Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39699
Docket No. MW-38136
09-3-NRAB-00003-040034
(04-3-34)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(The Texas Mexican Railway

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed to call and assign Machine Operator V. Moncivais to perform machine operator duties (operate an 18-wheeler truck to haul rail, ties, switches and track material) between the Corpus Christi Yard and the Laredo Yard on May 30, June 2, 3, 4 and 5, 2003 and instead called and assigned B&B Foreman P. Serna (System File EPTM-03-793/234).

(2) As a consequence of the violation referred to in Part (1) above, Claimant V. Moncivais shall now be compensated for thirty-two (32) hours' pay at his respective straight time rate, twenty-three (23) hours' pay at his respective time and one-half rate and three (3) hours' pay at his respective double time 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 Organization filed the instant claim on behalf of Claimant V. Moncivais, alleging that the Carrier violated the parties' Agreement when it assigned a B&B Foreman, instead of the Claimant, to operate an 18-wheel semi-tractor trailer in transporting and distributing track material to be installed by track forces between Corpus Christi Yard and Laredo Yard.

The Organization initially contends that there is no dispute that on the claim dates, the Claimant was assigned as a Machine Operator assisting track forces. There also is no dispute that on the claim dates, P. Serna was assigned as a B&B Foreman. Citing Rule 1 of the parties' Agreement and several Awards, the Organization argues that it is well established that the character of the work performed is the basis for determining the class/sub-department to which such work would accrue.

The Organization asserts that the nature of the work performed by Serna on the claim dates would not accrue to a Bridge and Building employee. The Organization emphasizes that when the clear and unambiguous language of Rule 1 and the principles enunciated in the prior Awards are applied to the facts of the instant case, there can be no question that the Carrier violated the Agreement, and that the Claimant therefore is entitled to the requested remedy.

The Organization then points to the repeated references to seniority in the Agreement, arguing that these indicate that both parties recognize the importance of seniority and relative length of service when making assignments. The Organization emphasizes that the Third Division invariably has held that such Rules apply to all positions. The Organization insists that seniority is one of the

most important cornerstones upon which agreements are made, and arbitral Boards have long recognized that seniority is a valuable property right of an employee.

The Organization maintains that although the Carrier confirmed that the Claimant was qualified to perform the work in question, it nevertheless assigned the subject work to B&B Foreman Serna. The Organization contends that the work of operating a tractor-trailer would not accrue to a B&B employee.

It insists that the Carrier's own statement during the processing of this matter confirms that the character of the work performed is the basis used in determining the class/sub-department to which such work would accrue. It argues that the operation of a tractor-trailer truck would not normally be performed by a B&B employee, especially when the work performed was that of transporting and distributing rail, crossties, and other track material for installation by track forces. The Organization asserts that under the circumstances, there can be no question that the Claimant is entitled to the requested remedy.

Addressing the Carrier's position that driving never has been limited to the Track Department, the Organization points out that this is extremely misleading. The Organization emphasizes that it is not asserting that the subject work is limited solely to the Track Department. Instead, as stated, the character of the work is the basis for determining the class/sub-department to which such work would accrue. Moreover, the Carrier's statement confirmed that the "additional duty" of operating a tractor-trailer was not part of B&B Foreman Serna's regular assigned duties.

The Organization then argues that there is no rational basis for the Carrier's assertion that the Claimant's normal work duties would have been impaired had he been required to operate the tractor-trailer. The absurdity of this assertion is readily evident by the fact that Serna temporarily was prevented from performing his regular assigned duties as a B&B Foreman on the claim dates when he was assigned the duty of operating a tractor-trailer. The Organization emphasizes that the Carrier's statement is an obviously untenable and misguided attempt to justify its violation of the Agreement.

The Organization goes on to address the Carrier's argument that the Claimant was "fully employed" on the claim dates and therefore allegedly suffered no monetary loss. It points out that there was an ipso facto loss of work opportunity when the Carrier assigned the work in question to a B&B Foreman instead of to the Claimant. It asserts that the Carrier's "full employment" argument must fail for a number of reasons. It emphasizes that the Board consistently has rejected the defense that an employee allegedly was not available to perform work because he was engaged elsewhere. It asserts that because the Claimant was merely performing duties associated with his regular assignment, there has been no showing that the Claimant could not have performed the subject work. It insists that it is well established that the fact that an employee is working where the Carrier assigns him does not render the employee unavailable or unable to perform other work.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the Organization failed to meet its burden of demonstrating that a violation occurred in this matter. It asserts that the instant claim is grossly excessive and misrepresents the actual time involved, so the claim should be denied in its entirety.

