PUBLIC LAW BOARD NO. 2182

Award No. 2

Case No. 2
Docket No. MW-77-74

Case No. 6
Docket No. MW-77-101

Parties to Dispute: Brotherhood of Maintenance of Way Employes and Southern Pacific Transportation Company

Statement of Claim:

1. The Carrier violated the Agreement when it refused to compensate Machine Operator J. W. Pohorelsky for service rendered while operating Plasser Tamper 184 R.W. on April 18, 19, and 20, 1977.

2. Machine Operator J. W. Pohorelsky now be allowed twenty-four (24) straight time hours at the Plasser Tamper operator's rate of pay and five (5) days' trailer allowance because of the violation referred to in Part (1) of this claim.

1. The Carrier violated the Agreement when it refused to compensate Machine Operator P. J. Allemond for service rendered, while operating Track Liner 270 R.W., on July 19 and 20, 1977.

2. Machine Operator P. J. Allemond now be allowed sixteen (16) straight time hours at the Track Liner 270 R.W. operator's rate of pay because of violation referred to in part (1) of this claim.

Findings: The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated May 22, 1978, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

In Case No. 2, Claimant J. W. Pohorelsky, established service as a machine operator December 4, 1969. He was assigned as a machine operator on the Dallas-Austin Seniority District of the San Antonio Division and because of a force reduction, his position was abolished. Claimant exercised his seniority on April 18, 1977 and displaced on Plasser Tamper 184-RW.

In Case No. 6, Claimant, P. J. Allemond, established seniority as a machine operator on May 16, 1977. Claimant was assigned as machine operator on the Lafayette Division and was working on Tie Spacer 6-R, rate of pay $1,189.95 per month. Claimant, as a result of a force reduction, exercised his seniority and displaced a junior operator, M. G. Landry, on Trackliner 270-RW, rate of pay $1,214.67 per month.

Claimant Machine Operator in Case No. 2 seeks pay for twenty-four (24) hours straight time hours for April 18, 19 and 20, 1977. While the Claimant in Case No. 6 seeks 16 hours pay at the straight time rate for July 19 and 20, 1977. In both such cases, Carrier states that such time claimed was spent as required by Article 8, Section 6, by Claimant's breaking in and qualifying to operate the machine on which they had displaced.

The Employees allege the Claimant Machine Operators, having been displaced from their assignments, exercised their seniority rights under Article 3, Section 1A, and paragraph 5, of Section 1(c), which reads:

Article 3
FORCE REDUCTIONS

> "SECTION 1. (a) When force is reduced, the senior men in the subdepartment, on the seniority district, capable of doing the work, shall be retained. Such employees affected, either by position being abolished or being displaced, may displace junior employees of their own rank or class on their seniority district.
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> (c) .....employees displaced under this rule shall have thirty (30) days to qualify on the position on which he displaces, the Division Engineer to be the judge of such qualification. If the employee fails to qualify within thirty (30) days, he may displace in the next lower classification."

Carrier contends that Claimant Machine Operators are governed by Article 8, Section 6, which reads:

"Section 6. Employees accepting positions in the exercise of their seniority rights will do so without causing expense to the company."

Carrier avers that, on this property, while machine operators may be and are qualified on several machines they must qualify on each machine to which they exercise their seniority if they are not qualified thereon. Carrier pointed out that Claimant in Case No. 2 was qualified to operate several machines but had never operated a Plasser Tamper. Such machine, it states, is very expensive. The machine costs somewhere between $90,000 and $100,000. The rate paid the operator of the Plasser Tamper, in April 1977, was $1,158.03, whereas the rate paid bulldozer operators, motor grader, etc., was $1,138.37, per month. Operators of such Machines such as Balast Regulator and heavy duty trucks were paid $1,114.60 per month.

Carrier argued further that the issue raised in these cases is similar, if not identical, to that raised in Case MW-75-38, which was decided by the NRAB's Third Division, in its Award No. 21656.

The Board finds that machine operators on this property have separate seniority rights as distinguished from other employees coming under the agreement represented by the Brotherhood of Maintenance of Way Employees. There are a multiplicity of different types of roadway machines which range from the most simplest of machines to the extremely sophisticated machine. The rates of pay are not set for the class and craft of Machine Operator. Rather, the rate of pay for a Machine Operator is geared to the machine which he operates.

When a machine operator bids in or displaces on a particular machine for which he is qualified it is obvious that he is paid the rate geared to that particular machine. However, if a Machine Operator displaces or bids on a

Machine Operator's position for which he is not qualified, then the issue becomes that which is placed before this Board, to wit- whether he is entitled to be paid while qualifying or whether consistent with the past practice he must qualify himself thereon without expense to the company. It appears to be logic vs. practice. However, we deal with rules and are impelled to conclude that this is precisely the same issue, involved herein, as was involved in Docket MW-21621, which resulted in Award No. 21656 of the NRAB's Third Division. There, the Opinion of the Board, in part, stated:

> "The Carrier interprets this Article (8, Section 6) to mean that said employes must use their time qualifying without compensation in that the alternative to said practice would require the Carrier to compensate two (2) employes, one to operate the machinery and the other who is being trained as a new operator. The Carrier asserts that this has been the past practice.
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> The Organization contends that on April 15, 1970, Carrier promulgated instructions which are contrary to Article 8, Section 6, in that this article is relative only to expense involving meals, lodging and travel in the exercise of seniority and at no time has it been interpreted to deny the employe wages. The Organization further contends that the interpretation placed upon the article by the Carrier is discriminatory in that the Carrier admits that it compensates employes to qualify on new machines as well as new employes to qualify for positions involving the operation of machines.
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> The Carrier and the Organization submit that it has been the past practice as they individually support their opposing positions. Under generally accepted arbital practice, past practice may be relevant in determining the intention of the parties to an agreement where said agreement is ambiguous or silent. In order to prove past practice, the petitioner must present evidence that said practice must be of sufficient generality and duration to imply acceptance of it as an authentic construction to contract. The record in this claim does not provide sufficient evidence to meet this criteria. The Organization submits letters from some twenty-five (25) employes who allege that the phrase "at no expense to the Company" was limited to expense relative to meals, travel and lodging and that this was the past practice. The reliability of these letters was challenged by the Carrier in its

declination of August 14, 1975. Accordingly, we have no authority to render a decision in this matter lacking sufficient and substantial evidence in the record as to what the parties to the Agreement intended. Accordingly we will dismiss the claim....

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AWARD

Claim dismissed."

This Board finds that there has been nothing added to these two Cases that had not been previously presented to the Third Division which rendered the above quoted Award. In fact, there may be less evidence offered here. We, too, find that lacking sufficient and substantial evidence as to the intent of the parties on the rules cited by them, we are without authority to properly interpret such rules. Accordingly, in such circumstance we, too, will dismiss the instant claim without prejudice.

Award: Claim dismissed.

M. A. Christie, Employee Member

R. W. Hickman, Carrier Member

Arthur T. Van Wart, Chairman
and Neutral Member

Issued at Falmouth, Massachusetts, June 26, 1979.