

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20041
Docket Number MW-19748

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way **Employes**
(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned Pump Repairer L. Roberts instead of Pump Repairer N. Carrier and Assistant Pump Repairer O. Lein to perform overtime service at Portland, Oregon on November 22, 1970 (System File 342 **F/MW-84(1),3-4-71 A**).

(2) Pump Repairer N. Carrier and Assistant Pump Repairer O. Lein each be allowed **1-3/4** hours of pay at their respective **time** and one-half rates because of the violation referred to in Part (1) hereof.

OPINION OF BOARD: Claimants, headquartered in **Portland**, Oregon, were assigned to Water Service Gang No. **1** with work days of Monday through Friday.

Roberts, headquartered in Vancouver, Washington, was assigned to Water **service** Gang No. 2, with work days Tuesday through Saturday.

On a Sunday (a rest day for both Gangs), Carrier selected Roberts to perform certain repair work to its steam heat system at Portland Roundhouse, and paid him three and one-half hours at time and one-half.

The Organization contends that Claimants should have been called to perform the work under the provisions of Rule 27(h):

"(h) Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by **an** available extra or unassigned **employee** who will otherwise not have 40 hours of work that week; in all other cases by the regular **employee**."

The day in question was not part of any assignment. There were no available extra or unassigned employees who would otherwise not have 40 hours of work that week. Thus, the only issue is whether Claimants were the "regular employees."

The Carrier contends that the claim must be dismissed because **the record** contains mutually contradicted statements by both **parties**. Carrier suggests **that** conflicts have not been resolved and the record is devoid of **evidence** to substantiate the allegation. **See** Awards 18806 (**Devine**) and 19501 (O'Brien).

The Board does not agree that the dispute is in such a posture, but rather, finds that the record, as developed on the property, establishes sufficient facts for the Board to make a determination on the merits.

On three occasions, during handling on the property, the Claimants stated that they regularly performed work in Portland on a five day a week basis. The Carrier never denied or rebutted that allegation, but was content to rely on its assertion that Roberts had no specific work limits and that he was senior to Claimants. Awards of this Division have concluded that when material statements are made by one party and not denied by the other party, so that the allegations stand unrebutted, the material statements are accepted as established fact (especially when there is both time and opportunity to deny). See Awards 9261 (Hornbeck), 12840 (Hamilton), 14385 (Wolf). See also Awards 14399 (Lynch), ~~15035~~ (Franden) and 18605 (Rimer).

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Carrier submitted certain documents suggesting that the Organization had abandoned a similar claim, which ~~was~~ processed at the same time as this claim. Those documents are disregarded, ~~because~~ no adverse inference should be drawn when a similar claim is abandoned during its pendency (See Award 12942 (Wolf)) and, in any event, the Organization had relied upon a different rule. "(17(b))".

Similar contractual provisions have been considered by this Board and the weight of authority supports the claim. The Awards suggest that Rules such as 27(h) clearly and unequivocally require the Carrier to call the employees who regularly performed the work on the preceding dates. (See Award 15064 (Ives), 8708 (Weston), 9557 (Bernstein) and 18393 (Franden). See also Award 18856 (Cull), dealing with these same parties.

The record clearly establishes that Claimants were the employees who regularly performed the work in Portland. It may be quite true, as stated by the Carrier, that Roberts is not restricted to any defined territory or area and that he is senior to Claimants. But, those allegations do not control this dispute. The Agreement does not speak in those terms, but rather, it states that the employees who regularly performed the work shall be utilized. Further, we fail to find significance in the fact of close geographic proximity of Portland to Vancouver.

Contrary to the above cited Awards, the Carrier relies upon Award 13389 (Zack) as authority for its action.

Although similar contract language is involved, we find that the factual circumstances present in Award 13389 are clearly distinguished from the instant dispute.

In Award 13389, during the work weeks preceding the weekend in question, the Carrier had assigned Gangs 1, 3 and 4 to perform certain work. During the days **immediately** preceding the weekend in question, Gang No. 4 had been employed at the physical location. However, on the disputed days when continuation of the work was required, Gang Nos. 1 and 3 were assigned.

The Award notes that the "parties" had considered the several Gangs as interchangeable and, thus, did not reserve any particular tasks or territory to any particular Gang. The claim was denied because all three Gangs were the "regular employees."

Here, there is no evidence of record to suggest that the Vancouver employee regularly performed work at Portland, whereas the record does show that the Claimants were the "regular employees" during the preceding weeks. For that reason, Award 13389 is not pertinent to our consideration here.

We do not disagree with Carrier's assertion that it has a basic right to control its business, but that right is always tempered by obligations of the collective bargaining agreement. Here, we conclude that the Claimants were the employees referred to in the final phrase of Rule 27(h).

Claim (2) requests one and three-quarters hours of time and one-half pay for a Pump Repairer and Assistant Pump Repairer. Obviously, the Organization has divided the three and one-half hours worked by Roberts at the overtime rate. Because the total sought by both employees relates to the time worked by, and penalty rate paid to, Roberts we feel that Claim No. 2 is sustainable.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived ~~oral~~ hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim (1) is sustained. Claim (2) is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 20th day of November 1973.