

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 31750
Docket No. MW-30576
96-3-92-3-330

The Third Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former
(Chesapeake and Ohio Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Firemen & Oiler Laborers instead of Maintenance of Way Laborers to grind rail and work with rail cranes on October 1, 2, 8, 9, 10, 11, 12, 30, 31 and November 5, 1990 and continuing [System File C-TC-7182/12(91-27) COS].**
- (2) As a consequence of the violation referred above, Maintenance of Way Laborers W. Clagg and G. Hatfield shall each be allowed eight (8) hours pay, at the Laborers rate of pay for each day expended by the Firemen & Oiler Laborers performing the work described in Part (1) above beginning October 1, 1990 and continuing until Maintenance of Way Employees are assigned to perform the work in question.”**

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 employee 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 were given due notice of hearing thereon.

As Third Party in Interest, the International Brotherhood of Firemen and Oilers was advised of the pendency of this dispute and did file a Submission with the Board.

Prior to 1985, Carrier maintained and operated two separate manufacturing and reclamation facilities. One was located on the former B&O in Martinsburg, West Virginia. Laborers employed at the Martinsburg, West Virginia plant were represented by the International Brotherhood of Firemen & Oilers.

The other plant was located at Barboursville, West Virginia, on the former Chesapeake and Ohio. Those Laborers were represented by the Brotherhood of Maintenance of Way Employees.

Carrier consolidated the two reclamation operations pursuant to Finance Docket No. 21160, by moving the work to Barboursville.

As a result, Carrier entered into an Implementation Agreement with the Brotherhood of Maintenance of Way and the International Brotherhood of Firemen & Oilers dated September 17, 1985. Carrier and the Organizations agreed to consolidate the seniority rosters and generally agreed to other protective conditions.

Of particular significance to this dispute is the provision found in Section 2(d) which reads:

"The integrated Laborers roster provided for in this Section 2 shall not be used for the assignment or reduction of forces which shall instead be made in accordance with the allocation table as provided in Section 5 hereof."

Section 5 reads:

"Laborer positions which include those positions which will be paid a differential of .15¢ per hour (hereinafter referred to as 'differential laborers') for performing work formerly performed by the 'MofW Helpers' at Barboursville will be filled from F&O and BMWWE forces as provided in the allocation table attached hereto as Appendix A and made part hereof."

Section 6(c) reads:

“Differential laborer positions will be filled first by giving preference to those employees on the ‘MofW Helpers’ prior rights roster. Three such positions will be offered in seniority order to the F&O employees transferring to Barboursville who are assigned to F&O allocated positions. The F&O employees accepting the ‘differential laborer’ position will be dovetailed onto the ‘MofW Helpers’ prior rights roster using either the date they first performed such work at Martinsburg or the date of the Coordination, whichever comes first, as their seniority date. When the ‘MofW’ prior rights roster is exhausted, ‘differential laborer’ positions will be filled by giving preference to the senior laborer and so on.

On September 21, 1987, the parties modified the provisions of Section 6(c) by applying those provisions only to employees who are considered as being involved in the original transaction covered by the September 17, 1985 Memorandum of Agreement and who were identified in that Agreement.

The parties then determined that for the purposes of applying Section 6(c) certain F&O employees would be considered as having certain constructive seniority dates on the BMWE seniority roster of Laborers at Barboursville, West Virginia.

Two of the affected F&O Oiler Laborers were G. L. Fox and C. T. Bartley. Mr. Fox received a constructive seniority date of September 15, 1980. Mr. Bartley received a constructive seniority date of October 6, 1980.

On the claim dates in question, Carrier assigned differential Laborers' work to Messrs. Fox and Bartley. The Brotherhood of Maintenance of Way took issue with the assignment believing that it was more proper to assign Claimants W. Clagg and G. Hatfield to grind rail and work with rail cranes at the Barboursville Shop at Barboursville, West Virginia, on the claim dates. On all of the claim dates, both of the Claimants were furloughed.

According to the 1985 prior rights roster of Maintenance of Way Helpers, Gary Hatfield has a seniority date for prior right purposes of September 10, 1981, while Mr. Clagg has a seniority date for prior rights purposes of February 28, 1984.

