

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21340  
Docket Number NW-21231

Frederick R. Blackwell, Referee

(Brotherhood of Maintenance of Way **Employees**

PARTIES TO DISPUTE: (   
(Burlington Northern Inc.

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

(1) The Agreement was violated when, on April 9, 1974, Section Foreman David **Simmons** was assigned to operate Jordan Spreader-Ditcher No. SP&S X4 (System File P-P-191C/MW-84(m)-1 6/6/74).

(2) Machine Operator L. Schuh and Machine Operator Helper J. Eager each be allowed pay at their respective straight-time rates for an equal proportionate share of the total hours worked by Foreman Simmons in performing the work described in (1) above.

OPINION OF BOARD: The Organization alleges that the Claimants (Machine Operator Schuh and Machine Operator Helper **Eager**) are entitled to pro rata compensation for proportionate shares of work performed in violation of Rules 5 G. and 55 N. of the Agreement, in that Section Foreman **David Simmons** operated a Jordan Spreader-Ditcher for eight (8) hours near Klickitat, Washington, on April 9, 1974. The Carrier opposes the claim on the ground that Foreman Simmons was assigned to operate the Jordan Spreader because there was urgent need to use the Spreader and because the foreman was working at the point of need. The Carrier says further that the situation presented a temporary one-day vacancy and that the use of Foreman **Simmons** to fill the vacancy was proper under Rules 19 A. and 44. The Carrier also asserts that the Claimants should not be awarded compensation **because** they were on duty and under pay on the claim date and in addition were **not available** to operate the Spreader since they were 34 miles away from the point where the Spreader work was performed.

Claimant Machine Operator Schuh and Claimant Machine Operator Helper Sager hold seniority within the Roadway Equipment Sub-Department (Rule 5 G.). Section Foreman Simmons holds seniority in the Track Sub-Department (Rule 5 D.), and does not hold seniority in the Roadway Equipment Sub-Department. Rule 5 G. makes provision for seniority rosters in the Roadway Equipment Sub-Department for all operators of roadway machines classified as Groups 1, 2, 3, or 4 machines. The Jordan Spreader is listed in Rule 5 G. as a Group 4 Machine. Rule 55 N. provides that a Machine Operator is an "**employee** qualified and assigned to the operation of machines classified as groups 1, 2, 3, and 4 in Rule 5."

Rule 5 G. clearly and specifically refers to the Jordan Spreader as one of the Group 4 machines within the Roadway Equipment Sub-Department and Rule 55 N. refers to a Machine Operator as the **employee** who operates the machines classified by groups in Rule 5 G. Thus, as between the Claimants who

hold a seniority in the Roadway Equipment Sub-Department and Foreman Simmons who does not hold seniority in such Sub-Department, **Rules 5 G.** and 55 N. in the instant record establish a **prima facie** case that the **Claimants** were entitled to perform the disputed **work**. The Carrier's rebuttal of **this prima facie** case centers on Rules 19 A. and 44. Rule 19 A. provides, *inter alia*, that in filing a temporary vacancy, a "preference will be given to the senior qualified **employee** who is not assigned in the rank in which the vacancy occurs and who has on file a written request to fill such vacancy." Rule 44, the Composite Service Rule, provides that an **employee** temporarily assigned to a position paying a higher rate of pay, shall be paid the **higher rate** of such position. Neither of these rules grants authority, either expressly or **impliedly**, for the Carrier to remove the work in question in this dispute from the Roadway Equipment Sub-Department for the purpose of having such work performed by a Foreman in the Track Sub-Department who held no seniority in **the Roadway** Equipment Sub-Department. It is true that the Carrier may have had to comply with Rule 44 in compensating Foreman Simmons for his work on the Jordan Spreader, but mere compliance with this rule in respect to the Foreman has no significance in determining the rights of the Claimants. Accordingly, the claim is **not** negated by Rules 19 A. and 44. Further, the claim is not negated by the Carrier's reference to the fact that the Claimants were working elsewhere when the need to use the spreader arose. This reference is but a **conclusionary** statement, and it has **no** tendency to **prove** that the work involving the Spreader could not have been scheduled for performance by the Claimants.

In view of the foregoing, and on the whole record, it is concluded that the **prima facie** case in support of the claim has not been rebutted by the Carrier and that the claim is meritorious under Rules 5 G. and 55 N. For a consistent ruling in a similar case involving these same parties, see Award No. 20892. With regard to compensation, numerous prior authorities have held that an award of compensation is appropriate for lost work opportunities notwithstanding that the particular claimants may have been under pay at the time of the violation. Award No. 19924. The claim will therefore be sustained and each Claimant shall be compensated at his respective pro rata rate for an equal **proportionate** share of the total hours worked by Foreman Simmons on the claim date..

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

Award Number 21340.  
Docket ~~Number~~ **MW-21231**

Page 3

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

That **the Agreement** was violated in accordance with the Opinion.

A W A R D

Claim sustained as per Opinion.

NATIONAL **RAILROAD ADJUSTMENT** BOARD  
By Order of Third Division

ATTEST: \_\_\_\_\_

*A. W. Pauls*  
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1976.

---