NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 29538
Docket No. MW-29720
93-3-91-3-58

The Third Division consisted of the regular members and in addition Referee Thomas J. DiLauro 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, on October 6, 1989, the Carrier assigned or otherwise allowed Trainmaster - Roadmaster J. Gerleman and Track Supervisor B. Hambrick to unload ballast between Enid and Mile Post 474 on Seniority District No. 5 instead of calling and using Trackmen G. Stahl and G. Fleig for such service (System File B-1445-14/EMWC 89-11-27D SLF).

(2) Trackmen G. Stahl and G. Fleig Shall each be allowed eight (8) hours' pay at their respective straight time rates because of the violation referred to in Part (1) hereof. In addition, Messrs. G. Stahl and G. Fleig shall be entitled to all special allowances and benefits applicable under the August 1, 1975 Working Agreement."

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 employe 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.

Claimants G. A. Stahl and R. J. Fleig were employed by the Carrier as trackmen. Both of them were placed on layoff effective September 1, 1989, and they were on furlough at the time of this dispute.

On October 6, 1989, train No. 8091 operated as a work extra, between Enid and M.P. 474, dumping ballast. This train left Enid with 9 cars of ballast (air dumps), at 6:40 A.M. This train reported clear on their track warrant at M.P. 474, at 12:50 P.M.

The Carrier acknowledges that the ballast was unloaded by the Trainmaster and the Track Supervisor and the task was completed within two hours. The Carrier asserts that this work has never been the exclusive work of one particular craft. The Carrier also maintains that supervisors have performed this task in the past. The Carrier argues that unloading an air dump does not require that an employee follow along to control the flow of the ballast.

The Carrier further contends that the hours claimed are excessive. The Carrier asserts that only 10 to 15 minutes are required per car, which totals 2 hours to complete the unloading of the ballast rather than the 8 hours claimed by the Organization.

The Carrier alleges that Claimant Fleig was on vacation on the date in question, and was unavailable to work. Additionally, the Carrier maintains that it is not required to recall an employee from furlough for two hours's work. The Carrier asserts that this work was so minimal it cannot be construed as re-establishment of forces.

The Organization contends that the work of dumping ballast has been historically and customarily performed by the track forces. The Organization maintains that the Claimants are fully qualified, and were available to work. The Organization submitted written statements that this work has been exclusively performed by the Organization's members.

Moreover, the Organization denies that 8 hours to perform the work in question is excessive. The Organization believes that travel time from location to location should be included, as well as the amount of time required for the build-up of air pressure and for boarding the train.

Carrier's Exhibit 5, which was a "blind carbon copy" of the letter of denial sent to the Organization on January 22, 1990, contains that statement that:

> In our response to this claim, we have taken the position that unloading of ballast from air dump cars does not require track personnel and that, in fact, others, including supervisors, have dumped air cars. However, we have nothing to back this up, therefore, it would certainly solidify our position if we could secure statements from individuals who can who have performed this work in the past and that this work does not accrue exclusively to track employees.

The Carrier's Exhibit 7 is a signed statement dated April 2, 1990, from several Roadmasters, Managers, Track Supervisors, Engineers, and Conductors stating that they have dumped air cars. However, these statements are vague as to the time or place where they supposedly performed these tasks. Thus, little weight is given to this exhibit.

Rule 1 and Rule 5 of the Scope Rule, when read together, support the Organization's contention that the work is reserved to the Claimants, and excludes the Trainmaster and the Track Supervisor, under this rule. Thus, when the work was performed by the Trainmaster and the Track Supervisor, the Agreement was violated.

However, there is reason to believe that the 8 hours claimed by the Organization is excessive. First, the train departed at 6:40 A.M. It was cleared at 12:50 P.M. This is a total of six hours and ten minutes. Based on this information, even if the Claimants are paid for the total time the train was in operation, it is less than the 8 hours claimed. Further, it appears that the crew performed other duties in addition to dumping the ballast. Based upon this information, it appears that the Carrier's contention that the dumping of the ballast took two hours to complete appears to be reasonable.

Although the Carrier points out that Claimant Fleig was on vacation through October 6, 1989, and was therefore unavailable, it is not apparent that he would have remained on his vacation if he had been offered the opportunity to perform the duties in question. The Carrier also argues that it was under no duty to recall Claimant Stahl from furlough. To support its position that the Claimants were entitled to file a claim, the Organization accurately cites Third Division Award 18557 which states:

"Carrier next contends that since the named Claimant was on vacation and not available, no monetary award should be made even if the claim be sustained as to the violation. This question of monetary payment to an unavailable Claimant has also been passed on by this Board in favor of the Organization. See Awards 10575 (LaBelle) and 6949 (Carter). These Awards hold that one of a group entitled to perform the work may prosecute a claim even if there be others having a preference to it. The essence of the claim by the Organization is for Rule violation and the penalty Claim is merely incidental to it. The fact that another employe may have a better right to make the Claim is of no concern to Carrier and does not relieve Carrier of the violation and penalty arising therefrom."

