Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41825
Docket No. SG-41311
14-3-NRAB-00003-100180

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Northeast Illinois Regional Commuter Railroad
(Corporation (Metra)

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Northeast Illinois Regional Commuter Railroad Corp. (Metra):

Claim on behalf of J. K. Bird, for five days pay at the Foreman's rate of pay on January 2, 14, 15, 16, and 30, 2009; T. D. McGhee, one days pay at the Foreman's rate of pay on January 15, 2009; T. J. Kremer for five days pay at the Foreman's rate of pay on January 2, 5, 6, 7, and 8, 2009; and N. Pagan, for two days pay at the Foreman's rate of pay on January 2, and 5, 2009; account Carrier violated the current Signalmen's Agreement, particularly Rules 2, 21, and 50 when it failed to properly compensate the Claimants at the Foreman's rate of pay when they supervised the work of the gangs they were on, due to the absence of the Foreman. Carrier's File No. 11-27-713. General Chairman's File No. 1-S-09. BRS File Case No. 14387-NIRC."

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.

On February 28, 2009, the Organization filed this claim asserting that the Carrier had violated Rules 2, 21, and 50 of the Agreement when it failed to pay the Claimants, who held the title of Lead Signalmen, the Foreman's rate of pay for several days in January 2009 after they supervised their respective gangs in the absence of a Foreman. In a letter dated March 20, 2009, the Carrier denied the claim asserting that the Organization did not meet its burden of proof by establishing that the Claimants performed functions of the Signal Foremen on the dates in question. The Carrier alleged that the absence of a Foreman alone is not evidence that the Claimants performed those duties. The Carrier argues that the Claimants, as Lead Signalmen, are paid a higher rate than a Foreman who is paid a monthly rate. Therefore, the Carrier contends, even if the Claimants had performed the Foreman's duties, there is no violation of Rule 2, 21, or 50 because they were paid the higher of the two rates.

The Organization argues that even though the rate sheet contained in the record shows the Lead Signalman/Maintainer rate of pay as higher than the rate for the Foremen (monthly/hourly), the hourly rate for Foremen in January 2009 was actually greater because the Carrier unilaterally converted the workweek for employees paid on a monthly rate, as are the Foremen at issue here, from a six day payroll week to a five day payroll week. The change, argues the Organization, increased the daily rate of pay for Foremen. The Organization concludes that the Claimants should, therefore, be compensated at the higher rate for the time they worked as Foremen. The Organization also contends that even under the six-day payroll method, the monthly rated Foremen receive a higher weekly wage when compared to the Lead Signalman's weekly rate.

The Organization, in very strong terms, argues that Rule 21, where it explicitly states that an employee "will" receive the higher rate when filling another position, mandates that the Claimants be compensated the difference between the two rates. It cites Third Division Awards 12632, 16573, and 19695 wherein the term "will" was determined to prohibit discretion and require a party to act in a certain manner. The Organization contends that because the Claimants were responsible for supervising the work of their respective gang in the absence of a Foreman, they must be paid the higher rate.

The Carrier asserts that the Board here does not have jurisdiction to decide this dispute because the Organization's claim is based primarily on its allegation that a unilateral change was made to the Agreement in violation of Section 152, Seventh of the Railway Labor Act (RLA). Therefore, argues the Carrier, the matter does not arise from the Agreement, but rather pertains to a unilateral change to the terms and conditions governing its employees and that the claim should be dismissed for lack of jurisdiction.

The Carrier further submits that should the Board decide that the matter is within its jurisdiction, the Organization failed to meet its burden to establish the essential elements of its claim. The Carrier argues that there is nothing in the parties' Agreement that obligates the Carrier to fill a Foreman's position when vacant. It cites Third Division Awards 11075, 12244, 12415 and 12783 to support its position that unless stated expressly in the controlling Agreement, a Foreman is not required to directly supervise every workday of a gang. According to the Carrier, there was no request to have a Foreman present on the dates in question. The Carrier asserts that the absence of the Foreman is not sufficient proof that the Lead Signalman performed the Signal Foreman's job and that there is no evidence that the Claimants performed the work of the Foremen.

The Carrier further avers that the Claimants already received the higher rate of pay as indicated by the rate chart in the record. It contends that Rule 51 establishes how the hourly compensation of monthly rated employees is calculated and applies to the Foremen in question. The Rule reads, in pertinent part, as follows: ". . . straight time hourly rate for monthly rated Signal Maintainers shall be determined by dividing the monthly rate by two hundred thirteen (213)* hours.

