NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19814
THIRD DIVISION Docket Number MW-19671

C. Robert Roadley, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Louisville and Nashville Railroad Company

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

(1) The Carrier violated the Agreement when it assigned Machine Operator R. L. Abney instead of Machine Operator J. E. Love to operate the burro crane used to lay ribbon rail and to pick up scrap rail between Henderson, Kentucky and Nashville, Tennessee (System File 1-12/E-364-18).

(2) Machine Operator J. E. Love be allowed pay at the burro crane operator's rate* for the same amount of time expended by Machine Operator R. L. Abney in the performance of the aforedescribed work since August 9, 1970.

*Time and one-half rate to be applied to the overtime hours worked by Mr. Abney - straight time rate to be applied to the time worked by Mr. Abney during regularly assigned work period.

OPINION OF BOARD: The basic question involved in this dispute is whether the Carrier violated the Agreement when it assigned an employee from the Bridge and Building Subdepartment to operate a burro crane in the performance of work alleged to belong to employees in the Track Subdepartment. The work performed is alleged to have been the laying of ribbon rail and the picking up of scrap rails and ditching.

Rule 3, of the Agreement, sets forth the various sub-departments comprising the Maintenance of Way and Structures Department as follows:

> "The employees covered herein shall be grouped in subdepartments, namely:
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> 3 (a) Track Subdepartment.
> 3 (b) Bridge and Building Subdepartment.
> 3 (c) Pump Repairmen and their Helpers.
> 3 (d) Welding subdepartment.
> 3 (e) Maintenance of Way - General."

Rule 5, of the Agreement, sets forth the grade and seniority rank of the various employees within the Track and B&B Subdepartments. Rank 3, in the Track Subdepartment covers, among others, "Operators of ditchers, cranes, shovel draglines, etc." Rank 3, in the B&B Subdepartment, covers "Engineers and assistant engineers of pile drivers, locomotive cranes, or similar machines, core drill operators."

The claimant is a regularly assigned machine operator within the Track Subdepartment. The employee assigned to operate the crane in question is a regularly assigned operator within the B&B Subdepartment.

Petitioner, in support of its position, stated in its submission to this Board:

> "Although there are machine operators within both the Track and B&B Subdepartments, there is a clear line of demarcation relative to the work accruing to said operators. The work of operating machines used to perform track work accrues to machine operators within the Track Subdepartment. The work of operating machines used in the performance of B&B work accrues to machine operators on the B&B Subdepartment. The work involved here is that of operating a burro-crane used to lay ribbon rail and to pick up scrap rails. This is work that undeniably accrues to track forces."

There is no disagreement between the parties as to the principles set forth in the foregoing statement, except that Carrier denies that the crane in question was used to lay ribbon rail, as claimed, but does concede that the work performed consisted of picking up scrap and ditching. In the absence of any evidence introduced by Petitioner regarding the matter of laying ribbon rail we will dismiss that portion of the claim but we will consider the merits of the remainder of the claim.

In support of its position the Carrier stated in its submission to this Board that it has been the practice on this property that when a crane is used in one sub-department and a more pressing need arises for its use in a different sub-department the operator assigned to the crane goes along with the crane and operates it in the other sub-department. A careful review of the handling of this claim on the property shows that this position was not raised by the Carrier but is a new position appearing for the first time in Carrier submission. Therefore, that contention of the Carrier is not properly before us and we cannot give it consideration now. See Awards 18442, 18122, 18006, 16733, and many others.

During the handling on the property the Carrier based its position in denying the claim on three assertions. First, the claimant did not choose to exercise his seniority to bid on three vacancies for crane operator jobs and therefore had demonstrated no interest in such an assignment; secondly, claimant was regularly assigned as a bushhog operator during the period of the claim and therefore could not be in two places at the same time - thus he was not available; and, thirdly, claimant suffered no loss in either work or earnings during the period of the claim and therefore there is no basis for the claim.

In our view, these three contentions tend to skirt the basic issue as to whether the work involved, picking up scrap and ditching, is properly work belonging to employees in the Track Subdepartment and, if so, should not a "Track" employee have been used to operate the equipment involved. We concur in the reasoning of Petitioner that the work involved in this dispute is work accruing to employees in the Track Subdepartment. Additionally, this Board has, on several prior occasions, enunciated the principle that when a piece of equipment (such as a crane in the instant case) can be used by more than one craft then it is the character of the work performed that determines from which craft the operator will be drawn.

In Award No. 13517 we stated:

"Second Division Award 1829 holds that the operation of a crane is not the exclusive work of any craft. In the same opinion it continues to say that:

> 'it ordinarily belongs to the craft whose work it performs. It is the character of the work performed by the crane that ordinarily determines the craft from which its operator will be drawn.'"

In Award 19158 we also stated:

"****It would be illogical to reserve scraping and grading for performance by Employees under the agreement and then contend that employees from any class, under any agreement, who were capable of operating the machine, could be assigned."

Also see Award 19038 in which we subscribed to the same principle.

In the light of the foregoing we are persuaded that the Carrier violated the Agreement in that it assigned work to an employee in the B&B Subdepartment that should have been properly assigned to an employee in the Track Subdepartment. We will therefore sustain Part 1 of the claim insofar as it relates to picking up **scrap rail and ditching.**

Insofar as Part 2 of the claim is concerned, having found that the Agreement was violated in this case, we now hold that this monetary portion of the claim is one for damages and not a penalty claim as argued by Carrier, for it is clear from the record that the motivation behind the claim was primarily to seek enforcement of the Agreement. Although there are conflicting prior Awards on the question of "damages" vs. "penalties" we feel that the Opinion of the Board as expressed in Award 11701, involving the same parties as in the instant case, is significant and is quoted, in part, as follows:

"Claimant contends that he is entitled to reparations resulting from the violation of the Agreement. Carrier, on the other hand, maintains that Claimant suffered no loss because he was employed. Carrier also points out that the compensation requested by Petitioner is in the nature of a penalty and that the Agreement makes no provision for a penalty payment in the event of a violation of the Agreement.

We are of the opinion that the fundamental factor in this dispute is the violation of the Agreement. **** For an Agreement to be effective, both parties must uphold the terms. It is not enough to recognize the breach without expecting the violator to accept the consequences for its act. **** The argument that compensation to Claimant would be in the nature of a penalty is likewise extraneous, for it brushes aside the sanctity of the Agreement. Claimant's behavior or employment income are not the conditions that caused the breach."

This principle has been reiterated in numerous other Awards of this Board, and we subscribe to the reasoning therein.

However, in view of the fact that claimant suffered no loss in earnings we find that the portion of the claim regarding payment of overtime is excessive. Additionally, having dismissed the portion of the claim regarding the laying of ribbon rail, we will sustain Part 2 of the claim only to the extent that the Carrier records indicate that the equipment involved was used to pick up scrap **rail and for ditching and, to such extent, at the pro-rata rate only.**

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 to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 20th day of June 1973.