NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20229
THIRD DIVISION Docket Number MS-20227

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Gordon L. Long, Lockytee Cleere, Robert L. Teahan
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the employes that:

1. Carrier violated Rule 14 and related rules of the Clerks' Agreement by not removing Clerk J. L. Sodders from the Southern District Group A Seniority Roster, when he failed to comply with Rule 14 and related rules of the Agreement, but continued using him as an extra and/or furloughed employe (Carrier's File 205-4666).

2. Carrier shall now be required to compensate Clerk Gordon L. Long eight hours' pay at punitive rate for March 16, 23, 30; April 6, 13, 20, 27 and May 4, 1972.

3. Carrier shall now be required to compensate Clerk Lockytee Cleere eight hours' pay at punitive rate for March 21, 22, 28, 29, 31; April 1, 3, 4 (two - 4PM and 12MN), 5, 11, 12, 18, 19, 24, 25; May 2, 3, 5 and 6, 1972.

4. Carrier shall now be required to compensate Clerk Robert L. Teahan eight hours' pay at punitive rate, April 22, 1972.

5. Claim is on a continuing basis for the senior employe of those listed above, each and every day that Mr. John L. Sodders is permitted to perform service for the Carrier, account violation of Rule 14 (h) and (i). A joint check of Carrier's payroll records to be made to determine each and every day Mr. Sodders performs service for the Carrier, in violation of Rule 14 (h) and (i).

OPINION OF BOARD: Clerk Sodders, who had a seniority date of January 10, 1972, was displaced by a senior employe from his regular assignment effective March 16, 1972. Since Sodders was unable to displace a junior employee, he was furloughed and required to file his name, address and telephone number within ten days with the appropriate Carrier official, as required by Rule 14. He failed to do this and, as provided in Rule 14, he forfeited his seniority on March 26, 1972. Sodders was called upon to perform service on March 28, 1972 and on various dates thereafter (for which claim is made).

The Claim herein was filed requesting one days pay for each day Clerk Sodders performed service, alleging that he was not a bonafide employe.

Carrier contends that Sodders was not an employe when called to perform service on March 28, 1972 but that as soon as he commenced compensated service on that date he established a new employment relationship and a new seniority date under the provisions of Rule 3. Rule 3 provides in pertinent part:

> "Seniority of any employe, other than laborer, shall date from the date and time he begins compensated service in the district where employed."

No agreement rule has been cited which restricts Carrier's right to rehire an employe who has forfeited his seniority. It is clear that Sodders did establish a new seniority date of March 28, 1972 and hence, the agreement was not violated when he was employed in extra service on the claim dates.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A W Paulus
Executive Secretary

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

Carrier Members' Dissent to Award 20230, Docket MW-19991

(Referee Sickles)

Carrier members are of the opinion that the majority erred in the adoption of Award 20230 for the following reasons:

The agreement between Burlington Northern Inc. and the Eggar Company constituted a valid lease. It may not have contained the terminology which the majority apparently believed it should have contained, but whether it did or not is really not too material to the question of whether it is a lease. No particular terminology is required in making a lease. Generally, the important ingredient is a showing of intent to establish a landlord - tenant relationship, and it can certainly be validly argued that there is sufficient evidence of such intention in the instant case e.g., the periodic rental stipulation and the provision forbidding assignment of the Eggar Company's rights to use and occupy the premises without the BN's written consent.

Contrary to what the majority appears to suggest, there is no requirement that a lease must specify the use to be made of the leased property. Nevertheless, since the document here indicated the Eggar Company was going to "construct, maintain and use a sand loading conveyor and storage tank" on the premises, it is difficult to understand how the majority could read it as making no reference to land use. Thirty day termination clauses are not foreign to leases either, contrary to what the majority also seems to have suggested.

The document here in case did not contain a specific word description of the premises leased to the Eggar Company but, again, the lack of such a description is not fatal to the question of whether it is a lease, especially when a scale map was attached showing the precise location of the property involved. And if Burlington Northern did not divest itself of control and use of the land on which the facilities were constructed by the Eggar Company, Carrier would like to know what it did. With a sand loading conveyor and storage tank sitting on this property, it seems quite obvious it is not simultaneously available for some other use by Burlington Northern Inc.

In any event, even if it were conceded that the document in question was not a lawful, valid lease, to establish a prima facie case under the critical language of the 1962 letter of agreement, the Organization must have proven by a preponderance of competent evidence, that the facilities in question are not only located on the BN right of way but are ".....used in the operation of the Railway Company in the performance of common carrier service." There is no such preponderance of evidence in the record. Moreover, the Carrier has unequivocally and emphatically denied the Organization's allegations that the facilities are so used.

Since the Organization acknowledges the Eggar Company constructed, maintains and operates the facilities in the couse of its sand supply business,

it seems self-evident those facilities are not used by Burlington Northern in the performance of common carrier service. Still, the majority's opinion does not even pretend to note or deal with this very significant factor.

The referee is in error when he states that Carrier did not raise the scope rule exclusivity issue on the property - Carrier's exhibit No. 5 which is a letter of declination addressed to the General Chairman and signed by Mr. T. C. DeButts - Vice President advised as follows:

> "The Maintenance of Way Agreement contains no provision that would prevent. the leasing of Railway Company land such as was done in this case and the construction of storage facility and conveyor on this leased property is not work coming within the scope of the Maintenance of Way Agreement."

It is self evident that the issue of scope rule exclusivity was raised by Carrier during the handling of this case on the property.

Even if the exclusivity issue had not been raised on the property by the Carrier, since the organization cited the scope rule in support of its claim before the Board, some evidence tending to show exclusive performance of sanding facility construction by M of W employes would be essential to the establishment of the union's prima facie case under that rule. No such evidence was submitted.

On the damages issue we think what Carrier members stated in their dissent to Award 19899 is apropos here and is incorporated herein by reference.

For the foregoing reasons we dissent.

W. B. Jones
W. B. JONES

P. C. Carter
P. C. CARTER

H. F. M. Braidwood
H. F. M. BRAIDWOOD

G. L. Naylor
G. L. NAYLOR

G. M. Youhn
G. M. YOUHN