Public Law Board No. 6204

Parties to Dispute

Brotherhood of Maintenance of Way Employees	)	
	)	
vs	)	**Case 31/Award 31**
	)	
Burlington Northern Santa Fe	)	

Statement of Claim

1. The Agreement was violated when the Carrier assigned Seniority District 4 Truck Operator J. E. Kosman and Foreman B. L. Rose to perform work (haul rock) on Seniority District 7 on April 28, 1998.

2. As a consequence of the violations referred to in Part (1) above, Foreman C. D. Rogers, Jr and Truck Operator M. S. Gentry shall each be compensated for two (2) hours pay at their respective straight time rates of pay and for five (5) hours' pay at their respective time and one-half rates of pay.

Background

A claim was filed on June 12, 1998 at Kansas City, Missouri on behalf of the Claimants cited in the Statement of Claim for the alleged violations outlined in the same. The claim was filed by the local chairman of Lodge No. 230, who was a district 4 employees, on grounds that he and foreman Rose ought not to have been assigned to do work in district 7. The district chairman cites various rules of the labor Agreement that had allegedly been violated by the maneuver in question.

In response to this claim the Carrier's manager of maintenance support agreed to settle the claim "...without prejudice to either party's contentions concerning the application of schedule rules or agreements..." for a "...total of four (4) straight time hours

each at their respective rates of pay..." to Claimant foreman C. D. Rogers and truck driver M. S. Gentry. This settlement offer was rejected by the general chairman of the organization on grounds that the settlement offer for payment at straight time rate was improper because the work was performed at overtime rate.

The issue here does not center on the merits of the claim but rather on the appropriate remedy. Absent settlement of this issue on property this case was docketed before this Board for final and binding adjudication.

Discussion & Findings

According to argument by the union the Carrier never questioned the number of hours claimed when the claim was filed. It simply contended the the Claimants to this case were not entitled to the overtime rate of pay for overtime hours worked when seniority district No. 4 employees worked in seniority district No. 7 on April 28, 1998.

The Carrier argues that the settlement it agreed upon, which is four hours at straight time rate, is proper and sufficient. Why? Because, according to the Carrier, "...a review of the Carrier's records indicates that the Claimants were fully employed during the claim period and lost no earnings. In fact (according to the Carrier) both Claimants performed overtime on the claim date." The Carrier goes on to argue that the remedy asked for in the claim filed is "...simply a claim for a windfall payment not supported by any Rule or Agreement...".

The Board observes that the issue here is appropriate or reasonable penalty to be

paid by the Carrier for violation of the labor Agreement that resulted in lost work opportunity for the two Claimants.

Neither party to this case deny that this happened.

Because of this the Carrier agreed to pay a penalty. But only four (4) hours at straight time rate. Why? Because to pay more than that would, according to the Carrier, represent a windfall. The cogency of this argument escapes the Board. It is already a windfall --- using the Carrier's vocabulary --- if the Claimants would be paid four (4) hours if they were indeed employed at the time of the rule violation. So apparently the Carrier is agreeable to paying small windfalls rather than larger ones.

But windfall vocabulary, apparently in league with terminology that speaks of damages, is that of the Carrier to this case.

Neutral forums prefer to view penalties for rule violations as precisely that: as penalties, and not windfalls. If there were no penalties imposed when rules were violated then they could be violated with impunity. Tribunals such as the instant one have never supported such a position.

So the only issue in this case is the size of the penalty to be assessed. There are no directives in the labor agreement on this matter as the Carrier correctly states. But that does not mean than the reasonableness of penalties can just be arbitrarily dreamed up. They ought to be founded on information of record on a case by case basis. Why did the union request the remedy that it did in the instant case? Because, it argues as moving party, that this is how much track employees Kosman and Rose, from seniority district 4,

were assigned to work in seniority district 7 on the date of April 28, 1998. If the Board understands the argument by the Carrier it implies that foreman Rose just sort of tagged along and what he did ought not be measured as work to be factored into a penalty. That is not what foreman do, as everyone party to the case well knows. This point need not be belabored any further.

The ruling is that the remedy be paid as requested in the claim filed by the union on June 12, 1998. Foreman C. D. Rogers, Jr. shall be compensated for two (2) hours' pay at straight-time rate, and five (5) hours' pay at overtime rate. Truck operator M. S. Gentry shall be compensated likewise. Payment shall be at the rate in effect when the violation took place on April 28, 1998. When District 4 truck driver Kosman filed the claim he stated that he hauled rock near Water Works, Missouri on April 28, 1998, in the wrong seniority district and worked "...2 hours straight time and 5 hours' overtime...". There is nothing in the record to dispute that statement.

Award

The claim is sustained in accordance with the Findings. Implementation of this Award shall be within thirty (30) days of its date.

Edward L. Suntrup, Neutral Member

William A. Osborn

Thomas M. Rohling, Carrier Member

Roy C. Robinson

Roy C. Robinson, Employee Member

Date: 10/31/06