

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Paul G. Jasper, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN RAILWAY COMPANY

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

(1) The Carrier violated the effective agreement when they failed to utilize the services of Section Laborer Amos B. Redding to make a traffic check at Second Street Crossing, Sheffield, Alabama, for twelve (12) hours on Saturday, September 9, 1950 and for four (4) hours on Mondays, September 11, 1950, and in lieu thereof, assigned the work to a junior employee;

(2) Section Laborer Amos B. Redding be allowed sixteen (16) hours pay at his time and one-half rate because of the violation referred to in part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The Carrier determined that it would be desirable to have definite information relative to the average number of vehicles traveling over its highway crossing at Second Street, Sheffield, Alabama.

Consequently, the Carrier decided to make a traffic density check covering two twelve hour periods, one to be made on Saturday, September 9, 1950, the other to be made on Monday, September 11, 1950.

Section Laborer Amos B. Redding, is regularly assigned to the section at Sheffield, maintains a telephone in his home for the Carrier's convenience in calling him for emergency service, has performed service for the Carrier as a Section Foreman, Relief Foreman, and Welder Helper, and was available to perform the services required to make a traffic density check.

The Carrier failed to utilize the services of Section Laborer Redding to make the desired traffic check and in lieu thereof, assigned the work to an extra gang laborer, who is junior in service to Mr. Redding.

Claim was filed in behalf of Section Laborer Redding for all wages which he was deprived of.

Carrier declined claim.

The agreement in effect between the two parties to this dispute dated August 1, 1947 and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

(13) **Work on Unassigned Days**—Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employe."

Particular attention is directed to the fact that Rule 4 (a) provides that "Seniority rights of laborers * * * shall be restricted to their respective gangs * * * ." The work here involved being a special job was not performed by the section gang in which claimant Redding was employed. His claim, therefore, is one for work not assigned to the gang. His rights being restricted to the section gang in which employed, he had no right under the agreement to claim the work here involved.

While Rules 11, 12 and 13 do not apply, it is significant to observe they provide that in transferring employes to fill vacancies or new positions, senior employes are not entitled to transfer unless they possess the necessary qualifications and ability to do the work required.

Mr. Redding, the claimant, was born March 4, 1892. He has an 8th grade education. Most of his service with the railway company has been in the capacity of laborer. Knowing Mr. Redding's qualifications and ability, and having a thorough knowledge of the work to be performed on the special assignment, Division Engineer Wood determined that Mr. Redding was not qualified and did not have the ability to do the work. He, therefore, did not call upon him. Instead, he utilized Mr. H. W. Dickerson, an alert employe and high school graduate. He was the senior available man possessing the necessary qualifications and ability to do the work demanded of him.

As evidence of the fact that claimant Redding did not possess the necessary qualifications and ability, there are attached copies of statements made by B&B Supervisor James Haynes, Carrier's Exhibit A, Track Supervisor P. H. Watkins, Carrier's Exhibit B, and Track Supervisor W. P. Higginbottom, Carrier's Exhibit C, all of which are self-explanatory and show clearly that claimant Redding did not have the necessary qualifications and ability to do the work here claimed.

Then, too, checking traffic on Saturday, September 9 and Sunday, September 10 constituted "Work on Unassigned Days" within the meaning of paragraph (13) of Rule 24-1 quoted above. Under this rule Redding was no more the "regular employe" than Dickerson.

Thus, carrier did not violate any provision of the effective agreement in utilizing Extra Gang Laborer Dickerson to check traffic at Second Street Crossing, Sheffield, Alabama on September 9, 10 and 11, 1950.

(3) **Claim is not supported by prior Board Awards.**

It is significant that the work involved in this claim extended over a period of 24 hours, i.e., from 6 P. M., September 9, to 6 A. M., September 10, 1950 and from 6 A. M., September 11, 1950 to 6 P. M., that same date, yet claim is "for twelve (12) hours on Saturday, September 9, 1950, and for four (4) hours on Monday, September 11, 1950 * * * ." Thus, all work involved is not here claimed on behalf of Mr. Redding. Claim is laid only to a part of the work involved. It is a fairly well established principle that work may not be sub-divided in situations such as here involved in considering claims alleging an agreement violation.

