NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20218
THIRD DIVISION Docket Number MW-20169

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Missouri-Kansas-Texas Railroad Company

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

(1) The Carrier violated the Agreement when it assigned Extra Gang Foreman A. K. Parks instead of C. D. Matteson to operate a back hoe machine on December 20, 21, 22, 23, 27 and 28, 1971 (System File O-142/2579).

(2) C. D. Matteson be allowed the difference between what he would have been paid at the machine operator's rate and what he received at the track laborer's rate on the aforementioned dates because of the violation referred to within Part (1) of this claim.

OPINION OF BOARD: The Claimant, a furloughed machine operator, was working as a track laborer on Gang No. 167 during the course of repairs to a highway crossing. On the claim dates the regularly assigned foreman of the gang operated a backhoe machine for a total of 16 1/2 hours and, in consequence, an award is sought on Claimant's behalf for the difference between the laborers' rate and the foreman's rate for 16 1/2 hours. The Employes' theory for the claim is that the need for the use of the backhoe machine created a vacancy and that Carrier's failure to assign it to Claimant, who was available and qualified to accept the assignment, was in violation of agreement Rules 4 and 6(a) of Article 5 and Rule 1 of Article 3. These rules read as follows:

"ARTICLE 5. BULLETINS AND ASSIGNMENTS

Rule 4. Vacancies or new positions that are definitely known to be of twenty (20) days or less duration will not be bulletined. The senior unassigned employe above the rank of track laborer will be notified at last available address of such vacancy and will be required to protect the vacancy as early as possible. Pending the senior employe getting on the job, the vacancy may be filled in the most practicable manner.

x * x * * * *

Rule 6. In filling positions temporarily, as referred to in Rule 4, the following shall be observed:

"(a) By individuals then employed in a lower classification in the gang or unit in which the vacancy occurs or the new position is created and who hold seniority rights on the district concerned, in the classification in which the vacancy occurs or the new position is created."

"ARTICLE 3. SENIORITY

Rule 1. Seniority begins at time employe's pay starts in the respective branch or class of service in which employed, transferred or promoted and when regularly assigned. Employes are entitled to consideration for positions in accordance with their seniority ranking as provided in these rules."

The Carrier's defense on the property, inter alia, was that the scope rule of the agreement is a general one and, hence, the operation of the backhoe machine is not the exclusive work of a machine operator. The Employes countered with the assertion that the claim was not based on the scope rule, but instead was based on past practice under Rules 4 and 6(a) and (b) of Article 5 and Rule 3 of Article 6. In dealing with the past practice issue on the property, the parties stated the following:

Letter of General Chairman. May 9. 1972

'We fail to understand why both Division Engineer J. T. Flake and Chief Engineer Hughes are attempting to make an issue of Rule 4 of Article 1 of the current Agreement (Scope Rule), as it has not been involved in this claim. Rules 4, 6(a) and 6(b) of Article 5 and Rule 3 of Article 6 of Agreement No. DP-357 have historically and traditionally been followed for many years in filling vacancies or new positions."

Letter of Manager of Personnel. June 22. 1972

". . ..The back hoe machine was required to work less than four hours per day on each of the dates involved - and in the past under those circumstances a position for machine operator has not been bulletined and employes other than those with seniority in the machine operator's classification have operated this machine."

Letter of General Chairman. July 14. 1972

"You allege that the Backhoe Machine was required to work less than 4 hours per day on each of the dates involved and that in the past under those circumstances a position for machine operator has not been bulletined, and employes other than those with seniority in the machine operator's classification have operated the machine.

The above statement by you involves three different circumstances of rule violations. First, Rule 4 of Article 5, by not notifying the senior unassigned machine operator who, in this instance, was Mr. C. D. Matteson. Second, Rule 3 of Article 6, by not allowing Mr. Matteson to exercise his seniority on the Backhoe Machine in accordance with his seniority and, Third, Rule 1 of Article 16, by not compensating Mr. Matteson at Machine Operator's rate of pay during the time the machine was actually used on Extra Gang 167 by Foreman A. K. Parks. Therefore, by your own acknowledgement the Carrier has been practicing a violation of the rules contained in Agreement No. DP-357."

From the foregoing and the whole record, it becomes apparent that the Employes have based their claim on the existence of a particular past practice under certain rules of the agreement. However, the Carrier not only challenged the past practice as asserted by the Employes, but also asserted that a contrary practice existed which conformed with Carrier's action in this dispute. In these circumstances the Employes had the burden of adducing evidence to prove the existence of the past practice as alleged, but the Employes have provided no evidence at all to satisfy this burden. Indeed, though the past practice issue was fully joined when the Employes wrote their letter of July 14, 1972, this letter merely refers to Carrier's stated version of the past practice and repeats the allegation that the agreement was violated. Mere repetition of argument and allegations does not substitute for evidence and we shall therefore dismiss the claim.

We note in conclusion that, in view of our disposition of this dispute on the ground of lack of evidence in respect to a particular allegation, it is not necessary to discuss other issues reflected in the record,

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

The Claim is dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1974.