NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20773
THIRD DIVISION Docket Number MW-20597

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Inc.

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

(1) The Carrier violated the Agreement when it failed and refused to compensate Mr. E. D. Langham at the assistant foreman's rate of pay for the services he rendered on June 7 and 8, 1972 (System File P-P-103C/MW-68 (h)-1 7/31/72).

(2) The Carrier now be required to pay E. D. Langham the difference between what he received at the sectionman's rate of pay and what he should have received at the assistant foreman's rate of pay for the services he rendered on June 7 and 8, 1972.

OPINION OF BOARD: On June 7 and 8, 1972, Claimant's Section Foreman was engaged in a rail testing program which required him to be physically removed from the crew in question.

Claimant asserts that he was assigned to direct the crew concerning changing defective rails and placing flags. Accordingly, Claimant argues that he was entitled to the benefits of Rule 44:

> "An employe temporarily assigned by proper authority to a position paying a higher rate than the position to which he is regularly assigned, for four (4) hours or more in one day will be allowed the higher rate for the entire day. The rate of pay of an employe will not be reduced when temporarily assigned by proper authority to a lower rated position."

Carrier denies that Claimant received any such assignment - but rather, it insists that on each morning the Foreman gave specific instructions to the crew before he assumed his duties concerning rail testing.

Initially, we deem it necessary to dispose of three (3) defenses raised by the Carrier concerning the merits of the dispute, i.e., the number of hours devoted by Claimant to "Assistant Foreman" duties; the fact that there was no such position at the location in question; and the authority of the Foreman to make any such assignment.

In the initial claim, the Organization stated that the assignment to "Assistant Foreman" was for more than four (4) hours on each claim date. Carrier never spoke directly to that assertion, but its denial that there was any such assignment would obviously act as a denial of the four (4) hour allegation. We feel that the Organization raised the issue, on the property, in sufficient manner so as to place it before us, and accordingly, the broader question of whether or not Claimant ever received instructions to direct the crew must ultimately control our disposition of the dispute.

Carrier states, and Claimant concedes, that no Assistant Foreman position existed at the location in question on the dates involved. Thus, Carrier argues, there is no violation because Rule 44 refers to assignment to a position, not assignment to higher rated work. The Organization does not contend that Claimant was, in fact, promoted to a position, nor does it demand that the position be established. gather, it seeks compensation at the higher rate of pay for the work performed by Claimant.

We are inclined to agree with the Organization's view. The fact that a position is not in existence may not control a dispute such as this if, in fact, an employee is assigned to perform work of a higher rated position - even though the position is vacant. To rule otherwise would beg the question, and could result in a Carrier receiving an improper advantage by means of its own inaction.

There is suggestion that the Foreman did not have authority to assign Claimant to Assistant Foreman duties. We question that such a defense is material in this type of dispute. Assuming there was such an assignment, and that the Foreman exceeded his authority in *his* instructions to Claimant, there is nothing of record to suggest that Claimant knew, or reasonably should have known, that the Foreman did not have the ability to issue binding instructions in this regard. To the contrary, under the record before us, we feel that a refusal to comply with a direction of the type alleged to have been given, would have been undertaken by the employee at his peril.

In the final analysis, our decision must be dictated by determining if Claimant has satisfied the burden of demonstrating that he was instructed to perform the work of an Assistant Foreman, and, in essence, was charged with the responsibility of exercising a discretionary control - rather than merely following routine orders.

The initial claim alleges that Claimant was "in charge" of the crew (on the dates in question) while the Foreman was engaged in other service. The claim was denied because, among other things, Claimant merely performed Sectionman's duties as directed by the Foreman. Subsequent handling and correspondence on the property contained similar allegations and denials. However, on August 20, 1973, the Organization forwarded to Carrier an August 15, 1973 statement from Claimant:

"I do definitely state that on June 7 & 8, 1972 section foreman K. D. Stewart left me in charge of the Elma section gang with instructions to supervise and direct the work of changing rails between Elma and Gate during his absence with the rail detector car."

Carrier's September 14, 1973 reply stated:

"Your submission of statement of claimant that he was left in charge of section crew by the foreman does not constitute proof of such assignment, but only a restatement of the initial claim file on his behalf. Furthermore, the section foreman does not have the authority to make an assignment such as you allege."

Carrier categorizes the August 15, 1973 letter as "self-serving." Many documents which are exchanged by the parties during the handling of these types of disputes are, to a great extent, self-serving. But, that factor does not, in and of itself, necessarily disqualify the document from all consideration. The letter in question was not authored until some fourteen (14) months after the filing of the initial claim. Any document presented on the property prior to the date of the *Notice* of Intention to File an Ex Parte Submission (October 16, 1973 in this case) is properly considered by this Board. But, we have noted in prior Awards that the timing of the submission of certain documents may have significant bearing on the credibility, or the weight to be attached, expecially if the timing suggests that the other party did not have reasonable opportunity to respond prior to submission to this Board. No such suggestion is involved here because Carrier did respond.

We do not conclude that the delay in preparation of the document is fatal. The record reveals that the parties had exchanged conclusionary statements (and they had agreed to certain time extensions) and finally a direct statement by one of the participants to the alleged discussion was presented. Although there were two (2) months in which to do so, Carrier did not supply a contrary statement by the other asserted participant.

Moreover, the August 15, 1973 statement is consistent with predictable results under the facts and circumstances which are not in dispute. We feel that Claimant has satisfied the burden of proof end we will sustain the claim.

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 18th day of July 1975.