According to Organization, neither assigned Firemen & Oiler Laborers' names appeared on the 1990 prior rights roster of Maintenance of Way Helpers. Therefore, Carrier made the assignment in violation of the Agreement.

Organization next takes issue with Carrier's alleged failure to substantiate its affirmative defense that the Firemen & Oiler Laborers were assigned in accordance with the allocation table attached as Appendix A to the September 17, 1985 Coordination Agreement.

Finally, Organization urges this Board to implement the claim remedy since Carrier took no issue with the requested remedy during handling on the property.

Carrier, and the Third Party, International Brotherhood of Firemen & Oilers, assert that the Carrier properly made the assignments in accordance with the allocation tables attached to the September 17, 1985 Agreement.

According to Carrier, the consolidation of the Martinsburg Shops contemplated by the September 17, 1985 Memorandum of Agreement, provided for the equitable distribution of work to both the IBF&O employees and the C&O - BMW employees at the Barboursville facility.

Furthermore, the allocations provided for in the Coordination Agreement superseded any Schedule Agreement rules cited by Organization. Specifically, Schedule Agreement Rule 2 and 5 involving seniority and Rule 66 (Scope).

Carrier argues that the Brotherhood of Maintenance of Way is impermissibly trying to assert that they have an exclusive right to perform laborer's work at the Barboursville facility which neither the Schedule Agreements nor the Coordination Agreement of September 17, 1985 support. Carrier asserts that in order to establish exclusivity of work Organization must prove that it performs the work on a system-wide basis which, according to Carrier, cannot be established by Organization since, historically, the work has been allocated amongst the Brotherhood of Maintenance of Way Employees and those represented by the International Brotherhood of Firemen & Oilers.

Finally, Carrier asserts that this Board is without authority to rewrite the Agreements on the property and therefore, since Organization failed its burden of proving a contract violation, Carrier urges this Board to deny the claim.

After considering the parties' arguments the crux of the dispute seems to center around the conflicting requirements of the September 17, 1985 Coordination Agreement.

Section 2(d) of the Coordination Agreement clearly provides that assignments of work shall be made in accordance with the allocation table provided in Section 5. Nevertheless, Section 6(c) provides that differential laborer positions will be first filled by giving preference to those employees on the MofW Helpers prior rights roster. Despite the conflicting provisions, this Board can resolve this dispute without attempting to reconcile the conflicting provisions of the September 17, 1985 Agreement.

While it alleges that Carrier improperly assigned the work in accordance with the allocation table, the Organization offers no such proof. Therefore, absent proof to the contrary, we have no reason to believe the Carrier misapplied the allocation table.

Given the fact that Carrier properly assigned it in accordance with the allocation table requirements of Sections 2(d) and 5, we next must consider whether or not the two Firemen & Oiler Laborers would have been entitled to perform the work by virtue of their position on the prior rights seniority roster.

Organization argues that the two assigned Firemen & Oiler Laborers never appeared on the prior rights seniority roster dated 1990. This is true. Nevertheless, by virtue of the parties' Agreement dated September 21, 1987, all parties agreed to give Messrs. Fox and Bartley constructive seniority dates senior to the two Claimants.

A review of the record indicates that the two Firemen & Oilers Laborers who were given constructive seniority dates, senior to the Claimants on the prior rights roster, have never had their names appear on the prior rights roster. There is no indication that they have lost their constructive seniority dates nor is there any indication that the parties amended the 1987 Agreement granting such constructive dates.

Given the fact that the two Firemen & Oiler Laborers had senior rights on the prior rights seniority roster and that Organization failed to demonstrate that they had lost such rights even if Section 6(c) had somehow superseded the Sections 2(d) and 5 requirements to assign work based on the allocation table, F&O members Fox and Bartley would in all circumstances have been the proper choice to perform the disputed work in question.

Consequently, since the Brotherhood of Maintenance of Way has failed to prove violation of any Agreement concerning the assignment of the disputed work we must deny this claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 24th day of October 1996.