

PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NO. 81

Case No. 81

Referee Fred Blackwell

Carrier Member: J. H. Burton

Labor Member: S. V. Powers

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

CONSOLIDATED RAIL CORPORATION

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it assigned Mr. B. W. Kacenski instead of Mr. E. F. Slebodnick to perform foreman's work at the Brier Hill Shop in Youngstown, Ohio beginning December 7, 1987 (System Docket CR-3701).
2. As a consequence of the aforesaid violation, Mr. E. F. Slebodnick shall be compensated for all straight time and overtime hours worked by Mr. B. W. Kacenski beginning December 7, 1987 and continuing until the violation is corrected.

FINDINGS:

Upon the whole record and all the evidence, and after hearing on July 31, 1991, in the Carrier's Office, Philadelphia, Pennsylvania, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter.

DECISION:

Claim sustained.

**FRED BLACKWELL
ATTORNEY AT LAW**

P.O. BOX 6095
WEST COLUMBIA,
S.C. 29171
(803) 791-8086

OPINION

This case arises from a claim filed on behalf of Claimant E. F. Slebodnick, on February 3, 1988, on the basis of allegations that the Carrier violated Rule 3 and Rule 4 of the Agreement by directing another Employee, Mr. B. W. Kacenski, to perform maintenance and repair work on Undercutter BU 3002 at the Brier Hill Shop, Youngstown, Ohio, while Claimant Slebodnick was on furlough.

At the times in question Claimant Slebodnick held seniority as an Undercutter Foreman on Inter-Regional Seniority District No. 2, in accordance with Rules 1, 3, and 4 of the Agreement. The Brier Hill Shop at Youngstown, Ohio, is located in Inter-Regional Seniority District No. 2. Mr. Kacenski, who held seniority in Inter-Regional Seniority District No. 4 at the times in question, had been assigned to Undercutter BU 3002 for the entire 1987 production season. At the end of the production season, Mr. Kacenski was retained in his position on Undercutter BU 3002 when it was sent to the Brier Hill Shop for winter repairs.

Undercutter BU 3002 went into the Brier Hill Shop on or about November 15, 1987. The claim was filed February 3, 1988.

The Carrier's opposition to the claim on the property was based on both merit and procedural arguments. The Carrier's merit argument on the property was that it was permissible for the Carrier to use the Foreman (Mr. Kacenski) who had been assigned to Undercutter BU 3002 during the 1987 production season, to perform winter repairs on the undercutter at the Brier Hill Shop, because such assignment was in accord with a

system wide practice dating from 1978 whereby the Inter-Regional personnel are retained on their respective undercutter machines for winter repair work. The Carrier's procedural argument on the property was that the claim was time-barred on the basis that the claim filing of February 3, 1988, was untimely under the Rule 26 (a) sixty (60) day time limit provision, because Undercutter BU 3002 went into the Brier Hill Shop on or about November 15, 1987, and that the claim was not a continuing claim under Rule 26 (f).

In its submission before the Board the Carrier makes no mention of the argument concerning system wide practice. The Carrier's submission opposition to the claim is based on the grounds that the claim was untimely filed under the Rule 26 (a) sixty day time limit provision, that the claim is not within the purview of the Rule 26 (f) provisions on an alleged continuing violation by the Carrier and hence is not a continuing claim, and that, therefore, the claim is time barred.

The Organization asserts that the claim is meritorious and that procedurally, it is based on an alleged continuing violation by the Carrier within the meaning of Rule 26 (f) and therefore, the claim is a continuing claim that is not barred by the sixty day time limit rule.

Both parties have cited prior awards dealing with the issues of time limits and continuing claims, which awards, as a body, present mixed results.

The provisions of paragraphs (a) and (f) of Rule 26 read as follows:

"RULE 26 - CLAIMS AND GRIEVANCES

(a) A claim or grievance must be presented, in writing, by an employee or on his behalf by his union representative to the Division Engineer or other designated

official within sixty (60) days from the date of the occurrence on which the claim is based. The Division Engineer or other designated official shall render a decision within sixty (60) days from the date same is filed, in writing, to whoever filed the claim or grievance (the employee or his union representative). When not so notified, the claim will be allowed.

* * *

(f) A claim may be filed at any time for an alleged continuing violation and all rights of the claimant(s) involved shall be protected by the filing of one (1) claim or grievance based thereon so long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than sixty (60) days prior to the filing thereof."

* * * * *

From review and assessment of the record as a whole the Board concludes and finds that the instant claim arises from an alleged continuing violation within the meaning of Rule 26 (f) of the Agreement and that, hence, the claim is a continuing claim. Accordingly, the Board finds that the February 3, 1988 claim filing complied with the Rule 26 time limit provisions subject to the limitation that the Carrier is not liable for retroactive compensation for any date sixty days prior to the claim filing. The Board finds further that the claim is meritorious and that a sustaining award is in order.

