NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25282
THIRD DIVISION Docket Number MW-24859

Rodney E. Dennis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Consolidated Rail Corporation
(Former Lehigh Valley Railroad Company)

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

(1) The Carrier violated the Agreement when it used Portable Equipment Operator W. P. McDermott to perform trackman's work at Ashley, Pennsylvania on February 4, 5, 6, 7, 8, 13 and 25, 1980 (System Docket LV-207).

(2) Because of the aforesaid violation, furloughed Trackman F. J. Prest shall be allowed fifty-six (56) hours of pay at the trackman's straight-time rate.

OPINION OF BOARD: On February 4, 5, 6, 7, 8, 13, and 25, 1980, a Portable Equipment Operator performed Trackman's work at Ashley, Pennsylvania. Claimant, a furloughed Trackman, contends that he should have been called back to perform the work. He requests 56 hours' pay at the pro rata rate as compensation for pay that he would have earned had he been properly called back to work.

Carrier contends that since 1938, it has been the practice on this property that when Portable Machine Operators had no work for their machines, they were used as Trackmen to perform Trackmen's duties rather than remain idle waiting for work for their machines to develop.

This Board has reviewed the record of this case and the Awards submitted on the issue by both sides. We have concluded from this record that Equipment Operators and Trackmen have seniority on two separate rosters. We have also concluded that it is generally accepted in the industry that Portable Machine Operators perform the functions associated with operating the machines used by the Machine Department and that Trackmen traditionally perform the function relating to the dismantling and laying of tracks and maintenance of the track and right of way associated with it. We are also persuaded that, on occasion, there is some overlap between job categories in maintenance of employment that cannot and should not be avoided. We are not persuaded, however, that this overlap would extend to a full week's work, as it obviously did in the instant case. The record here reveals that the Machine Operator was used as a Trackman for five consecutive days and then on track patrol on two single days. This clearly is work that normally should have been performed by Trackmen, not Portable Machine Operators.

Carrier's position that Portable Machine Operators have always been used as Trackmen when there was no work for their machines has not been demonstrated in this record with one thread of probative evidence. This was so asserted by Carrier, but no support for its assertion was presented to the Board. We therefore find that argument unpersuasive.

Carrier cites Awards 24 to 28 of Public Law Board 2203, involving the same parties as are involved here, as support for its position in this case. This Board has reviewed those Awards and finds no fault with them. In fact, they are supportive of this Board's position that some overlap in Maintenance of Way jobs by necessity exists. Those Awards, however, deal as far as we can tell with single incident and not with a situation in which the work was performed on a regular basis for an extended period, as is the case here.

This Board relies for its support more on the line of cases that support the notion that since separate seniority lists for various job categories have been established in the Maintenance of Way Craft, it was the intent of these lists to establish boundaries between the categories and limit the work traditionally performed by each subdepartment to that department. We look to Third Division Award No. 22072 for guidance. Award 22072 presented an almost identical situation to the one we have here. A Crane Operator was used as a Trackman for two weeks while his crane was being repaired. In that Award, we clearly stated our position on Machine Operators performing Trackmen's duties:

"AWARD 22072

> This dispute arose when a Burro Crane had to be taken out of service for repairs and the crane operator was instructed to report to the T&S and Section Force to assist them while the crane was being repaired. The Carrier stresses the fact that no vacancy existed at the time and that the work that was performed would have been absorbed by the existing gang members.
>
> The issue to be determined in this matter is what kind of work was performed by the Crane Operator. The fact that the work would have been absorbed by the existing gang has no bearing on the case. The work in question was work belonging to those holding seniority rights in the track subdepartment. When Carrier adds to its force to perform the work it must do so in accordance with the established seniority system.

"The Carrier argues that its intention in the instant case was merely to save the crane operator from being furloughed. While the Carrier's good intentions are to be applauded the Carrier is still bound by the terms of its collective bargaining Agreement. The assignment of work belonging to employes holding seniority in the track subdepartment to one not holding such seniority is violative of the Agreement."

We sustained the claim in Award 22072 and, based on our reasoning in that case, we shall sustain this claim.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1985.

CARRIER MEMBERS' DISSENT
TO
AWARD 25282, DOCKET MW-24859
(Referee Rodney E. Dennis)

In our opinion, the Majority committed serious error in reaching their conclusions sustaining this claim. The Majority was advised in the course of the handling of this case that:

> "...the Carrier cites and relies upon Awards from this property involving analogous factual situations, in which the same claims, involving the same alleged rule support were denied. The Referee's attention is invited particularly to Awards 24, 25, 26, 27 and 28 of P. L. Bd. 2203, cited by Carrier and attached as their Exhibit "G". While these awards were cited on the property in support of Carrier's position dealing with past practice, there is no evidence that the Organization rebutted them or challenged Carrier's arguments dealing with practice while the claim was being handled on the property, and any attempt to do so at this time comes too late for our consideration. See Award 23447 (Dennis); 23541, 23432 (Mikrut); 22726 (Roukis) and Award 21843 (O'Brien). See Award 22156 (Weiss)."

Relevant to this point, the Organization cited 26 Third Division Awards in support of the principle "that undenied statements must be accepted as correct". In the present case, while the claim was on the property, the Carrier asserted repeatedly that it was the past practice to use the Equipment Operator to perform Trackmen's work when there was no P. O. work to perform. These assertions were brought to the attention of the Majority as shown above. Notwithstanding, the Majority held:

> "Carrier's position that Portable Machine Operators have always been used as Trackmen when there was no work for their machines has not been demonstrated in this record with one thread of probative evidence. This was so asserted by Carrier, but no support for its assertion was presented to the Board. We therefore find that argument unpersuasive."

Needless to say, the proof demanded by the Majority was not necessary unless Carrier's argument had been contested. If the Organization didn't see fit

to contest it on the property, then what arbitral rule permits the Majority to challenge the assertion?

Unfortunately this was not the only serious error committed in this case. The Majority states:

> "This Board relies for its support more on the line of cases that support the notion that since separate seniority lists for various job categories have been established in the Maintenance of Way Craft, it was the intent of these lists to establish boundaries between the categories and limit the work traditionally performed by each subdepartment to that department. We look to Third Division Award No. 22072, Referee R. A. Franden, for guidance..."

The Majority then quotes from Award 22072 and we cite this portion in particular:

> "...The assignment of work belonging to employes holding seniority in the track subdepartment to one not holding such seniority is violative of the Agreement." (Emphasis Supplied)

That award had no application to the facts in our case for the P.E.O. did have seniority as a Trackman. The General Chairman conceded this for he said:

> "Mr. Prest (Cliamant) is senior to Mr. McDermott (P.E.O.) on the Trackman'e Roster."

In summary, the Majority erred when it rejected the Carrier's five Awards dealing with the identical problem from P. L. Bd. 2203; it erred when it failed to apply the principle enunciated by the Organization with 26 Board decisions in support; and finally it committed error in applying an Award from another property dealing with an employe who had no seniority in the craft in which he was used on the mistaken assumption that these were the facts applicable in this case.

For the reasons set forth above we Dissent.

W. F. Euker

M. W. Fingerhut

T. F. Strunck

P. V. Varga

J. E. Yost