NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20425
THIRD DIVISION Docket Number MW-20539

Irwin M. Lieberman, 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 Agreement was violated when Foreman S. A. Brooks performed track repairman's (track laborer) work on August 21, 22, 23, 24, 28, 29, 30, 31, September 6, 7, 8, and 12, 1972 instead of recalling cut-off track repairman (track laborer) Vernon R. Black to perform such service. (System File 1-1/E-304-2 E-304)

(2) Track Repairman (Track Laborer) Vernon R. Black now be allowed 120 hours of straight-time pay and 25 hours of time and one-half pay because of the aforesaid violation.

OPINION OF BOARD: Claimant, holding seniority as a laborer (Rank No. 6) within the Track Subdepartment, was furloughed during the claim period from Extra Gang No. 53. During August and September 1972 the Foreman of the Gang performed some work in connection with laying panel track in addition to his supervisory responsibilities. Petitioner claims that this was inappropriate and that Claimant should have been recalled to perform the work. There is a dispute as to the amount of time that the Foreman worked with the gang with Petitioner alleging full days and the Carrier contending that he did not work even half a day on each day involved. Petitioner's documentation was presented with its submission and not on the property; it may not be considered by the Board in conformity with long established doctrine.

Essentially Petitioner argues that the Carrier has no right to permit an employe with Seniority Rank No. 1 to perform the work of Seniority Rank No. 6; the physical work of laying panel track accrues to employes having Seniority Rank No. 6. Petitioner concludes that Claimant should have been recalled to perform the work in question. It should be noted that there is no information whatever as to the date Claimant was furloughed. The Organization relies heavily on Award 19816 in support of its position, which involved the same parties and Agreement. While we concur in the finding in that Award with respect to the Composite Service Rule, we believe that Award to be in error insofar as it holds that Rule 5 dealing with Seniority Ranks constitutes a reservation of work rule. We have held in many prior Awards (for example 19922, 18876 and 18471) that rules listing positions per se do not reserve work exclusively to

employes of a given class and certainly a Seniority Rank Rule such as in the instant Agreement vests no exclusive right to specific work in the absence of system-wide custom and practice.

Carrier states that its Operating Rules in Rule 141 provide that foremen must "....as far as possible engage in the work when the forces are small". Carrier claims that the gang in question constituted four men and a foreman and there was no vacancy in the gang for which Claimant could have been recalled. Carrier also contends that the work performed by the foreman on the days involved was of his own volition and without instruction from any supervisory personnel. Carrier concludes that the claim is not supported by the Agreement and should be denied.

There is no indication in the record that there was in fact a vacancy in Extra Gang No. 53. Further in Award 17360 involving the same parties and Agreement we said: "We do not believe the Agreement contemplates that two men gangs are improper or that where such are authorized the foreman is to be confined to supervisory duties only." We find no Agreement support restricting the foreman's work in this instance.

With respect to the voluntary aspect of the foreman's actions, despite contrary Awards (18003) we find that the position that voluntary service cannot support a claim is correct (Awards 12907, 17172, 19839 and others).

It is well established that Claimant must bear the burden of proving exclusive jurisdiction over work to the exclusion of others. This Board has also found that when there is a jurisdictional question between employes of the same craft in different classes, represented by the same Organization, the burden of establishing exclusivity is even more heavily upon Petitioner (Awards 13083 and 13198).

Petitioner's General Chairman, in his letter to Carrier dated December 14, 1972 while acknowledging the existence of Operating Rule 141 but denying any conforming Agreement language, said: "....and I believe you will have to agree that no foreman has a right to work the amount of hours which I have claimed above with cut-off laborers...." The inference may be drawn from that statement that the foreman is not prohibited from doing <u>any</u> physical work with the gang; if this is true, then the length of time he does such work is not significant (Award 13083) and Petitioner's position is seriously weakened.

Based on the entire record of this dispute and the reasoning above, we find that Petitioner has not sustained its burden of proof and the Claim is not supported by the Agreement: it must be denied.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Panka
Executive Secretary

Dated at Chicago, Illinois, this 27th day of September 1974.