

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES) The Delaware and Hudson Railroad Corporation
TO THE) and
DISPUTE:) Brotherhood of Maintenance of Way Employees

QUESTIONS (1) Is the Carrier in violation of the pro-
AT ISSUE: visions of Mediation Agreement Case A-7128
dated February 7, 1965, when it did not
retain Crossing Watchmen Louis F. Gambucci,
Frank M. Kubicki and Frank A. Swanek in ser-
vice as Crossing Watchmen on and subsequent to
March 24, 1966.

(2) Should Crossing Watchmen Louis F. Gambucci,
Frank M. Kubicki and Frank T. Swanek be reim-
bursed for time that they have been improperly
held out of service on and subsequent to the
following dates:

Louis F. Gambucci April 8, 1966
Frank M. Kubicki April 20, 1966
Frank T. Swanek May 3, 1966

OPINION The three Crossing Watchmen were protected employees
OF BOARD: under the February 7, 1965, Agreement. Each of them
refused to accept a temporary assignment as Trackman,
and was therefore denied protected status and guaranteed compen-
sation.

The Employees contend that Carrier was required to
recall furloughed Trackmen to the vacancies involved, in accord-
ance with seniority rules. Watchmen and Trackmen are on separate
rosters. The Employees assert that the seniority rules do not
contemplate the crossing of seniority rosters as Carrier proposed
to do in these cases, but such transfers can be accomplished only
pursuant to an implementing agreement. Finally, it was said,
Carrier knew that "certain of the claimants could not physically
perform duties of Trackman."

According to Carrier, the Agreement requires furloughed
protected employees to accept temporary assignments which do not
involve the crossing of craft lines. Failure to do so as in this
case, Carrier maintains, results in the loss of protected status
pursuant to Article II, Section 1.

Nothing in the record substantiates the Employees' assertion that there were available furloughed Trackmen who could have been recalled, and were required to be recalled, under the seniority rules, or that any of the claimants were physically unable to perform Trackman work.

The applicable provision of the Agreement is the first sentence of Article II, Section 3, providing:

When a protected employee is entitled to compensation under this Agreement, he may be used in accordance with existing seniority rules for vacation relief, holiday vacancies, or sick relief, or for any other temporary assignments which do not require the crossing of craft lines.

Implementing agreements, pursuant to Article III, Section 1, are required in order to permit Carrier to transfer work or employees (within craft lines) as the result of "technological, operational and organizational changes." Obviously, this refers to permanent transfers, and it is unrelated to temporary assignments which may result from another employee's absence. Neither Article II nor Article III provides the slightest hint that implementing agreements are required in connection with temporary assignments.

The seniority rules of course do require the use of a furloughed Trackman if one is available, but they do not prohibit the use otherwise of a Crossing Watchman. In the absence of a rule which prohibits it, the import of Article II, Section 3, is that a protected employee receiving compensation can be utilized for these temporary assignments. Indeed, the phrase in that sentence, "for any other temporary assignments," manifestly envisages precisely what occurred here.

Where it was intended that the crossing of craft lines could not take place, it was stated succinctly. An intention to prohibit the crossing of seniority lines would have been as specifically stated, if intended. Consequently, so long as there was no showing of a violation of "existing seniority rules," it must be held that Carrier acted in accordance with the Agreement in its assignments on the days in question.

Article II, Section 1, provides that "an employee shall cease to be a protected employee in case of his...failure to accept employment as provided in this Article." Consequently, Carrier did not violate the Agreement in failing to retain the three Crossing Watchmen in service.

AWARD NO. 66
Case No. MW-7-E

AWARD

The answer to Questions (1) and (2) is "No."


Milton Friedman, Referee

Washington, D. C
May 9, 1969

Dissent to Award No. 66 (Case No. MW-7-E), February 7, 1965 Agreement,
by Employee Members of Special Board of Adjustment No. 605

(Parties: Delaware & Hudson Railway Company - Brotherhood of Maintenance
of Way Employes)

Section 3 of Article II of the February 7, 1965 Agreement
reads in part:

"When a protected employe is entitled to compensation under this Agreement, he may be used in accordance with existing seniority rules for vacation relief, holiday vacancies, or sick relief, or for any other temporary assignments which do not require the crossing of craft lines." (emphasis added)

The underscored language is explicit and unambiguous. It is the position of the employes that the proposed transfer of the three claimants in this case across seniority lines for temporary service was not "in accordance with existing seniority rules." This was not disputed by the carrier; it is not refuted by anything in the record. It follows, therefore, that these transfers were not contemplated by Section 3 of Article II.

In these circumstances, the question of whether furloughed trackmen were or were not available becomes irrelevant. Yet the Referee obviously makes this the basis on which he rendered his Award. The Award reads in part:

"Nothing in the record substantiates the Employees' assertion that there were available furloughed Trackmen who could have been recalled, and were required to be recalled, under the seniority rules, or that any of the claimants were physically unable to perform Trackman work."

In their submission, the employes pointed out that there were furloughed trackmen on the seniority district concerned and that the carrier "made no effort to recall them to service when it made its so-called offer of temporary employment as trackmen" to the three claimant crossing watchmen. There is nothing whatsoever in the record to refute this statement. The carrier has not denied that there are many furloughed trackmen on this seniority district who stand for recall to service.

The Award completely ignores the fact that the "availability" or "non-availability" of furloughed employes can be determined only by the carrier in accordance with the recall provisions of the schedule agreement. The carrier has not contended that it made, or even attempted to make, this determination before requesting the three claimant crossing watchmen to transfer across seniority lines.

In fact, the failure of the carrier to follow agreement procedure is illustrated in a letter dated December 10, 1968, which was

made a part of the record, addressed to Mr. J. W. Oram, Chairman, Eastern Carriers' Conference Committee, by Mr. E. G. Young, Director of Labor Relations and Personnel Planning, of the carrier. This letter clearly indicated that in various instances the availability of furloughed trackmen on the seniority district in question was checked and verified by the carrier only after the organization filed claim for furloughed trackmen whom the carrier should have recalled to the service instead of transferring protected crossing watchmen across seniority lines.

In their submission, the employees also stated that the carrier "made the so-called offer of temporary employment to the claimants with full knowledge that certain of the claimants could not physically perform duties of trackmen." This statement was not challenged by the carrier because positions of crossing watchmen are jobs to which incapacitated men, oftentimes incapacitated in the service of the carrier, are given preference. The carrier's only reply in its submission was that this allegation had never been handled on the property. Yet the Award holds that nothing in the record substantiates the employees' assertion. Certainly, nothing in the records discredits it.

For the reasons set forth, the Employees Members of the Board feel that the Award of Referee Milton Friedman, Neutral Member, is palpably in error.

G. E. Light
Employee Member

H. C. Crotty
Employee Member

May 26, 1969