

PUBLIC LAW BOARD NO. 4138

Award No.: 26

Case No.: 26

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM

First: that the Carrier violated the Agreement when it assigned J. L. Holloway, Bridge and Building Subdepartment Employee, to Track Subdepartment work.

Second: that claimant M. L. Robinson be paid 8 hours straight time for each date of April 25, May 8, 9, 12, 13, 14, 15, 16, June 2, 3, 4, 5, 9, 10, and 11, 1986, at Crane Operator's rate of pay.

Third: that claim was made continuous until violation was stopped.

FINDINGS

During the time in question, Claimant was assigned to the Track Subdepartment. On the dates stated, while Claimant was so assigned, a B&B Subdepartment employee, J. L. Holloway, operated a crane to perform certain Track Sub-department functions. The Carrier acknowledged repeatedly that Holloway performed Track Sub-department functions and offered to settle this claim, while admitting no violation of the rules. The Carrier then authorized payment to Claimant for the difference in earnings for the period of

time Holloway worked on the crane. What this payment amounted to was payment at the crane operator's rate for the 22 hours 52 minutes' difference between the amount of time that Holloway worked as a crane operator versus the time Claimant worked at his assignment.

The Organization states that Holloway's crane operation continued until September 4, 1986 and filed a continuing claim on that basis. Rule 26(c)(2) provides:

A claim may be filed at any time for an alleged continuing violation of the Agreement and all rights of the claimant or claimants involved thereby shall, under the rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof. With respect to claims and grievances involving an employee held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

Rule 5 provides, in relevant part:

#### Seniority Rank

The grade or rank sequence of employees in the track and bridge and building subdepartments shall be as shown below, the lowest number designating the highest rank and the highest number the lowest rank in the respective subdepartments:

##### 5(a) Track Subdepartment

Rank No. 3 +- Operators of ditchers, cranes, shovel draglines, core drills, adzers, bullgraders, grouting machines, track cleaners, tampers (also assistant dual automatic tamper-liner operator), cranes (also assistant crane operators), tractor (with low boy or flat bed trailer), motor graders, ditcher spreaders (also ditcher spreader assistant operator), audigauges, swing loaders, ballast regulator, ballast cleaner, cribber, multiple spike driver, tamping jack, tie bed scarifier, track liner, back hoe, off-track and on-track brush cutters, ditcher engineer,

ditcher fireman, hy-rail ditcher dumper, end loaders, gradalls, mannix winch cart, pile driver engineer (also assistant pile driver engineer), rail heater, tie destroyer, tie handler, tie injector, tie saw, tie shearer, tie spacer, weed burner, spiker-gauger, and similar power driven machines in this class.

5(b) Bridge and Building Subdepartment

Rank No. 1 - Foremen.

Rank No. 2 - Assistant foremen, lead carpenters, and lead painters.

Rank No. 3 - Engineers and assistant engineers of pile drivers, locomotive cranes, or similar machines, core drill operators.

Rank No. 4 - Carpenters, painters, tinner and sawyers.

Rank No. 5 - Carpenter helpers, painter helpers, tinner helpers; operators of concrete pumps, adzers, and similar machines; drawbridge tenders, pumpers, watchmen and trick drivers.

Rank No. 6 - B&B repairmen.

The issue to be decided in this dispute is whether the Carrier violated the Agreement by Holloway's performance of Track Sub-department work instead of Claimant; and if so, what should the remedy be.

The position of the Organization is that the Carrier has violated the Agreement and that the Organization is permitted to file a continuing claim. The Organization contends that the Carrier is not permitted to assign the work of one sub-department to another, as it did here. The Organization notes that at no level of the claim process has the Carrier declined the claim on the basis that no violation was committed. The Organization indignantly points out that the Carrier knew it was violating the Agreement and thought it could "get away with it" because Claimant was employed.

The position of the Carrier is that it has not violated the Agreement and it has made the several settlement offers in a spirit of compromise. The Carrier contends that Holloway was permitted by the Agreement to operate the crane because Rank No. 3, set forth in Rule 5(b), includes "locomotive

crane" in the B&B Sub-department. The Carrier rejects the notion, as the Organization asserts, that the work in question was to be performed only by one group or class of employees. Further, the Carrier maintains that the Organization is not permitted to file a continuing claim because such a claim does not adhere to the provisions of Rule 26.

After review of the entire record, the Board finds that the Carrier violated the Agreement and directs that the Carrier pay Claimant the difference between what he earned in his assignment and what he would have earned had he performed the work Holloway performed.

The Organization has sustained its burden of proving that the Carrier permitted a B&B Sub-department employee to operate a crane, thus performing Track Sub-department work. There is no real dispute that Holloway operated the crane. The Carrier's argument that he is permitted to do so according to Rule 5(b) is not supported by the facts in the record. Rule 5(b) refers to operating a "locomotive crane." However, the facts of this case and the language of 5(a), which defines the Track Sub-department ranks, refers to operation of a "crane." The evidence is that these are two different types of machinery, while the Carrier's argument rests on the premise that they are one. Holloway may well be authorized to operate a "locomotive crane" pursuant to Rule 5(b), but that does not necessarily mean that he is permitted to operate a "crane" whose operation is performed by employees with ranks in the Track Sub-department.

As to the question of a continuing claim, the Organization may make such a claim as set forth in Rule 26(c)(2), but that claim is limited severely in the rule and the Organization must prove damages for those additional days. It has not done so here.

As to the measure of damages, Claimant is entitled to the difference between what he earned in his assignment and what he would have earned had he performed the work Holloway performed. This means not just the difference in pay for the total time Claimant did not work that Holloway did work -- which Claimant has been paid -- but also whatever difference there is in the pay Claimant would have received had he worked as a crane operator on the days Holloway did, if on those days Claimant was working in a lower paying position.

AWARD

Claim disposed of per Findings herein.

Nicholas James  
Neutral Member

B. Claude Sweatt  
Carrier Member

Bryce L. Hall  
Organization Member

Date: April 3, 1990