, Claimant admittedly has no right to work a Group 2 position. There is evidence, also, that Claimant's regular assigned position required him to work as needed over a large territory and that he was unavailable to work all of the relief days that he now claims. For the foregoing reasons, the Carrier asserts that this claim must be denied.

The current Agreement provides as follows in regard to unassigned work:

> "(g) Where work is required by the Carrier to be performed on a day which is not a part of any assignment it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

The Organization contends that although the Claimant was not the regular employe under the foregoing rule, he was, nevertheless, entitled to the work in preference to the clerical employe who had no seniority whatever under the Maintenance of Way Agreement.

It is evident from the record that there were no extra or unassigned employes available. It is evident, also, that no regular employe claimed the work or made any claim for work lost because he was not used. The question then arises as to whether or not this Claimant has a valid claim.

We fully concur with the Organization that the fact that the claim may have been successfully urged in behalf of others is of no concern to the Carrier. But the employe processing the claim must have a right to perform the work, even though others may have a prior right to perform it. In this respect the Carrier asserts that Claimant had no right to the work for two reasons: (1) That the seniority of the Claimant at the time in question was confined to Group 1 positions without seniority rights as to Group 2 positions, and (2) that Claimant was not available to perform the work.

The Claimant being regularly assigned in Group 1 of the Water Service Sub-Department, his seniority rights under Rule 5 (a) are confined to that group as long as his seniority permits him to hold a regular position in that group. His seniority can be exercised on a position in another group only in case of force reduction, displacement, voluntarily accepting an assignment of more than 30 days in a lower grade, or by bidding for bulletined vacancies on new positions under Rule 26. We necessarily conclude that Claimant had no seniority right to the work constituting the basis of the present claim. It is very doubtful, also, that Claimant was available to do the work. But the Organization says that we are not concerned with these matters if there was in fact an agreement violation and cites Awards 6019, 6136, 6158. We are in agreement with these awards which hold that one of a group entitled to perform the work may prosecute a claim even if there be others having a preference to it. The question here is whether or not one who has no right at all to perform the work may properly invoke the principle of these awards.

We think this question requires a negative answer. A claimant who is not among a class of employes entitled to perform work has no basis for a claim. Clearly an employe making claim for a penalty for work lost must have a right to the work even though there may be employes senior to him who have a right prior to his. The awards holding that it is immaterial as to which employe makes the claim, implies that it is immaterial as between employes of the same class in the same seniority district. No reason exists for saying that one having no right whatever, contingent or otherwise, to perform work can process a claim for its loss.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated but the Claimant has no basis for claim.

AWARD

Claim (1) sustained. Claim (2) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois this 29th day of March, 1955.