Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37398
Docket No. MW-37321
05-3-02-3-346

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Duluth, Missabe and Iron Range Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned two (2) furloughed track laborers to perform overtime service on January 30 and January 31, 2001, instead of assigning Track Laborers G. Wallgren and R. Jorgenson (Claim No. 06-01).

(2) As a consequence of the violation referred to in Part (1) above, Track Laborers G. Wallgren and R. Jorgenson shall each be allowed sixteen (16) hours' pay at the track laborer's time and one-half rate."

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.

The basic facts giving rise to this claim are not in dispute. On Tuesday, January 30 and Wednesday, January 31, 2001, two furloughed track employees were called in to perform snow removal work from 3:00 P.M. to 11:00 P.M. along with the regular assigned afternoon crew. They were used to augment the afternoon shift rather than fill in for absent employees. The Claimants were regularly assigned to the morning shift with hours from 7:00 A.M. to 3:00 P.M.

The Organization contends that the Claimants were entitled to the overtime opportunities pursuant to Rule 20(a) because it was continuous with their regular assignments. The Organization cited Public Law Board No. 5732, Award 1, issued June 6, 1995, as determinative support of the claim. It followed the rationale of Third Division Award 30156, which issued in April 1994. While not precisely the same as the instant facts, the fact patterns in the two Awards are closely similar and involve these same parties as well as Rule 20(a).

For its defense, the Carrier relies on what it believes is a significant factual difference between the present dispute and the prior Awards cited by the Organization. In this case, the furloughed employees augmented an existing work shift. In the prior Awards, there was no assigned shift to augment. The Carrier also relies on Award 2 of Public Law Board No. 5732 which, in the Carrier's view, did not follow its own Award 1 because of this factual difference.

Rule 20 reads, in pertinent part, as follows:

"RULE 20
Division of Overtime

(a) During the regular assigned workweek, an employee assigned to a particular job during the workday at a point where overtime is required continuous with his shift will be given all the overtime connected with that job.

(b) All other overtime will be given to the senior qualified available employee working in the classification at the headquarters point where the overtime is to be performed."

The Carrier's reliance on Award 2 of Public Law Board No. 5732 is mistaken. The facts of that case did not involve a work assignment continuous with the duty hours of the work shift that immediately preceded it. The disputed assignment did not begin until one hour after the end of the previous work shift. As a result, the case was decided upon an interpretation of Rule 20(b) and not Rule 20(a). Therefore, the existence or non-existence of a work shift to be augmented was effectively irrelevant.

Were the instant dispute a case of first impression, we might not have reached the same conclusion as Third Division Award 30156. Interestingly, the facts in that case involved a work assignment that began 30 minutes prior to the end of that Claimant's work shift. Nonetheless, the Board there determined the assignment to have been continuous with the prior shift and was, therefore, governed by Rule 20(a). It is noted that the Carrier Members' Dissent to that Award did not take exception to the Board's finding that the work assignment was continuous with the prior shift.

Our review of Award 1 of Public Law Board No. 5732 shows that it, too, might have reached a different conclusion but for the existence of Third Division Award 30156. It felt bound by the earlier Award upon concluding that it was not ". . . palpably wrong. . . ."

As previously noted, Award 1 of Public Law Board No. 5732 was issued in June 1995. Although the instant dispute did not arise until more than five years later, there is no evidence that the parties have altered or otherwise clarified Rule 20(a) to produce a result different from the earlier Awards. Because of the lack of such change, we find that following the lead of the earlier Awards best provides stability and predictability for the parties in these kinds of situations. Accordingly, we must sustain the claim as written.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of February 2005.

CARRIER MEMBER'S DISSENT
TO
THIRD DIVISION AWARD 37398, DOCKET MW 37321
(Referee Wallin)

The Claimants, maintenance of way laborers, stopped what they normally do and began cleaning snow "due to a significant amount of snowfall". No one would argue that snow shoveling is a function that is unique to certain positions. It can be assigned to all employees, regardless of shift and regardless of work classification. The Claimants thus worked to the end of their shift and went home. A second shift gang took over the shoveling. Had the Carrier confined the shoveling to existing regularly assigned employees, there would have been no claim.

The Carrier called in additional furloughed laborers to help shovel on the second shift. The Organization disputes the Carrier's right to call in extra people at straight time when the Claimants could have been carried over to shovel at overtime.

This Board sustained the claims in the face of textbook principle and long standing precedent that management is not obligated to use people at overtime to perform extra work when people are available at straight time. Precedent on this property is Third Division Award 30672.

The Board relies on Third Division Award 30156 (Benn) and states, "Were the instant dispute a case of first impression, we might not have reached the same conclusion as Third Division Award 30156." In that case, work that was expressly part of Claimants' positions (B&B Foreman and Storage Facility Mechanic) was continued beyond quitting time by extra people and there was no second shift. It is clear in the language of Award 30156 that the neutral was influenced by the facts in his case: The Carrier had just abolished the Storage Facility Foremen and mechanics positions on second and third shifts for an alleged lack of work a few days prior to the claim and the Arbitrator seemed to feel the Carrier was overreaching. He held that the work was "connected to that job" or first shift, which is the language of the agreement. Since there was no second or third shift that day, he felt the Carrier should pay: "The result may appear harsh ... the result is dictated by the clear language of the relevant rule and the fact that the Carrier earlier canceled the shifts...".

The Board said it "might not have reached the same conclusion" if the case before it was one "of first impression". What has happened is the Board has misunderstood and misapplied the rationale that Referee Been used to justify the decision in Award 30672. It now extends its erroneous application to generic snow shoveling "that began ... prior to the shift", which is part of everybody's job and which is not owned by any incumbent, in circumstances where there is a second shift. The arcane distinctions will keep front line supervisors in turmoil. For these reasons, we dissent.

John P. Lange

Martin W. Fingerhut

Blaine R. Henderson

Michael C. Lesnik

March 23, 2005