

Award No. 13223

Docket No. MW-13524

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

**RAILROAD DIVISION, TRANSPORT WORKERS
UNION OF AMERICA A. F. L.-C.I.O.**

ALIQUIPPA AND SOUTHERN RAILROAD COMPANY

STATEMENT OF CLAIM: The claim of the Organization as stated in its letter of notification of intention to file an ex-parte submission with the Third Division of the National Railroad Adjustment Board, dated July 2, 1962, is stated as follows:

D. Cheuvront is a regular assigned Signal and Water Service Employee. He is also an extra Track Foreman. He was assigned as an extra Track Foreman on a advertised position as provided in 'Section (e) of Article 12, 'Seniority', of the current Agreement 'Article 3, 'Used on Other Work' was violated. Organization requests that D. Cheuvront be compensated as per 'Article 3, 'Used on Other Work'.

EMPLOYEES' STATEMENT OF FACTS: D. Cheuvront is an employe of the Aliquippa & Southern Railroad Company in the Maintenance of Way Department as a Signal and Water Service employe.

On the following dates D. Cheuvront was used as track foreman, instead of working his regular position in Signal Water and Service.: Oct. 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, 31, 1962.

"Used on other Work" his rate of pay was changed to a lower rate of pay which is a violation of the present Agreement, Article 3, "Used on other Work".

It has always been the policy and practice of the carrier, "during the life of this Agreement", to abide by Article 3, Used on other Work" without question.

The Railroad Division, Transport Workers Union of America, AFL-CIO does have a bargaining agreement, effective December 31, 1946 with the Aliquippa & Southern Railroad Company covering the Maintenance of Way Department Employees, copies of which are on file with the Board and are by reference hereto made a part of these Statement of Facts.

POSITION OF EMPLOYEES: Article 3 of the present agreement was vio-

" * * * The burden of proof in support of a claim rests with the petitioner who, in this particular case, has not furnished sufficient evidence to justify an affirmative award."

Second Division Award No. 3246 with Referee Hornbeck:

" * * * The burden is on the organization to show a violation either of the applicable rules or the agreement. It has not made this proof."

CONCLUSION: Notwithstanding the foregoing, however, the Carrier has conclusively hereinbefore shown that the claimant, D. Cheuvront, was compensated at the proper rate of pay for each of the various dates in question and that such action was in no way violative of the current Agreement or any practice or interpretation with respect thereto. In view of this, the Carrier respectfully requests your Honorable Board to affirm the Carrier's position in the instant case by the issuance of a denial award.

(Exhibits not reproduced.)

OPINION OF BOARD: The Claimant in this case is the regular incumbent of a Signal and Water Service Man position in the Maintenance of Way Department. The rate of pay for this position is \$2.975 per hour in addition to incentive pay for that position. He also held a position of extra track foreman with a basic rate of pay of \$2.815 per hour plus incentive pay accruing to that position. This latter job was awarded to him in accordance with the provisions of Article 12(e) of the Contract, by the exercise of his seniority and the subsequent awarding of the position to him by appropriate bulletin. During the period in question, he was paid at the lower of the two rates, that is the rate attached to the Extra Foreman's position. Because of the incentive pay of this position, he earned approximately \$43.00 more than he would have earned had he received the rate of the higher position plus its incentive pay. He alleges that he should have been paid at the higher rate of his Signal and Water Service position plus the incentive rates of the Foreman's position. He claims that by not being paid in this manner the Carrier has violated Article 3 of the Contract, entitled "Used on Other Work."

The Organization contends that the Claimant was required (emphasis ours) to fill the Track Foreman's position. The applicable portion of Article 3, which they submit has been violated, reads as follows:

" . . . But if the employe is required to fill temporarily the place of another employe receiving a lower rate of pay, his rate will not be changed, . . . "

The Carrier refutes this contention by denying that the Claimant was in anyway required to fill the Foreman's position. Article 12(e) captioned "Seniority", came into play in this matter. The Claimant, in the voluntary exercise of his rights as the senior man bid for and was awarded the position, it being management's judgment that he possessed the necessary fitness and ability. There was no requirement on the part of the Claimant, to bid for this job. He could have refused to do so and remained on his other job at the higher rate.

The meaning and intent of Article 3 appears to us to be clear and unambiguous. It was designed principally to protect employes from being forced

by Management to move into another position, which called for a higher rate of pay with it's added responsibilities, and being paid at the lower rate. It was also designed to protect employes from being forced by Management to move into another position, which called for a lower rate of pay, and being paid at the lower rate rather than the higher of his own position. This Article in our judgement, is inapplicable to a situation where the employe is placed in the position of a volunteer, as was the instant case. He voluntarily submitted his services to the Carrier by the exercise of his seniority, and possessing the fitness and ability, the Carrier could not refuse him. For the foregoing reasons, we will deny the claim.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of January, 1965.