NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 30065
Docket No. MW-29346
94-3-90-3-218

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Consolidated Rail Corporation

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

1. The Agreement was violated when the Carrier assigned Pittsburgh Division employes instead of Youngstown Division employes to remove and replace track ties at Graham, Ohio on the Youngstown Division on September 8, 12, 13 and 14, 1988 (System Docket MW-237).

2. As a consequence of the aforesaid violation, Foreman D. Unkefer, Class 2 Machine Operator M. Closson and Vehicle Operator J. Brooks shall each be allowed thirty-two (32) hours of pay at their respective straight time rates."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

This dispute arose when the Carrier assigned Pittsburgh Division employees instead of Youngstown Division employees to remove and replace track ties at Graham, Ohio, on the Youngstown Division. The Pittsburgh Division employees do not hold seniority within the Youngstown Seniority District. The central dispute is whether there were any qualified tie handler operators available on the Youngstown Division at the time.

There are three claimants: Mr. Closson, Mr. Brooks and Mr. Unkefer who hold seniority in the Youngstown Division. During the handling of the dispute on the property, the Carrier discovered that Mr. Unkefer was a qualified tie handler operator and his portion of the claim was sustained and he was paid the requested amount. Since Mr. Unkefer's claim has been accepted and paid by the Carrier, there is no need for this Board to consider his claim any further.

The evidence exchanged during the handling of the dispute on the property is minimal. Claimants have submitted a machine operators roster within the Youngstown Division. But this roster gives no indication as to whether any of these operators are qualified tie handlers. The Carrier has submitted the claimants' MW-200 forms which shows that they were not tie handler operators. However, this was submitted on April 25, 1990. Claimants gave notice of their intent to file an ex parte submission on April 18, 1990. Claimants have objected to the admission of these forms on this basis. Since these forms were not submitted prior to the Organization's notice, they are improper evidence and will not be considered by this Board in the handling of this dispute.

The Organization has presented no evidence that claimants were qualified to perform tie handling work. The issues that must be decided then, are whether the Carrier was obligated to train them. The Organization has cited Third Division Award 16960 in support of its position. In that award, the Carrier had installed new equipment and modified signal circuits. The claimant was regularly assigned as TCS Maintainer. On the disputed days, claimant performed all the work he was capable of and paid for all his time. Due to his unfamiliarity with the new equipment he was found unable to properly interpret plans and therefore unable to accomplish the work in its entirety. Supervisors were used to complete the work. The Board found that the claimant was unable to perform the work but that under the agreement he was the only man on the job who could claim the work under the Scope Rule. The Board sustained the claim, finding that the Carrier had a duty to train its personnel.

> "We re-affirm the doctrine enunciated in our Awards 10932, 11142 and 11151 wherein we hold that one who would claim the right to perform work must first possess the qualifications necessary to do such work. In the instant case the first denial letter complained that Aul 'was unable to properly interpret plans of new equipment which Mr. Aul had never seen before.'
>
> We believe that the training of personnel to handle new equipment is the joint responsibility of Carrier and employes. But the initiation must come from management.

> Only when management has discharged its training responsibility can it avail itself of defense against an untrained employee claiming work.
>
> We are unable to find any indication that Carrier initiated this project with the slightest deference to the applicable agreement. The conclusion is inescapable that on this project Aul was demoted to helper and the three supervisors were intended as a major part of the work force."

The parties addressed this issue in only a very cursory way. The Organization simply claimed that the Carrier had a duty to train its employees. The Carrier briefly states in its supplemental memorandum that it did not have time to train claimants for this work in four days.

In Third Division Award 16960, it appeared that none of the employees required to perform the work under the contract, had been trained to use the new equipment necessary to perform that work. While the Carrier does have the responsibility to train a requisite number of its employees to perform tie handling work, this Board has not been presented with any evidence that the Carrier has not trained an adequate number of tie handlers to discharge its training responsibility.

The Organization further argues that who they name as a claimant doesn't matter insofar as the violation of the Agreement is concerned. The fact that other employees on the Youngstown Division may have a better right to make a claim is of no import. The Organization cites several awards in support of this position. None of these Awards, however, involved a situation where a claimant was not qualified to perform the work at issue. These were all cases where the claimant was unavailable.

The Awards submitted by claimants are not the only authority on this issue. There is conflicting authority with respect to whether the claimant in a case must have suffered an actual loss as a result of a violation. This Board prefers to adopt the reasoning set forth in Third Division Award 28889 and in Second Division Award 12136. In Third Division Award 28889, the Board held,

> "This Board is aware of the divergence of awards in this difficult area where a violation has been found but no loss has been established. We understand the 'emptiness' associated with a violation without a remedy. However, we believe the better reasoned and more jurisdictionally sound line of decisions does not provide for an award of damages where there is no proven

cognizable loss causally traceable to the violation of the Agreement."

The claimants in this case have not shown that they are qualified tie handler operators or that the Carrier had a responsibility to train them to be tie handler operators. Therefore, claimants suffered no economic loss when Carrier assigned Pittsburgh Division employees to perform tie handling work within the Youngstown Division.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 17th day of February 1994.

