

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21808  
Docket Number MW-21648

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 used Section Foreman W. W. Albus instead of Machine Operator O. Wells to operate Jordan Spreader X-19 between Mile Post 92 and Mile Post 94 on December 12, 16, 17 and 18, 1974 [System File P-P-219C/MW-6(d)-19 4/14/75].

(2) Machine Operator O. Wells be allowed twenty-four (24) hours of pay at his straight-time rate and four (4) hours and twenty (20) minutes of pay at his time and one-half rate because of the violation referred to in Part (1) hereof.

OPINION OF BOARD: On the claim dates, Carrier used a Section Foreman to operate a Jordan Spreader X-19, rather than Claimant (a Machine Operator).

The Roadway Equipment Subdepartment is listed in Rule 1(B) and a "Jordan Spreader-Ditcher" is listed as a Group Four Machine. Rule 55N defines a Machine Operator as an employee assigned to the operation of machines classified "...as groups...4..."

On the property, Carrier noted that the Claimant was under pay (Group 2 Machine Operator) on the claim dates and that the Foreman operated the Jordan Spreader because of emergency conditions (clearing mud in slide area). In its Submission here, Carrier also refers to Rule 19 (as it relates to temporary vacancies) and Rule 44.

The Employes minimize Carrier's "emergency" argument stating that a mere allegation does not ipso facto establish an emergency, and that one would have expected to find work performed around the clock if a real emergency existed - which was not the case here as rest days were observed. See Award 14982. Similarly, the Employes are unimpressed with Carrier's allegation that "the foreman used was properly compensated ...in accordance with...Rule 44" because such rule governs neither seniority, nor the right to work. (Award 19816).

Concerning the question of "full employment", the Organization invites our attention to certain Awards between the parties wherein that defense was rejected.

While it may be that the Scope Rule in question is general in nature, as asserted in Carrier's Submission, we are confined to the "factual" matters raised by Carrier on the property. Accordingly, our deliberations have been controlled, to some extent, by Award 21340. That Award was adopted on December 16, 1976 - subsequent to the submission of the Reply documents in this docket - and resolved a dispute between these same parties concerning the same basic issues and contentions as presented here. Although it is suggested that the only difference between the two cases is the question of the asserted "emergency", we note that the cited Award considered an asserted "...urgent need to use the spreader and because the foreman was working at the point of need."

In any event, we feel that the Organization's assertion regarding the "emergency" is well taken. We are only able to find a conclusion of an emergency as the matter was handled on the property - not the factual assertions necessary to weigh that conclusion. Thus, for all intents and purposes, this case is in precisely the same posture as Award 21340. It has considered the same rules, the same machine, the "urgent need", the "temporary vacancy", Claimants "on duty and under pay" with a significant geographic distance involved, etc.

There, the Board found a prima facie case of entitlement to perform the disputed work and ruled that reliance on Rules 19A and 44 did not negate that finding - anymore than did the fact that the "...claimants were working elsewhere when the need to use the spreader arose."

It is fundamental that an Award between the same parties which considered the same rules and similar factual circumstances should be followed by this Board, regardless of the possible result had we heard the case in the first instance, unless we find that the prior award was palpably erroneous. Thus, that concept alone compels a sustaining Award.

The Board has re-examined the question of awarding damages for loss of work opportunity when Claimants are on duty and under pay at the time of the violation. This matter was quite ably briefed and argued by both parties in their written and oral presentations. We find it unnecessary to restate the various controlling factors, which are detailed in Award 19899 involving the same Referee who sits with the Board in this case. Suffice it to say that after a thorough re-evaluation of the matter, we reaffirm the concepts expressed in Award 19899.

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

A. W. Paulsen  
Executive Secretary

Dated at Chicago, Illinois, this 30th day of November 1977.