The basis of the Board decision that the claim is a continuing one is that it would be unduly technical and unwarranted to treat the herein alleged violations by the Carrier as being compressed into a single occurrence created by the action of Mr. Kacenski, the Seniority District 4 Foreman, crossing the boundary from Seniority District 4 into Seniority District 2 on November 15, 1987. There was no job abolishment, no contracting out, and no transfer of work from one work jurisdiction to another work jurisdiction.

The facts of this dispute involve the transfer of an Employee from one seniority district to another seniority district to perform work in the latter district that his home district seniority did not entitle him to perform. In these circumstances the alleged violation continued each day that the Employee from the foreign seniority district performed work in Seniority District 2 that should have been performed by an Employee from District 2.

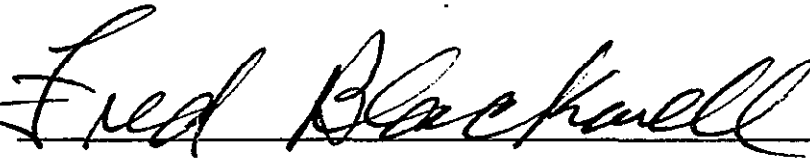
In regard to the awards submitted for the record, all of which have been read and analyzed in the study of this case, the awards submitted by the Organization are more in line with the confronting problem than the awards submitted by the Carrier. The Carrier awards, for example, treated claims arising from events such as the abolishment of positions, the transfer of work performed by dispatchers employed by one Carrier to dispatchers employed by another Carrier, and the contracting out of janitorial work in the context of ten (10) years of prior contracting out.¹ These events are not comparable to the herein facts: none of these events are present in this case and, as previously noted, the claim event in this case was the transfer of an Employee from one seniority district to another seniority district to perform work in the latter district that his home district seniority did not entitle him to perform. The Carrier-cited awards are thus not apropos to the confronting dispute, whereas, a ruling similar to the herein ruling is found in Organization-cited Third Division, Award No. 28524 (8-28-90); there, the Board held that a continuing

¹ Second Division Award 6854, Public Law Board No. 2945, Award No. 71, Third Division Award 20631, and Public Law Board No. 2945, Award No. 72.

claim was presented where a Carrier assigned an Employee from his home seniority district to perform work in a seniority district where he held no seniority.

Having found that the claim is not procedurally barred from Board consideration, the Board further finds that, under Rules 3 and 4 of the Agreement, the Claimant's seniority in District 2 entitled him to recall from furlough to perform the disputed work that was performed in District 2 at the Brier Hill Shop at Youngstown, Ohio, on and after November 15, 1987, by an Employee who held only District 4 seniority. The Carrier's action of assigning the District 4 Employee to perform the disputed work in District 2 violated the Claimant's work rights and Claimant is entitled to receive compensation for the work performed in District 2 by the District 4 Employee.

In view of the foregoing, and based on the record as a whole, it is found that the record establishes the merit of the claim and accordingly, the claim will be sustained.

A handwritten signature in cursive script that reads "Fred Blackwell". The signature is written in black ink and is positioned above a horizontal line.

Fred Blackwell
Chairman / Neutral Member
Special Board of Adjustment No. 1016

FRED BLACKWELL
ATTORNEY AT LAW

P.O. BOX 6095
WEST COLUMBIA,
S.C. 29171
(803) 791-8086

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AWARD

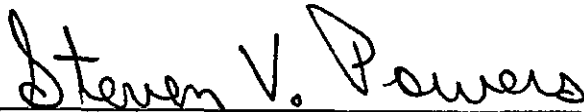
The record supports the claim of the Claimant, Mr. E. F. Slebodnick, and accordingly, the claim is hereby sustained with no retroactive compensation being allowed for dates prior to December 7, 1987.

The Carrier shall comply with this award on or before March 12, 1994.

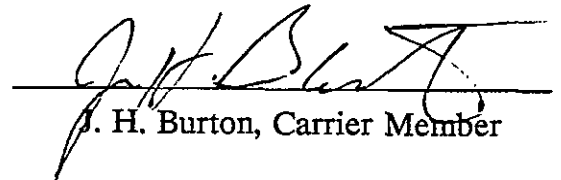
BY ORDER OF SPECIAL BOARD OF ADJUSTMENT NO. 1016



Fred Blackwell, Neutral Member



S. V. Powers, Labor Member



J. H. Burton, Carrier Member

Executed on 3/10, 1994.

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FRED BLACKWELL
ATTORNEY AT LAW

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WEST COLUMBIA,
S.C. 29171
(803) 791-8086