PUBLIC LAW BOARD No. 1210 AWARD No. 4

PARTIES TO DISPUTE: Baltimore & Ohio Railroad Company

and

Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM: 1. Carrier violated the effective Agreement by failing to use Class "A" Machine Operators V. R. Keister and P. C. Logan, who were working in the Trackman's gang on June 4, 1971, to operate a Weed Spray Car between Garrett, Ind. and Gary, Ind.

2. Class "A" Operators V. R. Keister and P. C. Logan be now reimbursed for the difference in pay between what they received as trackmen on June 4, 1971 and what they should have received on that date if they had been used as Operators of this Weed Spray Car for 8 hours normal tour of duty, plus 6 hours overtime at the $1\frac{1}{2}$ time rate.

OPINION OF BOARD: Essentially, Weed Spray Car X-3579 was run out of Garrett, Indiana in a work train for a one day spraying operation. Claimants, who were furloughed Class "A" Machine operators, were working on the claim date as trackmen out of Syracuse, Indiana, 32 miles from Garrett. In denying this claim, the Carrier held that Claimants had expressed no desire to operate the Weed Spray Car, had refused to exercise their seniority to Machine Operator positions that were available to them on their seniority district, and were not immediately available to cover the assignment in question. The one day assignment was therefore filled by qualified employees who could operate the machine.

Petitioner, on the other hand, stated his position in a letter to the Carrier, dated August 10, 1971, reading, in pertinent part, as follows:

> "On July 13, 1971 Division Engineer Schilt declined payment of this claim stating that there was no indication that either Mr. Logan or Mr. Keister requested this work for the one day June 4, 1971.
>
> "I cannot agree with Division Engineer Schilt inasmuch as neither of these men had any knowledge whatsoever that this weed sprayer would be working over the territory on June 4, and it was the responsibility of the supervisor or the company to assign Class A operators to this machine for this work instead of a Track Foreman and a Trackman."

In its submission to this Board, the Organization expanded on the foregoing by alleging, additionally, that Claimants were available (the distance of 32 miles being insignificant in the light of today's high-speed highways), that Claimants were senior to the employees assigned, and that Carrier had the obligation to offer the assignment to Claimants before filling it with other employees.

Although Carrier asserted, in his submission, that no specific Rule had been cited by the Organization in support of the claim it is apparent to us, based upon the record and the hearing in this case, that there was no confusion during the handling on the property that the Organization was basing its position on an alleged violation of the Seniority Rule of the Agreement. This Rule is Rule 53, Seniority-Work Equipment Operators. The Carrier, as a matter of fact, cited Rule 53 (d-1) of the Agreement in support of its declination of the claim, and it was this final declination that brought this dispute before this Board.

Rule 53 (d-1) states as follows:

> "Where vacancies of an unforeseen nature occur in positions of Work Equipment Operator and where there is no Work Equipment Operator immediately available to cover such vacancies, the senior employee who can operate the machine may be assigned to cover such vacancy for a period of two days or less."

This Rule is actually an exception to the basic requirement of filling vacancies by the posting of appropriate bulletins; whereby vacancies of short duration - two (2) days or less - can be filled by other than a Work Equipment Operator, under specified circumstances, without bulletin.

Those circumstances are (1) that the vacancy be "of an unforeseen nature" and (2) that no Work Equipment Operator is immediately available to fill such vacancy.

We are persuaded, based upon the record, that the vacancies herein were not "unforeseen". The Weed Sprayer was obviously in position to be used, on a stand-by basis, its operation conditioned only upon suitable weather and the availability of an operator. Carrier stated that, ". . . weed spraying operations are subject to the vagaries of the weather and therefore are not susceptible to be planned much in advance." (emphasis added)

It is logical to assume, due to the nature of the operation, that the actual spraying day is not spontaneously decided upon and the phrase "much in advance" infers that some advance planning is necessary.

Insofar as Claimants availability is concerned, the record shows that the machine in question was operated over their territory and, in fact, through their location where they were

working on the claim date as Trackmen.

In summarizing its position, the Carrier stated:

> "Thus, Carrier acted within the specific authority granted to it by Rule 53 (d-1) of the Collective Bargaining Agreement in this case."

Having made such assertion, the burden of proof rests with the Carrier to establish the validity of such assertion.

Based upon a thorough review of the record it is our determination, for the reasons expressed herein, that the Carrier has not met the burden of proof with probative evidence sufficient to sustain its position.

AWARD: That Claimants be paid the difference in earnings between what they actually earned on the claim date and what they would have earned had they been used as operators on the Weed Spray Car on claim date, exclusive of travel time.

ORDER: The Carrier shall comply with the Award within thirty (30) days from the date of this Award.

C. Robert Roadley, Neutral Member

A. J. Cunningham, Employee Member

L. W. Burks, Carrier Member

Baltimore, Maryland
March 11, 1974