NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 5905

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case Nos. 24
and	)
	) Award No. 24
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY	)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
J. F. Ingham, Carrier Member

Hearing Date: June 25, 2002

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier assigned a B&B Subdepartment mechanical helper to perform B&B carpenter duties beginning on February 12, 2001 and continuing. (System File GC-9-01/UM-9-01).

2. As a consequence of the violation referred to in Part (1) above, Claimant J. Milevski shall ". . . be compensated for the difference between the Gary, Indiana Carpenter's rate of pay ($18.09 straight time) and that of Mechanical Helper ($17.13 straight time)."

FINDINGS:

Public Law Board No. 5905, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

Claimant holds seniority, among other positions, as a carpenter. However, due to an eye condition, Claimant was unable to hold a commercial driver's licence. Because a CDL is required for a carpenter position, Claimant has been unable to work in that position.

Until late 2000, Claimant was working as a painter. His painter position was eliminated and Claimant began working as a trackman. Claimant also worked some days each week as a bridge tender.

Due to a further reduction in force, Claimant was scheduled to be laid off because he was near the bottom of the trackman's seniority roster. Claimant was also a protected employee, meaning that Carrier would have to pay him for days he did not perform service as a bridge tender.

On February 1, 2001, Carrier abolished the carpenter position held by Mr. J. Woodbury, the claimant in Case No. 25, effective February 8, 2001. On February 5, 2001, Carrier bulletined a mechanical helper position which it awarded to Claimant, effective February 12, 2001. During the period that Claimant worked in this position he also worked as a bridge tender. Mr. Woodbury was furloughed.

On March 9, 2001, Carrier abolished Claimant's mechanical helper position, effective March 16, 2001. On March 19, 2001, Mr. Woodbury was returned to a carpenter position.

Although the above described facts are not in dispute, the parties interpret them in markedly different ways. The Organization contends that Carrier abolished Mr. Woodbury's position to avoid paying Claimant as a protected employee and then had Claimant essentially fill Mr. Woodbury's position as a carpenter but paid him as a mechanical helper. In so doing, the Organization maintains, Carrier violated Rule 48, which provides:

> An employee working on more than one (1) class of work, coming within the scope of this agreement, four (4) hours or more on any day, will be allowed the higher rate of pay for the entire day. When less than four (4) hours are worked, he will be paid at the higher rate for the actual time worked. . . . .

Carrier regards the abolishment of Mr. Woodbury's position and the bulletining of the mechanical helper position as separate exercises of its management right to control the size and makeup of its workforce. Carrier maintains that Claimant could not hold a carpenter position because of his inability to hold a CDL. Therefore, Carrier urges, Claimant was not entitled to be paid at a carpenter's rate, unless the Organization can prove that Claimant performed work exclusively reserved to carpenters. In Carrier's view, the Organization failed to meet its burden of proof.

Carrier is correct that it has a management right to control the size and makeup of its workforce. However, Rule 48 plainly requires that Carrier have paid Claimant at the carpenter's rate if Claimant performed carpenter work. That Claimant could not hold a carpenter's position because he could not qualify for a CDL is irrelevant to the claim. Rule 48 only requires that Claimant have performed carpenter's work to be entitled to the higher rate of pay. Thus, the case turns on the key factual issue of whether Claimant performed carpenter's work during the period in question. With respect to this issue, the Organization has the burden of proof.

As an appellate body, we do not find facts de novo. Rather, in finding the facts, we are restricted to the record developed on the property. On April 12, 2001, the General Chairman

filed the claim asking that Claimant be paid the difference between the carpenter's rate and the mechanical helper's rate. On June 8, 2001, the Chief Engineer responded:

> You have failed to cite any specific carpenter work that the claimant performed and I am not aware of any such work having been performed. The claimant is certainly assisting carpenters. However, this is provided for in Rule 2 of the collective bargaining agreement. Even if your claim had merit, claimant is unable to work as a carpenter because he does not possess the requisite CDL license.

On August 3, 2001, the General Chairman appealed the denial to Carrier's Director of Labor Relations. Among other things, the General Chairman stated, "If need be, I am prepared to submit written testimony from Mr. Milevski that he was performing all the duties of a carpenter, except driving the gang truck on the dates in question, thus qualifying him for the carpenter's rate of pay."

On August 23, 2001, Carrier's Director of Labor Relations replied, denying the appeal. Among the grounds for denying the appeal, the Director wrote, "I have also attached a signed statement from Division Engineer Maloney regarding the work performed by the claimant. As you can see, the claimant has not performed any work that would entitle him to the Carpenter's rate of pay." The attached signed statement read, in relevant part:

> Mr. Milevki is assisting the carpenters and has not done any work that constitutes carpenter work. Mr. Milevski is used as assistance and support and bulletined carpenters have done the work itself with Mr. Milevski assisting.
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> . . . . .
>
> Mr. Milevski works Tuesday through Saturday. On the Saturdays, when needed, Mr. Milevski operates the bridge at South Chicago, outside the scope of carpenters gang. On the Saturdays that he does not operate the bridge, he is assigned tasks the day before. These tasks are designed to supplement the carpenters upon their return to work on Monday. For example, cleaning of trucks and tools, cleaning the shop, etc. These are not specifically carpenter tasks and are assigned to support the carpenters only. Mr. Milevski knows his duties on Friday so on Saturday he can complete them.

Although the Organization indicated that it could provide written testimony from Claimant attesting to the carpenter work that he performed, no such written testimony appears in the record. The only written testimony in the record is the Division Engineer's statement that Claimant performed no carpenter's work. The state of the record developed on the property permits only one conclusion – the Organization has failed to meet its burden of proof. Assertions that Claimant performed carpenter's work are not evidence, particularly in the face of denials and written statements to the contrary. Accordingly, the claim must be denied for lack of proof.

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AWARD

Claim denied.

Martin H. Malin, Chairman

J. F. Ingham
Carrier Member

D. D. Bartholomay
Employee Member

Dated at Chicago, Illinois, December 11, 2002.