PUBLIC LAW BOARD NO. 7633

Case No.: Case No.: 25/Award No.: 23
System File No.: UP: 1580248/BMWED: CE1001012
Claimant: Thomas J. Cartwright

UNION PACIFIC RAILWAY COMPANY)
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION)

Organization's Statement of Claim:

1. The Carrier violated the agreement when it improperly bulletined a track foreman position on Gang 1205 requiring a CDL Class A Driver's License when no truck requiring a Cass (sic) A License was assigned to Gang 1205.

2. As a consequence of the Carrier's violation referred to in Part 1 above, Claimant T. Cartwright must now be compensated for the difference in wages between the track foreman position referenced in Part 1 above and Claimant Cartwright's worked position beginning October 8, 2012 and continuing through January 14, 2013.

Facts:

On December 28, 2012, the Carrier bulletined a Track Foreman position on Gang 1205. The position included the qualification of a Class A Commercial Driver's License (CDL). The qualification was disputed and the position was ultimately re-bulletined because Gang 1205 was not assigned a truck requiring the driver to have a CDL.

Carrier Position:

The Carrier has the prerogative to attach qualifications to positions. The Track Foreman position in Gang 1205 was re-bulletined after the Carrier became aware of the erroneous position qualification. This allowed a fair bidding process. Neither the Claimant's seniority date nor his compensation was affected. Overtime would be speculative and in accordance with prior awards, should not be compensated. The Claimant is not due a remedy. The Organization has not met its burden to prove a violation of the CBA. No denial of financial compensation has been shown and no rule violation has been established. Therefore the Board must deny the claim.

Organization Position:

The Organization has met its burden of proof by showing the Carrier's improper bulletining of the Gang 12056 Track Foreman position when the Carrier mistakenly included a Class A CDL as a requirement when no such vehicle was assigned to the gang. The Carrier admitted the mistake but did not fix the bulletin until January 14, 2013, thus allowing junior Track Foreman Varela to perform straight and overtime hours that should have gone to the Claimant.

Findings:

The Carrier clearly improperly bulletined a Track Foreman position on Gang 1205 by initially requiring a Class A CDL although no vehicle requiring a Class A CDL was assigned to the gang. The Carrier's rebulletining of the Track Foreman position after the mistake was brought to their attention is all of the proof needed of the error.

The Board agrees with the Organization's position that the Claimant could be due a make-whole remedy from the time that the Track Foreman position was initially awarded to Mr. Varela and the Claimant bid on the rebulletined position with the Class A CDL removed as a qualification as his second choice, but was awarded a different position that was his first choice. However, the Board expects the Organization to provide a reasonable indication that a make-whole remedy might be due. Neither the Claimant's seniority nor his base pay were affected by the Carrier's error, since the Claimant was already a Track Foreman. There was no indication during the on-property proceedings that the Claimant worked fewer straight-time hours in his pre-bid Track Foreman position than he would have worked had a he moved to the Gang 1205 Track Foreman position. Nor do the on-property proceedings contain a suggestion that Mr. Varela's overtime eclipsed that of the Claimant. Based solely on the unique facts of the claim before us, the Board sees no need to provide a remedy simply as a means of motivating the Carrier to pay more attention to contract compliance in the future. Had the Carrier continued to insist that it had done the right thing once the improper posting was pointed out, the Board might have responded differently, but in this instance, the Carrier acted in good faith to correct the mistaken bulletin.

Award:

Claim partially sustained.

Order:

The Board, after consideration of the dispute identified above, sustains the claim to the extent of finding a violation of the contract. For reasons set forth above, as a response to the unique facts of this case, no further award is ordered.

Andrew Mulford, Organization Member
Organization Concurrence and
Dissent to follow.

Katherine N. Novak, Carrier Member

I. B. Helburn, Neutral Referee

Austin, Texas
February 26, 2015

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 23 OF PUBLIC LAW BOARD NO. 7633
(Referee Helburn)

In Award 23, the Majority correctly found that the Carrier violated the Agreement and, therefore, a partial concurrence is appropriate. However, the Majority grievously erred when it failed to award a remedy to compensate the Claimant for the damages he unquestionably suffered as a consequence of the Carrier's violation. The findings of the Majority in the matter of damages are clearly and palpably erroneous and dissent is required.