Furthermore, it is an established principle that the management determines an employes qualifications and ability. Numerous awards of the Adjustment Board have sustained this principle. For example, in Third Division Award No. 5025, it was held—

"* * * The established rule (e.g., Awards 5006, 4485, 4466 and 3273) is that fitness and ability in the first instance is a matter

which rests in the sound discretion of the carrier and that once it makes a finding that senior applicant for the position is lacking in fitness and ability the employee contesting sufficiency of that finding has the burden of overcoming it by proof. Otherwise the carrier's action will not be disturbed.

* * * * *

Also see Awards 96, 98, 110, 198, 324, 1009, 1147, 1208, 2031, 2142, 2299, 2350, 2427, 2490, 2615, 2673, 2692, 2791, 2864, 3139, 3466 and 3480."

As evidenced by the record in this case, the carrier, in exercising its sound discretion, determined that claimant Amos B. Redding did not possess the necessary qualifications and ability to make the traffic check here involved; therefore, under the principles of Board Awards, he had the burden of overcoming this finding by proof. No such proof was submitted, and it is now too late for him to do so. His opportunity to submit proof was when his claim was being handled on the property, and not after the case reached the Third Division of the Adjustment Board.

That claim is unsupported by prior Board awards is obvious.

CONCLUSION

Carrier respectfully submits that:

(a) The work of checking railroad and vehicular traffic here involved constituted a special job where alertness and special qualifications and ability were required.

(b) It was **not** work embraced in the scope of the effective Maintenance of Way Agreement.

(c) Carrier did not violate the effective agreement as alleged.

(d) Claim is for only a part of the work involved.

(e) Following the principles of previous Board Awards claim is **not** supported by any provision of the effective agreement as the management determined that the claimant did **not** possess the necessary qualifications and ability to perform the work here involved and has so proven.

(f) The claimant contesting the sufficiency of carrier's findings had the burden of overcoming it by proof, which he did not present when handling the claim on the property and is therefore now at this late date barred from presenting such proof.

For all the reasons given, the claim should, in all things, be denied and carrier respectfully requests the Board to so hold.

Carrier in making response in this case, without having seen petitioner's submission, undertaking to meet the issues raised in handling of the case on the property, reserves the right, after being apprised of petitioner's allegations of facts, statement of position and argument, to present such additional evidence and argument as to it may seem appropriate and necessary for a complete presentation of the case.

All relevant facts and arguments in this case have been made known to the employees' representative.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier decided to conduct a traffic density check over the Second Street Crossing in Sheffield, Alabama.

H. W. Dickerson was picked from the extra gang laborers to make the check.

The check was to cover the two periods of 12 hours each from 6:00 P. M., September 9, 1950 to 6:00 A. M., September 10 and 6:00 A. M., September 11, 1950 to 6:00 P. M. the same day.

The Claimant, Amos B. Redding, is employed as a section laborer regularly assigned to a section gang at Sheffield. His seniority as a laborer was restricted to his respective gang as provided under Rule 4.

Redding claims he is senior to Dickerson and should have been called and assigned to do the work of checking the traffic density.

There are no serious disagreements that this is special work not covered by the Agreement. The Claimant contends, however, that since the work was assigned by the Carrier to the Track Department laborers, the senior man available should have been used.

From the facts and the Agreement, we now find that the work of checking traffic density was special work and not within the scope of the Agreement, Rule 1.

If the Carrier had picked a man qualified and available but with less seniority than the Claimant from the Claimant's gang, then he could complain, but not otherwise.

Rule 3, Seniority Datum, was not violated.

Because of what we have heretofore said, we need not decide the Claimant's contentions that Rule 11, Basis of Promotion, and Rule 39, Composite Service, were violated.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 30th day of July, 1952.