Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28544
THIRD DIVISION Docket No. MW-27381
90-3-86-3-608

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(The Atchison, Topeka and Santa Fe Railway Company

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

(1) The Carrier violated the Agreement when it used a Transportation Department employe instead of a Maintenance of Way and Structures Department employe to protect Track 55 at the Kansas City Terminal Yards beginning April 29, 1985 (System File 30-50-8510/11-1940-240-4).

(2) Trackman J. Chacon shall be allowed one hundred sixty (160) hours of pay for the period April 29 through May 24, 1985 and eight (8) hours for each day subsequent to May 24, 1985 on which the work referred to in Part (1) hereof is performed by a Transportation Department employe."

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 employes 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.

As Third Party in Interest, the United Transportation Union was advised of the pendency of this dispute but chose not to file a Submission with the Division.

The Claimant was regularly assigned as a trackman at the Kansas City Terminal when this dispute arose. Beginning on April 29, 1985, Carrier assigned a terminal switchman to perform certain work in connection with a highway overpass project being performed by the Kansas Highway Department. According to the Organization, the Kansas Highway Department work on the highway overpass on I-635 over Track 55 in the Kansas City Terminal Yards required a track watchman to protect the track from falling debris. The Organization asserts that Carrier assigned a terminal switchman instead of assigning a trackman as required by Rule 12(a), which reads:

"RULE 12 - WATCHMEN AND FLAGMEN

12 - (a) - Filling of Positions. Employes who have given long and faithful service to the Carrier and are unable to perform heavy work may be assigned as Track, Bridge, Tunnel and Crossing Watchmen and Flagmen.

The seniority provisions of this Agreement will not apply to filling these positions. These positions will be filled in the following order:

1. Disabled employes with consideration given to length of service and ability to perform the duties of the position.

2. Trackmen who hold seniority on the seniority district where the vacancy is located.

If a trackman is selected to fill the vacancy, the individual will retain seniority as a Trackman."

The Organization maintains that the foregoing Rule specifically stipulates that if no disabled employees are available, watchmen and flagmen positions will be filled by a trackman who holds seniority on the seniority district where the vacancy is located. In this instance, it is the Organization's contention that a track watchman was required to protect the track at issue, and that Carrier was obligated by Rule 12(a) to fill the position either by assigning a disabled employee or assigning a trackman who held the requisite seniority. Thus, the Organization submits, Carrier's assignment of a switchman to fill the track watchman's position unquestionably violated the Agreement.

Carrier contends, first, that it properly determined that the operation at the overpass location should be protected by an operating employee -- a terminal switchman -- who is thoroughly familiar with train operations in the Kansas City Terminal and who could communicate by radio and telephone with Santa Fe personnel at various locations. Second, Carrier asserts that neither Rule 12(a) nor any other Rule of the Agreement reserves flagging work exclusively to Maintenance of Way employees. In fact, Carrier stresses, trainmen and other crafts and classes of employees have also participated in the performance of such work for many years, with no one craft or class of employee having exclusive rights thereto. Third, Rule 12(a) is simply inapplicable here, Carrier urges. The intent of that Rule is to enable Carrier to fill a vacancy by assigning an employee who has given long and faithful service to the Carrier and is unable to perform heavy work to a watchman or flagman position. Here, Carrier argues that the work performed by the switchman is not the type of work contemplated in Rule 12(a). Finally, Carrier argues that Claimant was fully employed and suffered no lost earnings as a result of the action complained of in the instant matter. A penalty payment is not supported by any Rule of the Agreement, Carrier stresses.

We note at the outset that the burden is upon the Organization to show that the action taken violates some part of the Agreement. Based on our review of the record in its entirety, we must conclude that the Organization has failed to meet this burden.

The difficulty with the Organization's case is two-fold. First, it is incumbent on the Organization that it substantiates its Claim by a preponderance of the evidence and that the evidence submitted be of probative value. In this case, the parties have submitted conflicting assertions as to the work that was actually performed. Though the Organization argues that the work at issue involved "track watching," Carrier insists that the work involved much more, including notifying those responsible for train movements of tracks being obstructed so that trains could be stopped or rerouted. Unfortunately, this Board is not capable of resolving factual conflicts of this nature. Our function is that of an appellate body, we are not authorized to act as fact-finders. Under these circumstances, we have no alternative but to conclude that the Organization failed to sustain its burden of proving the elements of its Claim.

Second, we note that even if we were to accept the Organization's position with reference to the disputed work, it is our view that neither the Scope Rule alone nor in conjunction with Rule 12 explicitly creates any exclusive reservation of this work to the Organization. Rule 12, in our view, simply does not confer an explicit reservation of work to trackmen, and, in accordance with numerous Awards of this Board, we find that absent an exclusive reservation of work provision or evidence of a system-wide practice of exclusive work assignment, the Claim must be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of September 1990.