*Effective July 1, 1989, comprehended hours for monthly rated Signal Department Employees increases from 213 to 213 2/3 hours per month."

The Carrier contends that the change to the five-day payroll system was a "bookkeeping method" that did not affect the compensation amount paid under the monthly rated system. Accordingly, argues the Carrier, when using the calculation for determining the hourly rate for those employees covered by Rule 51, as are the Foremen in question here, the rate is lower than the hourly rate paid to Lead Signalmen.

The Carrier also argues that pursuant to Rule 3 of the Agreement, Lead Signalmen are obligated to supervise up to five employees of a gang without any additional compensation. While not conceding that the Foremen's rate is higher, the Rule would prohibit the Claimants from receiving additional pay. Rule 3 reads, in pertinent part, as follows: ". . . a signalman under the direction of a foreman working with and supervising the work of a . . . group of employees of a gang, shall be classified as a Lead Signalman. At no time shall a leading signalman have supervision over more than five (5) men." The Carrier argues that the record demonstrates that the Claimants did not supervise more than five employees and, therefore, they are not entitled to additional compensation even if the Foremen were compensated at a higher rate.

As an initial matter, the Board finds that the matter is properly before it as a dispute over an interpretation of the existing Agreement between the parties as provided for by the Section 153, First, paragraph (i) of the RLA. Even though the Carrier eventually reverted back to the six-day payroll system for monthly rated employees, the dispute involves the interpretation of several sections of the Agreement as they apply to the events that took place in January 2009 while the five-day payroll system was in effect. One aspect of the claim involves contract provisions that address when a higher rate should be paid to Lead Signalmen in the absence of a Foreman, while another pertains to how a straight time hourly rate is calculated for monthly rated employees. The impact of the change in the payroll system to the Claimants, given their contention that they worked as Foremen, requires an interpretation of the applicable provisions and, therefore, we find that the claim is properly before the Board.

The Boards next turns to the merits and finds that the Organization failed to meet its burden to prove with substantial evidence that the Claimants were "assigned" to supervise the duties of their respective gangs in accordance with the clear and unambiguous language of Rule 2 (b). The Rule, in pertinent part, reads, "An employee who is assigned to the duties of supervising the work of a gang of other employees shall be classified as a foreman." There is no documentary evidence in the record that meets the requirement of Rule 2 (b). None of the "Engineering Department Work Report" in the record indicates that a Claimant was "assigned" to perform the Foremen's function. No other written statement is found in the record reciting a directive or confirming a verbal communication from a Carrier official assigning any of the Claimants to supervise their respective gang in the absence of the Foreman.

The Rule is clear and unambiguous where it requires that an employee must be "assigned." No other interpretation is necessary. The mere absence of a Foreman does not require that another employee assume a Foreman's role absent an express provision in the Agreement that such an assignment is required. As stated previously by the Board in Award 11075, "We find no provision in the Agreement which prescribes under what circumstances Carrier will be required to assign a full-time B&B Foreman to a B&B unit. In the absence of such a prescription Carrier retains the right to unilaterally determine what supervision is necessary." (Emphasis added) See also Award 12415.

The "Engineering Department Work Report" for several of the dates in question for Claimant Kremer indicates that the word "Foreman" or the phrase "Working as Foreman" was added to the report. In some instances these words are found on reports even on days where the Foreman was not absent. These specific reports do not provide support for the claim because, as mentioned above, there is no indication that the Claimant was "assigned" to the Foreman's position as required by Rule 2 (b). Further, the contradiction as to the meaning of those documents, where the same notations are made even when the Foreman was present, creates an ambiguity not addressed in the record.

Having found that as a threshold issue Rule 2 (b) has not been violated, there is no basis for a review of the other Rules allegedly violated because they pertain to the remedy aspect of the claim. However, the Board finds it necessary to address the

Carrier's assertion that there is no evidence that "the Claimants performed work as Foremen on the dates claimed." Nothing in the record indicates such a requirement. Rule 2 (b) requires an assignment – not a showing of actual performance by the Claimant. It is not necessary for a Claimant to prove that the Foreman's duties were carried out – only that there was an assignment to the role of Foreman. A Lead Signalman so assigned could trigger the application of Rule 21 without having to establish that the work of the Foreman was performed.

Based on the foregoing, the Board concludes that the case record lacks the requisite substantial evidence that the Carrier violated Rule 2 (b) or any of the other Rules cited by the Organization. Accordingly, 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 20th day of March 2014.