

PUBLIC LAW BOARD NO. 3558

PARTIES) BROtherHOOD OF MAINTENANCE OF WAY EMPLOYEES
TO)
DISPUTE) SOUTHERN PACIFIC TRANSPORTATION CO. (EASTERN LINES)

STATEMENT OF CLAIM:

"1. Carrier violated the effective Agreement when it failed to call and use furloughed Laborer-Driver Peter Jeanlouis III to perform laborer-driver work on dates herein specified. (Claim No. 1 MW-85-26 - file 421-63-A; Claim No. 2 MW-84-141 - file 420-71-A; Claim No. 3 MW-84-83 - file 418-88-A; Claim No. 4 MW-84-142 - file 420-72-A; Claim No. 5 MW-84-86 - file 419-3-A and Claim No. 6 MW-84-135 - file 420-54-A).

2. Claimant Jeanlouis shall now be allowed pay at laborer-driver's respective pro rata rate for a number of hours equal to that expended by others in the performance of this work, plus any compensation he may have received on these dates.

Claim dates are:

April 30 through May 4, 1984
May 21 through June 1, 1984
August 6 through August 10, 1984
August 13 through August 17, 1984
August 28 continuing until position filled
September 3 through September 7, 1984"

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

The basic issue here in dispute concerns a determination as to whether the Carrier may use other members of a track gang to drive a vehicle when the employee regularly assigned the position of laborer-driver is on vacation or not at work because of illness, or, whether the Carrier is contractually required to recall from furlough, as claimed, an employee who has seniority as a laborer-driver for the temporary vacancy.

In setting forth its position the Organization says: "We do not agree with Carrier that Article 23 [Laborer-Driver] gives Carrier the right to blank the position of laborer-driver when an employee is off for various reasons, such as vacation, illness, etc. The intent of Article 23 is to give the Carrier the right to use other employees to drive the truck when the laborer-driver is working as a member of the gang and may not be working at the exact location of the truck and thereby obligates the Carrier to require another member of the gang to walk to where the laborer-driver is working and have the laborer-driver walk back to where the truck is in order to be able to use the truck."

Although the Organization cites the Carrier as being in violation of several other rules in addition to Article 23, we think that the following provisions of Article 23 are especially pertinent to consideration of the dispute here at issue:

"When a motor vehicle for use on the highway is assigned to a track gang for the purpose of transporting men and material in connection with their work, one position of 'Laborer-Driver' shall be established for each such vehicle so assigned and such position shall carry an hourly rate of six (6) cents above the laborer rate on the gang. * * *

The establishing of a laborer-driver position on a track gang does not preclude other members of the track gang above the rank or class of laborer-driver who is assigned to the gang from driving a motor vehicle assigned to the track gang for which they will receive no additional compensation.

A laborer, to be qualified for assignment to the position of laborer-driver, must at his own expense secure and maintain a Commercial Vehicle Operator's License...

A laborer-driver position will be above the rank or class of laborer and a seniority roster for laborer-drivers will be maintained.

* * *

Vacancies in the position of laborer-driver will be advertised as contemplated in Article 8, Sections 4 and 5, and assignments made as provided in Section 1.

Separate seniority rosters will be compiled, one for

each division, and one for system laborer-drivers. Employees qualified as laborer-drivers will be placed on the laborer-driver roster in the order that they have qualified.

When a position of laborer-driver is bulletined, and no bids are received, the senior unassigned laborer-driver will be assigned to the position. If he fails to protect the position to which assigned within ten (10) days after being notified, he will forfeit his seniority of laborer-driver and the next unassigned laborer-driver will be assigned.

Laborer-drivers are working members of a track gang, and the number of laborers, as well as the number of motor vehicles for use on the highway, used in a track gang, is a prerogative of the Management and no guarantee exists for any given number of laborers or laborer-drivers on a track gang."

Sections 1, 4 and 5 of Article 8, "Promotions and Filling of Vacancies," as mentioned above in Article 23, read in pertinent part as follows:

"SECTION 1. Employees covered by these rules shall be considered for promotion. Promotion shall be based on seniority, fitness, and ability. Ability being equal, seniority shall prevail, the Management to be the judge, subject to appeal.

* * * * *

SECTION 4. New positions and vacancies (including temporary vacancies of more than thirty (30) days will be bulletined at home stations of the employees concerned within thirty (30) days previous to or fifteen (15) days after the date such vacancies occur. New positions or vacancies including temporary ones may be filled pending bulletin. Vacancies and positions of more than thirty (30) calendar days' and less than ninety (90) calendar days' duration and vacancies caused by granting leaves of absence of thirty (30) days or more, will be considered as temporary and bulletined as such. In making assignments to fill bulletined positions, the senior qualified employee holding seniority in the class involv-

ed, who files bid, will be assigned. Employees filling such positions pending bulletin, or assigned thereto by the Company, if no bids are received, may, when released, return to former position.