Based on the Board's review of the record, there is sufficient evidence to establish that a violation of the Agreement occurred on October 6, 1989, when Supervisors unloaded ballast when this work is within the Scope of the Agreement. Each Claimant shall be entitled to two hours pay for this work.

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 9th day of March 1993.

CARRIER MEMBERS' DISSENT
TO
AWARD 29538, DOCKET MW-29720
(Referee DiLauro)

It is factual that Carrier operated a work extra on October 6, 1989 to dump ballast from nine air-dump cars along the side of the track. The activating levers were pulled by a trainmaster and a track supervisor and the work took approximately two hours to complete. Claimants were furloughed trackmen and one was observing assigned vacation on this date.

The Majority has concluded that:

> "Rule 1 and Rule 5 of the Scope Rule, when read together, support the Organization's contention that the work is reserved to the Claimants,..." (Emphasis added)

However, on the property, the only rules cited by the Organization were Rules 2, 3(b) and 79. These rules deal with establishing seniority, reserving work within a seniority district and recalling employees. Neither Rule 1 (scope) nor Rule 5, listing subdepartments, was raised or argued on the property. These rules, in addition to other rule citations, were first raised in the Organization's Submission to this Board. Despite the impropriety of such action and the fact that such was brought to the Majority's attention, it is gross error for this Majority to conclude that rules not joined on the property substantiate reservation of this work. None of the contract rules, cited by the Organization on the property (Rules 2, 3(b), 79) or in their Submission (Rules 3, 5, 45, 46, 47, 48, 88) can be quoted to substantiate the erroneous reservation of work concluded in this case.

In Third Division Award 26033, involving the same parties and contract, we noted:

> "This Board has carefully reviewed the evidence as presented on the property and finds nothing in the Agreement Rules cited of clear and unambiguous language assigning such work as herein disputed exclusively to the Maintenance of Way ranks. Nor does this Board find sufficient evidence of probative value to establish that such disputed work has historically been performed exclusively by members of the Maintenance of Way by custom, practice and tradition on a system-wide basis. Letters of support documented by the Organization do not establish that the materials hauled were either solely Maintenance of Way materials or work exclusively performed by employes of the Maintenance of Way to the exclusion of Clerks and other Crafts. Carrier denies on property exclusivity and more importantly supporting documentation indicates that while Maintenance of Way employees have performed similar work in the past, so too have other Crafts."

See also Third Division Awards 19823, 20362, 20640.

Since there is no rule support for the claim, the only other avenue is to substantiate the Organization's reservation of work is via exclusive practice. Carrier, in its initial denial of this claim, dated November 20, 1989, pointed out:

> "In the past supervisors (roadmasters, trainmasters, division engineers), machine operators, foremen, special equipment operators as well as switchmen and brakemen have dumped air dumps. This has never been the exclusive work of one particular craft."

While the Majority categorizes Carrier's April 2, 1990 correspondence as "vague" it and Carrier's November 20, 1989 denial, noted above, substantiates that supervisory personnel "...dumped air dump ballast cars <u>without track personnel on hand</u>..." (Emphasis added)

Thus, there was no rebuttal during the year of on-property handling to the fact that the work involved here had been routinely done by other crafts as well as supervision. It is not until the time limits had expired and the Organization had received an extension of time that the Organization offered their general listing and statement on October 22, 1990 asserting:

> "...that dumping ballast cars, (either by air or manual), has historically and customarily been work of our track maintenance forces."

It is obvious that this document was an attempt to pad a barren record just before filing the matter with this Board.

In Third Division Award 20640, involving the same parties and agreements, this Board found:

> "In order to sustain the Organization's position on Claim (1), the Organization must show that the Agreement clearly reserves to the employes an exclusive right to the work in question, or, if not, then it must show by probative evidence that the work in question has been exclusively reserved to the employes by custom, practice and tradition, system wide. No exclusive reservation of the work in question is found in the Scope Rule. Nor does the record show exclusive reservation of the type of work to the employes by custom, practice and tradition, systemwide. Since the Organization has not met its burden of proof on this issue, we must deny Claim (1)." (Emphasis added)

Given the foregoing precedent and the facts of record, this claim should have been denied on the Organization's failure to prove that the complained of work was reserved to them by contract and/or practice.

Finally, neither Claimant was available for the two hours of work. Rule 79 deals with the recall of employees to positions. An

employee under the rule, after being notified "by mail or telegram" has up to 10 days to report. Obviously, neither Claimant under Rule 79 was available. Further, despite the dicta cited from Third Division Award 18557, Claimant Fleig was not aggrieved and he stands no right to compensation for work he could not do. However, in Award 18557, the "...essence of the claim by the Organization is for Rule violation..." but in this matter there is no substantial evidence that pulling the handle on an air-dump car is reserved by contract or practice to this Organization.

We Dissent.

P. V. Varga

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

J. E. Yost