The Carrier argues that all B&B Foreman Serna was required to do on the claim dates was to drive a large commercial vehicle from one point to another. It points out that Serna was one of only four employees in the entire Maintenance of Way Department qualified to drive such a vehicle. The Carrier emphasizes that there is no evidence that Serna did anything other than operate the vehicle.

The Carrier asserts that the Organization apparently is taking the position that only a Machine Operator or an employee in the Machine Sub-Department may drive the Carrier's largest commercial truck. It asserts that there is no evidence or contractual language to support this position, and none of the cited Rules ascribe the driving of trucks to any particular employee, sub-department, or craft. Pointing to the language of Rule 22, the Carrier argues that the Organization failed to explain why a Gang Foreman would not have been a more proper claimant than a Machine Operator.

The Carrier insists that no particular employee, position, or sub-department may lay claim to the exclusive right to drive a truck on this property. Nothing in the record indicates that the work performed was within the exclusive purview of the Claimant's job assignment or of the sub-department encompassing his position. The Carrier contends that under the general Scope Rule that appears in the Agreement, the Organization bears the burden of demonstrating entitlement to the work by virtue of tradition, historical practice, and custom, but no such showing has been made, or even attempted, in this case.

The Carrier points out that previous Awards have held that the right to drive a truck is not typically a work function that vests in a particular employee or position, and such right must be established either by specific contract language or a showing of historical custom and practice. The Carrier submits that the Organization failed to meet its burden of establishing an Agreement violation, so the instant claim must fail.

The Carrier then turns to the issue of the measure of damages claimed. It asserts that there can be no doubt that the Claimant is attempting to claim every hour worked by Serna on the claim dates, without any distinction between the time consumed driving the truck and the time spent performing his regular (non-driving) assigned duties. It asserts that no foundation has been established for the Organization's calculation of damages being claimed, and this claim is grossly excessive. It insists that Serna was utilized to get the truck from one point to another incidentally to his regular assignment. It contends that there is no way that Serna could have expended more than a few hours performing the driving duties over the period of the claim.

The Carrier contends that it also is relevant that the Claimant worked 16 hours on May 30, and a full day on each of the other claim dates. It asserts that in addition to being excessive, the claim is duplicative of the Claimant's earnings on his own assignment on the claim dates.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it failed to call and assign the Claimant to perform Machine Operator duties, basically operating an 18-wheeler truck to haul rail and other materials, between Corpus Christi Yard and Laredo Yard on five dates in May and June of 2003. Therefore, the claim must be denied.

This case involved the assignment of work in the same craft; and in cases of that kind, the Organization's burden to prove a violation of the Scope Rule is even greater than when different crafts are involved. As stated in earlier Awards, it is incumbent upon the Organization to introduce evidence to support its assertion that the disputed work belonged to the Claimant because the Agreement does not guarantee the assignment to the Claimant. In Third Division Award 20425, the Board stated:

> "It is well established that Claimant must bear the burden of proving exclusive jurisdiction over work to the exclusion of others. This Board has also found that where there is a jurisdictional question between employees of the same craft in different classes, represented by the same Organization, the burden of establishing exclusivity is even more heavily upon petitioner."

See also Awards 13083 and 13198.

The Carrier in this case has shown that the function of driving a truck of the size involved in this incident is limited to only four qualified and certified employees, two of which were involved in this claim. The determination on who will drive the truck is dependent upon the locations of driving and the other required normal assigned duties of each of the employees. In this case, the Carrier has shown that the driving locations were more compatible with the B&B Foreman than with the Claimant and his duties.

There is nothing in the Agreement that requires that the work involved in this case be assigned to the Claimant. The Organization failed to meet its burden of proof in this case. Consequently, the claim must be denied.

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 26th day of May 2009.