* * * * *

SECTION 5. (a) Positions to be bulletined are: Foreman, ...Laborer Drivers..."

Contrary to the claim and position of the Organization, the Carrier maintains that it is not required to recall from furlough a laborer-driver to operate a vehicle when a laborer-driver who is in active service is granted a vacation of away from work as the result of a short-term sickness. In this respect, the Carrier submits that Article 23 "does not prevent the Carrier from using other than laborer-driver from operating trucks assigned to a gang." The Carrier here directs attention to that portion of Article 23 which reads:

"The establishing of a laborer-driver position on a track gang does not preclude other members of the track gang above the rank or class of laborer-driver who is assigned to the gang from driving a motor vehicle assigned to the track gang for which they will receive no additional compensation."

As concerns the manner in which it provided for operation of its vehicles in those situations involved in the instant dispute, the Carrier states that either a machine operator or a foreman of the gang, or, in other words, a member of the gang above the rank of laborer-driver operated the vehicle assigned the gang. It denies it had used laborers to operate the vehicles, as was maintained by the Organization in filing its initial statement of claim.

The Carrier offers a review of how Article 23 evolved over the years, contending that despite several negotiated changes, the agreements continued to reserve the right of the Carrier to use other than laborer-drivers to operate a vehicle assigned to a gang.

In giving studied consideration to the record, there is no question that pursuant to Article 23 of the current Agreement the parties have agreed that one position of Laborer-Driver shall be established for each vehicle assigned to a track gang and that such work is reserved to laborers who elect to become and remain

qualified laborer-drivers, with the exception that members of the track gang above the rank or class of laborer-driver may be used to drive a motor vehicle assigned to the gang.

In this latter regard, we think it clear that although the Carrier may use other than a laborer-driver to operate a vehicle assigned to the gang, that the Carrier must nevertheless have an established position of laborer-driver for each motor vehicle assigned to track gang for the purpose of transporting men and material in connection with their work, except as concerns certain extenuating or emergency situations. For example, we think it obvious that the other specifically defined employees may be used to drive the vehicle when no employee with seniority as a laborer-driver has bid for an open or vacant position. However, even in this situation, Article 23 provides that when no bids are received, the senior unassigned laborer-driver will be assigned to the position, and failing to protect the position to which assigned within ten days after being notified, will forfeit seniority as a laborer-driver. In this connection, since the rule further provides that after the senior employee holding seniority as a laborer-driver fails to protect the open position within ten days, that the position will then be assigned to the next senior unassigned laborer-driver, we would think that in the interim period of time the Carrier would have the right to use other employees. We also believe, as the Organization states in its submission to this Board, that other Carrier employees may be used to operate a vehicle when the assigned laborer-driver is not immediately available at the job site to move the vehicle. In addition, it would also seem to this Board that another member of the gang, could be used to operate the vehicle in the event the regularly assigned laborer-driver is off as the result of short-term sickness and short term absences from work, or situations where the Carrier ought to have some discretion as to the method of carrying on its daily operation, and not have to go to unusual lengths in order to have another laborer-driver called to cover a short-term or unusual situation.

Accordingly, the record not showing that it has been the practice to have employees in extra or vacation relief assignments, or to have otherwise utilized furloughed employees, in pursuance of Article 11(f), to cover vacancies in positions of laborer-driver, the Board must hold that absences from work account a regularly assigned laborer-driver being granted a vacation or being off duty account illness may be properly treated as a short-term vacancy, or, as described under Section 4 of Article 8, a temporary vacancy of less than 30-days duration.

as above the rank or class of laborer-driver ²²⁹

In making this determination, the Board would hasten to add that although Article 23 may be read as permitting the use of other than a laborer-driver in circumstances as indicated above, the contractual requirement to have an established position of laborer-driver does not become inoperative merely because the Carrier would reduce its work force by furloughing employees from the laborer-driver seniority roster.

The record not showing that by reason of past practice, bulletins and assignments that furloughed employees have been recalled to cover short-term vacancies in positions of laborer-driver, and, further, there being no probative documentation to show that laborers rather than, as the Carrier states, members of the gang above the rank or class of laborer-driver were used to operate the vehicles in question during the absence of the regularly assigned laborer-driver, we will hold that the claim be denied.

AWARD:

Claim denied.



Robert E. Peterson, Chairman
and Neutral Member



C. B. Goyne
Carrier Member



M. A. Christie
Organization Member

Branson, MO
May 19, 1986