LABOR MEMBER'S DISSENT
TO
AWARD 30065, DOCKET MW-29346
(Referee Vernon)

The Majority clearly erred in this award and a reading thereof readily establishes the flawed reasoning. Consequently, a detailed discussion is not necessary here.

However, it is important to point out that the Majority clearly erred when it tied qualifications to whether or not a monetary award was allowable. In addition, it relied on an Award that has been clearly shown to be in error. This claim was based on a violation of the Agreement as it dealt with seniority and how that seniority was restricted to a particular seniority district. The Carrier did not question the application of those rules nor argue that these rules cited were not germane to this case. Moreover, the Carrier paid the claim for one of the Claimants. Obviously, a violation of the Agreement existed and the Majority was in error for not so holding.

The Majority further erred when it relied on Award 28889 to deny the remedy. The dissent to that award is attached hereto. Moreover, Third Division Award 29381 dealt extensively with Award 28889 and held:

> "Notwithstanding the conclusions reached in Award 28889, this Board notes that a number of Awards of this Board and Special Boards of Adjustment which have required monetary payments in established cases where employees of one seniority district were used to perform work in a different seniority district. The rational (sic) behind these decisions is that bringing employees from one district to work in another district deprives employees with seniority rights in the district where the work is performed of contractually secured work opportunities. If the Carrier is permitted to move

"employees from one district to another, without payment to the employees deprived of the work opportunity, the seniority provisions, mutually developed by the parties and written into their Agreement, is vitiated.

While there are a number of citations, involving this Carrier and this Organization, which could be referenced on these points, one seems particularly appropriate. In Award 41, SBA No. 1016, the Board held that:

> 'Important seniority rights are in question in this case, because an employee whose name is on a seniority roster in an Agreement designated seniority district owns a vested right to perform work in that district that accrues to his standing and status on the district seniority roster. The Seniority District boundaries established by the parties' Agreement to protect and enforce that right, have been improperly crossed by Carrier action, resulting in the Claimants loss of work opportunities, and hence the principle that compensation is warranted in order to preserve and protect the integrity of the Agreement, is applicable to this dispute. For similar rulings between these same parties see Award No. 34 of Special Board of Adjustment No. 1016 (07-28-89) and Award No. 7 of Public Law Board No. 3781 (02-12-86).'

Accordingly, in the circumstances of this case, the Board must conclude that Award 41, SBA No. 1016 is better reasoned than the decision in Award 28889. Award 28889 cannot be accepted as authoritative precedent. Award 41 details the correct application of the Agreement and the requirement that payments must be made to Claimants who lost work opportunities when Carrier utilized employees from a different seniority district for the performance of work on their district. The Claim will be sustained.

A W A R D

Claim sustained." (Underscoring in original)

Moreover, the Referee in Award 28889, in a subsequent award, clearly recognized the importance of protecting the integrity of the Agreement and held:

AWARD 29912:

"There is no dispute that all named Claimants were fully employed at all relevant times. Carrier maintains that no backpay remedy would be appropriate even of (sic) the Claim was sustained on the merits. It cites five prior awards of this Board in support of its contention. See Third Division Awards 28943, 29033, 29034, 28889, and 29330.

* * *

On the record before us, however, we are persuaded that circumstances exist which make a damage award appropriate. In addition to the Scope Rule violation found, it is clear that the Carrier did not undertake the required good faith efforts to perform the work with its own forces. Refusing to award damages would, in practical effect, condone the combination of Carrier's violation and its lack of good faith efforts. Accordingly, Carrier is directed to determine the number of hours worked by contractor personnel on the portions of the project targeted by the Claim and to compensate each Claimant for an amount equal to the proportionate shares of the total hours expended on the disputed work.

A W A R D

Claim sustained in accordance with the Findings."

Therefore, I dissent.

Respectfully submitted,

D. D. Bartholomay
Labor Member

Attachment

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S DISSENT
TO
AWARD 30065, DOCKET MW-29346
(Referee Vernon)

The Organization has consistently argued that if the Carrier violates its contract, it must pay, period. Regardless of whether the Claimant had a contract right to the work in question (See Third Division Award 29219), was qualified (See Third Division Award 29558), was on vacation and considered not available (See Third Division Awards 29263, 29092), or whether Claimant is even an employee (See Third Division Award 29091), the consistent theme is pay.

Fortunately, common sense prevails. If the Claimant has no contract right to the work in question, if he is not qualified, if he is not available or if he is not an employee, the Board has denied the claim without even considering whether Carrier's application was correct or incorrect.

In this instance, Carrier did move some machine operators across seniority district lines because of a need of their services for four days.

Carrier's defense was that it had no qualified employees available to do this work. When it did discover that one of the Claimants was indeed qualified, it promptly paid the claim on his behalf. Had each Claimant been qualified, Carrier would have used them.

The Majority's reasoning was sound and right on target, consistent with Board precedent. Not one Claimant was deprived economically as they were unable to perform the work regardless of who Carrier used.

Robert L Hicks
R. L. Hicks

Michael C. Lesnik
M. C. Lesnik

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