

SPECIAL BOARD OF ADJUSTMENT NO. 279

Award No. 288

Case No. 288

Parties Brotherhood of Maintenance of Way Employees
to and
Dispute Union Pacific Railroad Company
 (Former Missouri Pacific Railroad Company)

Statement

of Claim: (1) Bulletin No. 51 and then Assignment Notice 49 were posted without the machine numbers. The past practice has been to assign operators to a certain machine. Bulletins and assignments such as these are improper.

(2) Bulletin Nos. 52 and 53 for one foreman and six trackmen on Eastern District Tie Gang 5854 were not in line with our current working agreement. Bulletins are for a District Crossing Gang, and there is no such agreement or provision between this Organization and the Carrier to establish such gangs.

(3) Bulletins for Eastern District Tie Gangs 5850 and 5854, Nos. 51, 52, 53 and Assignment Notice No. 49 be canceled and re-bulletined in line with our current working agreement.

Findings: This Board has jurisdiction by reason of the Parties Agreement of January 5, 1959.

This is the first of a series of four (4) identical cases, i.e., has 288, 294, 297 and 298, and which are also involved with three other related cases, i.e., 259, 267 and 299.

The Employees objected in late 1985 and early 1986 Assignment Notice along with Bulletin Notice 51, involving an alleged failure to assign Machine Operators with assigned identified mechanics. Bulletin Number 52 and 53 were for a District Tie Gang 5854, were bulletined, on or about October 3, 1983.

The Parties, acting pursuant to the February 7, 1965 National Job Stabilization Agreement, negotiated an Agreement, on March 19, 1981, establishing therein for District Tie Gangs and providing, among other things, for establishing District seniority and its application.

The Director of Labor Relations, on May 14, 1984, wrote the former BMW General Chairman, in part, as follows:

"The District Tie Gangs concept was implemented to utilize high production gangs on large tie renewal projects. A necessary part of this operation is the renewal of road crossings, replacement of ties in switches, and out of face surfacing within the limits of the project. This work however is presently being performed by Division Seniority forces. Such an arrangement is extremely inefficient and often results in delays to the completion of the project as well as train operations.

This is to advise that effective June 1, 1984, District Tie Gang forces will perform all work necessary to completely finishing a tie gang project. This will include rehabilitation of road crossings, replacement of ties in switches, and the out of face surfacing within the limits of the project.

This is provided as information to you. If you should have any questions, please do not hesitate to call this office."

The instant case No. 288, the first of the said four (4) identical cases, arose in early October 1985, when Carrier, on October 7, 1985, posted Bulletin Notice No. 51 (and assignment Notice No. 49) against which the Union on October 9, filed a grievance in part saying:

"...First, bulletin No. 51 and assignment Notice 49. Neither of these jobs were posted with the machine number. Past practice has been to assign operators to a certain machine. Bulletins and assignments such as these are improper...all Machine Operators jobs on the respective divisions are bulletined with the Machine Numbers, and we are requesting that Eastern District Tie Gangs machines be bulletined the same. There is no provision which makes this gang an exception.

Second, bulletin numbers 52 and 53 for one (1) Foreman and six (6) Trackman (sic) on Eastern District Gang 5854, were not in line with our current Working Agreement. The bulletins are for a District Crossing Gang. There is no such agreement or provision...to establish such gangs. This type of work is not District Work...This work is Division Work and should not be bulletined as work belonging to the Tie Gang. Therefore, we would ask that these bulletins and assignments be canceled and rebulletined in line with our...working agreement."

Rule 11(a) Bulletin: in part, reads:

"New positions and vacancies will be bulletined and in no case not later than ten (10) days following the establishment of the position or date the vacancy

occurs...the bulletin will show the reason for the vacancy....When more than one vacancy or position exists and are bulletined at the same time, employees shall have the right to bid on all such positions, stating their preference.

(c) Promotions to new positions or to fill vacancies will be made after bulletin notice has been posted for a period of ten (10) days..."

As to the first issue, i.e., whether a rule or past practice requires Carrier to bulletin unique machine identification numbers for Machine Operators to bid on, the Board finds that both parties are partially right, which, of course, implies that both are partially wrong.

There is, of course no specific contractual requirement, per se, but there has to be some means of identification for seniority purposes.

In Celanese Corporation of America 24 LA 168 (1954) arbitrator Julie Justin held that in the absence of a written rule a past practice to be binding on both parties, must be "(1) unequivocal, (2) clearly enunciated and acted upon and (3) readily ascertainable over a reasonable period of time and fixed and established practice accepted by both parties."

The past practice here is a mixed bag. The record reflected that, apparently, in the past the Carrier had identified them more often than not in some territories. However, the thrust of the Employee's fear was really more as to whether Carrier could move the Operator from the machine bid on to another machine and yet hold them responsible for the machine bid on.

The Carrier can move a machine operator from "his" machine to operate another machine if he qualified thereon. There should, of course, be a reasonable rationale therefor. Also, in that connection it should be remembered that an employee cannot properly be held accountable for something over which he had no control. Nor should an employee be held accountable for an omission, if that be cause, to not be able to perform a required task. In the final analysis the facts of any given situation should rightfully and properly govern an employee's accountability and not the mere fact of being the assigned holder of a particular bulletined machine. The commission or omission of something for which blame may be properly assessed is a matter

normally determined after a fair and proper evaluation of the applicable facts.

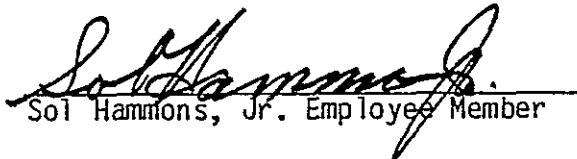
This point appears to be a matter that requires mutual discussions to resolve fears, whether imagined or otherwise, absent showing a rational for the change this claim will be sustained.

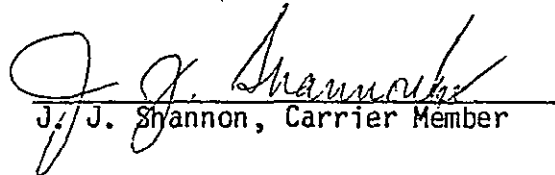
The second issue involved Bulletins 52-53, among others, for one (1) Foreman and six (6) Trackmen of Eastern District Tie Gang 5854, for a District Crossing Gang. The Union alleged that this was work that belonged to the Division forces.

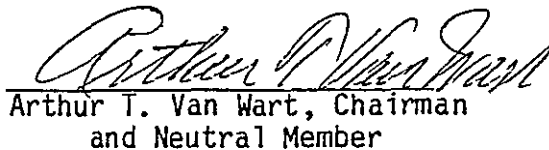
The Union is wrong. This is work that may be performed by either District or Division Forces. In fact, the Carrier notified the former General Chairman who negotiated the District Agreement, on May 24, 1984, to this effect and no exception was registered thereto. Even were a transfer of work from one seniority District to another such transfer could have taken place under the National February 7, 1965 Job Stabilization Program.

Award: First issue, sustained as per findings.
Second issue, denied as per findings.

Order: Carrier is directed to make this Award effective within thirty days of date of issuance shown below.


Sol Hammons, Jr. Employee Member


J. J. Shannon, Carrier Member


Arthur T. Van Wart, Chairman
and Neutral Member

Issued July 19, 1989.