In this case, the Majority determined the Organization provided sufficient evidence to show that the Carrier violated the Agreement when it improperly bulletined a foreman position as requiring a CDL when, in fact, no CDL was required to perform the duties of the position. In fact, the Carrier did not even argue that it had properly bulletined the position. As such, it should have been a simple matter to determine that the Carrier had violated the Agreement and enforce the Organization's requested remedy. However, for reasons that escape this Board Member, the Majority instead lost its way and, ignoring the maxim that where there is a wrong, there is a remedy, decided that regardless of the clear cut contractual violation, the Claimant would be left without a remedy in this case. In other words, the Carrier was allowed to violate the Agreement with impunity to the detriment of the Claimant. Based on this erroneous decision, Award 23 of PLB No. 7633 stands as an outlier and is palpably erroneous.

The Organization's requested relief is wholly unambiguous – Claimant was to be made whole for the loss he suffered as a result of the improper bulletin and subsequent denial of assignment to the position. Calculation of that loss requires only the straightforward calculation of the difference in wages between the wages earned by the junior employe assigned to the position and the wages earned by Claimant Cartwright in the position he worked as a result of the Carrier's violation beginning October 8, 2012 and continuing through January 14, 2013. In view of the clarity of the requested remedy and ease of its calculation, we are at a loss to comprehend the Majority's finding that the requested relief was unclear.

It must also be noted the Carrier maintains and keeps any and all records which would have been used to resolve questions over the number of hours worked by the inappropriately assigned junior employe. The Organization does not have subpoena powers under the Agreement nor the right to demand documents. Section 3 Boards have routinely recognized that fact and, therefore, have ordinarily ordered a joint check of carrier records to finally determine the appropriate monetary remedy when a violation is found. The principle that the parties should be ordered to jointly check the carrier's records to fix the monetary amount to be paid as damages was succinctly stated within the findings of the NRAB Third Division in its Award 31531, as follows:

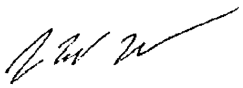
> "Calculation of the number of hours for which Claimant should be compensated is problematic. The record is devoid of any evidence concerning the amount of time the Roadmaster or Assistant Roadmaster spent performing work which should have been performed by the Claimant. The description of the work contained in the record developed on the property does not enable us to estimate the amount of time with a reasonable degree of certainty. In similar situations, the Board has ordered the parties to conduct a joint check of the Carrier's records to ascertain the amount of time spent on work that should have been performed by employees covered under the Agreement. See, e.g., Third Division Awards 28611, 24280, 14004, 330. Claimant is entitled to a minimum of the number of hours guaranteed for a call under the Agreement for each day. However, if the records reflect that the jobs took more than that amount of time on any particular days, Claimant is entitled to the actual amount of time spent on the work for those days. If Carrier does not provide the records necessary for the joint check, the claim is to be sustained as presented. See Third Division Awards 29622, 26072."

Ordering a joint check of Carrier records to arrive at the specific monetary remedy has never been controversial within the railroad industry and the Majority's failure to order such in this case represents a palpably erroneous anomaly. In fact, the parties regularly rely on the Carrier's records so as to review, police and protect the Agreement. While the Majority appears to wish that the Organization had brought forward payroll records, time sheets, etc in order to meet a burden of proof, it in fact sets up an impossibility inasmuch as the Organization does not have access to such records. This not only goes beyond reason and the notion of good faith required by the Railway Labor Act, but it also goes against the long standing arbitral principle that the final calculation of a remedy may be accomplished through a joint review of the relevant records. The Majority's failure to enforce the joint review (which has been the practice in Section 3 cases since the inception of RLA Section 3 resolution of disputes) and instead place a new and impossible burden of proof upon the Organization is a stark departure from the longstanding and accepted practice.

Finally, any future reader of this palpably erroneous award must remember that the contract places specific obligations upon the parties. In this case, the Carrier did not dispute that it had failed to comply with such obligations when it advertised the subject foreman position as requiring a CDL when no CDL was actually required. However, despite Union Pacific's un-denied violation of the Agreement which caused Claimant to suffer a loss, the Majority somehow failed to award a remedy. On the basis of the wrong-headed reasoning used to deny a remedy for the wrong that was undeniably committed, Award 23 is palpably erroneous and cannot stand as precedent in any future case.

For all the reasons set forth above, I must respectfully dissent to the remedy portion of this Award.

Respectfully submitted,



Andrew M. Mulford