Award No. 16946
Docket No. MW-17346

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when, on October 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28 and 31, 1966, it assigned the work of burning rails, bolts and other track material at Sibert Yard, near Mobile, Alabama, to a B&B Crane Operator.

(2) Welder L. C. Edwards be allowed one hundred and eighteen (118) hours of pay at his straight time rate because of the violation referred to above.

EMPLOYES' STATEMENT OF FACTS: On October 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28 and 31, 1966, the Carrier assigned the work of burning rails, bolts and other track material with an acetylene torch at Sibert Yard, near Mobile, Alabama, to a B&B crane operator. The B&B crane operator worked eight (8) hours on October 14 and ten (10) hours on each of the other dates specified above.

The claimant has established and holds seniority rights as a welder. On the above mentioned dates he was employed as an electric welder at Mobile, Alabama. Although the claimant was available and fully qualified to perform the welder's work that was performed by the B&B crane operator, the Carrier made no effort to assign the work to him.

Claim was timely and properly presented and handled by the Employes at all stages of appeal up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated May 1, 1960, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: On October 14, and 17 through 31, 1966, carrier needed certain acetylene welding work performed, and since there were no welders available, it had the work performed by a crane operator who was also a qualified welder.

Employes said that the agreement was violated and filed claim in favor of L. C. Edwards, a regularly assigned electric welder.

The claimant was working at least forty hours per week and at a higher rate of pay than that of an acetylene welder. Since the claimant was regularly assigned and was working at least forty hours per week, he was not available. Neither were any other welders available for they, too, were working at least forty hours per week and could not be spared from their jobs. There were no furloughed welders for they have all long since been recalled. As a matter of fact, the welders seniority roster is completely exhausted.

Since the work could not be performed by a welder, there was only one thing to do, outside of applying Rule 2(f) which carrier did not elect to do, and that was to have the work performed by someone who could weld but who might at the time be assigned in some other capacity, and this was done. In view of the circumstances involved, carrier saw no basis for the claim and it was, therefore, declined.

Correspondence exchanged in connection with the claim is shown by Carrier's Exhibits AA through GG.

There is on file with this Division a copy of the current working rules agreement and it, by reference, is made a part of this submission.

(Exhibits not reproduced.)

OPINION OF BOARD: There is no dispute that on the dates set forth in the Claim Carrier assigned work of burning rails, bolts, and other track materials to a B&B Crane Operator; except on October 14, when he worked at the job for eight hours, the Crane Operator performed the work ten hours on each of the other dates. Claimant holds seniority rights as a welder; and on the dates in question he worked as an electric welder at Mobile, Alabama, near the Sibert Yard where the burning was done. Rule 38(b) of the Agreement provides:

> "Maintenance of way welders will be used to do all welding that is done on materials or parts of tracks, bridges or buildings. It is intended that this rule will apply only to welding that can be performed on line of road or in maintenance of way shops, and is not applicable to welding requiring the service of other departments.
>
> Maintenance of way welders will also do all cutting, heating, and burning on materials or parts of tracks, bridges and buildings, except that employes of the Bridge and Building Subdepartment will be allowed to perform burning or cutting that is directly in connection with work properly coming within their jurisdiction."

Brotherhood contends that Carrier violated the Agreement when it assigned the work to the Crane Operator instead of assigning it to Claimant who held seniority as a Welder. Carrier defends by alleging that it had no welders available in a furloughed status and that Claimant was working at least forty hours a week at the time, and was thus not available for the work.

The language of Rule 38(b) is clear that all the burning involved belonged to maintenance of way welders, with the single listed exception which is not here applicable, and its assignment of the work to other than a welder violated the Agreement. Claimant was available as he was performing work where assigned by Carrier in the immediate vicinity. (See Award 13832.)

Carrier also argues that the claim is simply a "penalty claim" and as such is not provided for in the Agreement. With this we do not agree. If the violation were to be undone and the involved work performed in compliance with the Agreement, Claimant could have been assigned the work, assuming, as Carrier contends in its Submission that he could not have been spared during his regular hours, on overtime (as indeed was the Crane Operator for part of the time involved).

By its violation, Carrier deprived Claimant of the opportunity to perform and to be paid for the work, possibly at overtime rates. We do not see an award to Claimant of pay for the time spent on the involved work as a penalty, like a fine for passing a traffic light, but rather as part of redressing the damage done by Carrier's violation.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of February, 1969.

CARRIER MEMBERS' DISSENT TO AWARD 16946
DOCKET MW-17346 (Referee Daniel House)

Through distortion and fiction, and an inartful play on words, the Majority concluded that what the Claimant was claiming was not a penalty. We disagree. The facts are that the Majority is awarding the Claimant what can only be considered to be a windfall because he not only worked each day involved but suffered no loss of employment.

For these and other reasons, we dissent.

J. R. Mathieu
R. A. DeRossett
C. H. Manoogian
C. L. Melberg
H. S. Tansley

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