



Award No. 19067
Docket No. MW-19278

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

WESTERN MARYLAND RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when it used a trackman instead of Welder R. S. Younker to perform service as welder at Baltimore, Maryland on November 15, 16, 19, 23 and 24, 1968. (System Case E-91)

(2) Welder R. S. Younker be allowed the difference between what he would have received as welder and what he was paid as welder helper for November 15 and 19, 1968 and twenty-five (25) hours' pay at the welder's time and one-half rate for November 16, 23 and 24, 1968 because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The claimant holds seniority as a welder as of March 19, 1953. He was awarded a welder's position in compliance with Rule 18 and worked that position for several years, headquarters at Port Covington, Baltimore. He worked the position until it was abolished, at which time he was awarded a position as welder helper, headquarters at Port Covington, Baltimore.

He held the welder helper's position for several years until it was abolished in the first part of 1968. During the period he held the welder helper's position, the claimant was required to perform the duties of a welder for a great part of the time. Because the Carrier would not permit him to displace a junior welder or welder helper, he was required to work as a trackman and was assigned to the Hagerstown Yard Gang at Hagerstown, Maryland.

On the dates involved here, the Carrier required the services of a welder at Baltimore, Maryland to perform welding work on frogs and rails. Instead of calling and using the claimant, who has established and holds seniority in the welder's class, the Carrier assigned and used a trackman, who holds no seniority whatever as a welder, to perform the welding work involved here.

The claimant was available, willing and is fully qualified to perform all of the work of the character involved here.

Claim was timely and properly presented and handled by the employee 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 September 16, 1945, together with supplements, amendments and interpretation thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: The claimant is regularly assigned as Trackman^(*) with headquarters at Hagerstown, Maryland, and a work week of Monday through Friday. He contends that on the claim dates he should have been sent to Baltimore, Maryland, about 80 miles from Hagerstown, to work as a Welder instead of using a Trackman at Baltimore for that work. On November 15 and 19, 1968, the claimant worked his regular position and is claiming the difference between Welder Helper's rate, which he was paid, and the Welder's rate. November 16, 23 and 24, 1968 were rest days of the claimant's assignment and he claims a day's pay at time and one-half rate for each of those days.

OPINION OF BOARD: Claimant, holding seniority as a welder, worked as a trackman with the Hagerstown Yard Gang at Hagerstown, Md. He alleges that Carrier violated the Agreement on the dates in question when it used a trackman holding no seniority as a welder for welding work on frogs and rails at Baltimore, Md.

The record discloses that Mr. S. W. George, Engineer Track, by letter dated May 5, 1969, addressed to the Organization's Vice Chairman, Mr. Fred S. Poling, stated in part as follows:

"You stated 'It is a known fact that the senior qualified employee will be used to fill any vacancy, either temporary or regular.' I am in agreement with this statement, however in the instant case, as previously pointed out, there was no vacancy because there was no position of welder at Port Covington."

Thus it is seen that Carrier recognized that the senior qualified employee will be used to fill any temporary or regular vacancy. However, we find that there was need for the services of additional help in performing the welding work in question and thus Carrier's defense of non-vacancy is without merit.

Carrier relies on Rule 39 of the Agreement alleging that said rule covers situations such as this where exigencies of the service require an employee to be taken from his assigned class of service to be used temporarily in another class of service.

This argument was rejected by this Board in Award No. 12688, involving the same parties to this dispute, when the Board in considering such a composite service rule concluded that such a rule should not be used to undermine the significance of seniority classes between chauffeuring work and bridgework. Further, we find that Carrier failed to offer any probative evidence showing that an emergency did exist on the dates in question.

^(*) Although working as a Trackman he is compensated at the Welder Helper rate under the terms of the national Stabilization of Employment Agreement date February 7, 1965.

We further find that parties on the property agreed that Claimant has seniority as a welder and had formerly been assigned as welder at Baltimore before the position was abolished on May 23, 1968. (See Carrier's F. B. Plummer's letter of June 17, 1970 to Vice Chairman, F. S. Poline.) While it may or may not be true, as Carrier contends, that Claimant had been disqualified for position of welder at Baltimore for failure to pass examination on the operation of a motor car, no evidence is offered and no contention is made by Carrier that the work in dispute required the operation of a motor car. Thus, Carrier's contention raised in its ex parte submission to this Board that Claimant was disqualified as welder at Baltimore is without merit.

Next Carrier argues that Claimant was not available for the temporary work because he held a regular position 80 miles away. Under Rule 2(b) welders' seniority extends over the entire engineering division and thus Carrier's contention in regard to non-availability of Claimant is not supported by said Rule 2(b) and thus this contention is without merit and must be denied. This Board's Award No. 18247 can be distinguished in that in said Award there existed a rule governing the "senior available employee."

Carrier argues that Claimant would not have been the person called on the basis of the Welders' Seniority Roster since Claimant was No. 5 on the list, and four senior welders, with the same work week, would have been called ahead of Claimant if strict seniority had been observed in filling the position. This contention was rejected in this Board's Award No. 18557 wherein the Board stated:

"* * *. The essence of the claim by the Organization is for Rule violation and the penalty claim is merely incidental to it. The fact that another employe may have a better right to make the claim is of no concern to Carrier and does not relieve Carrier of the violation and penalty arising therefrom."

Next, Carrier contends in its answer to employees' ex parte submission that Claimant did not work from November 5 through November 18 due to illness and also did not work on November 23 and 24 and that Claimant was paid sickness benefits therefor under provisions of the Railroad Unemployment Insurance Act, and thus the amount of sickness benefits should be withheld in the event Claimant is awarded compensation by this Board. This contention was not raised on the property and cannot now be considered by this Board.

In regard to damages, we find that the Organization did not support its claim for overtime pay by reference to any specific rule or practice allowing such overtime pay. We find that Rule 27 of the Agreement refers to work of an employee's designated to work on his designated rest days and said rule provides for time and one-half rate of pay for employees who are "required to work" on said rest days. As was said by this Board in Award No. 13191 involving a similar rule as Rule 27: "Therefore, Rule 25, which clearly contemplates the performance of service by an employee on his rest day, is controlling. Under its terms 'service' must be rendered by an employee to entitle him to the time and one-half rate set out in Rule 21." Thus, Claimant is entitled to damages at the pro rata rate of pay.

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 Employees involved in this dispute are respectively Carrier and Employees 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 at the pro rata rate of pay.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. KILLEEN
Executive Secretary

Dated at Chicago, Illinois, this 10th day of March 1972.