

The Third Division consisted of the regular members and in addition Referee Charlotte Gold when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Railroad Company (former St. Louis-
(San Francisco Railway Company)

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

(1) The Agreement was violated when the Carrier assigned Machine Operator G. Brand instead of Trackman William Widener to perform trackman's work in the St. Louis, Missouri area beginning sixty (60) days retroactive from September 6, 1988 (System File B-2068/EMWC 88-10-31 SLF).

(2) As a consequence of the aforesaid violation, Trackman William Widener shall be compensated for all wage loss suffered beginning sixty (60) days retroactive from September 6, 1988 continuing until such time as the violation is corrected."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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.

Claimant alleges that beginning on January 1, 1988, Carrier erroneously assigned a Machine Operator to perform Trackman's work that Claimant more appropriately should have been recalled to perform as a furloughed Trackman. He seeks retroactive compensation for sixty days prior to September 6, 1988, "continuing until such time as the violation is corrected."

There is no doubt, as the Organization points out, that a series of Third Division Awards involving the parties have clearly affirmed the proposition that, in general, it is an Agreement violation to have Machine Equipment Operators perform Trackman's work when their machines were inoperable.

(See Third Division Awards 27696, 27874, 27875, 27876, and 27877). As noted in Third Division Award 25282 (cited in Award 27696), Equipment Operators and Trackmen have seniority on two separate rosters and the generally accepted practice in the industry is for these groups to perform separate functions. Award 25282 acknowledges that there are some limited circumstances where overlap occurs:

"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...."

In the instant dispute, Carrier alleges that the Machine Operator performed Trackman's work on only an occasional and sporadic basis. Claimant, on the other hand, produced statements and signatures from Trackmen to support his contention that the Machine Operator did Trackman's work all but one or two days a month. The difficulty with this case, as both Carrier and Claimant acknowledge, is there is insufficient evidence in the record to establish just how often the work was performed. The Division Maintenance Engineer, for example, stated that "The trouble with this claim is that there is no way to record exactly how many hours are involved." Claimant, in addition, admitted as much when he wrote that "I must agree that there is no way to tell how many days he [the Machine Operator] worked a laborers job."

In Award 27876, this Board expressed concern with that "Claim's sweeping scope," where neither specific dates were cited nor the type of work performed was noted. As in the present case, the Board was faced with a request for sixty days' retroactive compensation and continuing compensation until the violation is discontinued. We concluded that "We recognize that retroactive Claims, as well as continuing Claims, are provided for in the Agreement but we question their appropriateness in the circumstances we are faced with here."

There is no doubt that Claimant and the Organization had the responsibility to provide acceptable substantiation for the Claim and that burden was not met. At the same time, however, the Division Maintenance Engineer acknowledged that there were "entire days" when the Operator performed Trackman's work and this Board must conclude that that was clearly inappropriate. ("Usually, it was the case where his machine would be with the gang and needed for only a small part of the job. But there were entire days when he never ran the machine, he just worked with the gang.") He added that the Operator did not do this work "at Mr. Hiam's direction...but rather at his own choice."


Given this acknowledgement, as well as the fact that Carrier cannot allow its employee to violate Agreements, even if an action is engaged in voluntarily and not at the direction of Management, we find that a token payment is warranted here. For such claims to be sustained in full in the future, Claimants will have to provide far more persuasive evidence than that which was produced here. Claimant shall receive one hour's pay per day for sixty days.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of January 1992.