NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 5905

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 38
and	)
	) Award No. 32
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY	)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
J. F. Ingham, Carrier Member

Hearing Date: June 5, 2008

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier utilized and assigned Trackman E. Garcia as a crane operator at Joliet, Illinois, instead of Heavy Equipment Operator R. Thompson beginning June 4 and continuing through August 12, 2005 and when it failed to bulletin said crane operator position (System File DJ-4-2005/UM6-2005).

2. As a consequence of the violation referred to in Part (1) above, Ms. R. Thompson shall now be paid 2 hours travel everyday worked to and from home at a total of 100 hours plus mileage at the present rate totaling 104 miles per day of 50 total days worked equaling 5200 miles.

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.

Effective June 3, 2005, Carrier abolished two Heavy Equipment Operator positions at Joliet. The positions had been held by Claimant and another employee. The other employee exercised his seniority to a Super Truck position at Gary. Claimant then exercised her seniority and displaced the other employee. The other employee then exercised his seniority to a Trackman position at Joliet.

There is no dispute that on many days during the time period that is the subject of the claim, the other employee operated a crane at Joliet. The dispute centers over whether Claimant

is a proper claimant to contest Carrier's actions, whether the Agreement required Carrier to bulletin a crane operator position at Joliet, and whether the remedy sought by the Organization on Claimant's behalf is appropriate under the Agreement.

Carrier concedes that Claimant had greater seniority than the other employee but contends that because there were other employees qualified for a crane operator position who had more seniority than Claimant, Claimant is not a proper claimant. We do not agree. It is well-established that the Organization names the claimant and that the existence of another potential claimant, who may or may not have sought the position if it had been bulletined, does not invalidate the claim on behalf of the claimant named by the Organization. *See, e.g.*, NRAB Third Division Award No. 29313.

At issue is the applicability of Rule 31(a), which provides, "When it is known that a position is to be established or that a vacancy of more than thirty (30) calendar days is to be open, such a position or vacancy will be bulletined in advance." Carrier contends that no vacancy of more than thirty calendar days existed, observing that there was no period of thirty consecutive days during which the other employee worked as a crane operator.

During handling on the property, Carrier presented a summary of the other employee's activities showing the job he worked for the preponderance of the day for each day within the claim period. We have reviewed this summary carefully. It shows that from June 21, 2005 through August 2, 2005, the other employee worked a preponderance of the day as a crane operator on every day he worked except for June 28 when he worked as a truck driver, July 1 when he worked as a trackman, and July 22 when he worked as a trackman. Carrier also conceded that Claimant might have performed crane operator duties on those days even though he was not working as a crane operator for the preponderance of the day.

Carrier cites us to Special Board of Adjustment 1016, Case No. 24, where the Board, noting that under the Agreement before it, an employee may be temporarily assigned to fill a position, held that the Organization had not "demonstrated by probative evidence that the Torsion Beam was used by Brutsman during the claim period on enough of a basis to warrant establishment of a position to operate it," and that "[t]he work was not performed on a continuous basis . . ." In contrast, the record before us demonstrates that Carrier had a continuous need for a crane operator at Joliet from June 21, 2005, through August 2, 2005. The existence of three sporadic workdays during this period on which the other employee did not perform crane operator duties for a preponderance of his workday, but may have performed them for less than four hours, does not establish otherwise. Indeed, to hold otherwise would privilege Carrier to avoid its obligation under the Agreement to bulletin a position by assigning an employee to a position for 29 days, then moving him for a day or two and then assigning him back to the position for another 29 days. Under such circumstances, the employee would not have worked the position for more than 30 consecutive days. We do not read the Agreement was sanctioning such manipulations, intentional or otherwise. We note that after August 2, 2005, the use of the other employee as a crane operator became much more sporadic, but it is clear that for the period June 21 - August 2, 2005, a vacancy existed which Carrier was obligated to bulletin.

The typical remedy where Carrier has failed to properly bulletin a position is to award the difference in pay between the position the claimant was working and the position that should have been bulletined. The Organization does not seek such a remedy in this case, presumably because there was no such difference in pay rates. Instead, it seeks a remedy of time and mileage that Claimant spent commuting from her home to her Super Truck position in Gary. The Organization relies on Rule 56, but Rule 56 applies only where employees are required to live away from home during their workweek. It has no application to the instant claim.

There can be many reasons why an employee might bid on a position even though it does not carry a rate of pay higher than the employee's current position. Like the Claimant, the position may involve a shorter commute. Other employees may bid on positions because they prefer the position's regular shift, its rest days or merely because they prefer the type of work of the position that should have been bulletined. In each such instance, the employee may suffer some incidental loss as a consequence of the Carrier's failure to bulletin the position. However, the Organization has cited no authority and we are not aware of any which holds that the employee is entitled to compensation for such incidental or consequential losses that flow from the employee's personal preferences. Accordingly, seeing no basis in the Agreement or precedent for the remedy requested, and seeing no proof of compensable loss, we are compelled to deny the claim.

AWARD

Claim denied.

Martin H. Malin, Chairman

J.F. Ingham
Carrier Member

T. W. Kreke
Employee Member

OCT 14, 2008

Dated at Chicago, Illinois, October 14, 2008.