Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 4056
Referee George E. Larney Docket Number 3955

PARTIES TO DISPUTE: Railroad Yardmasters of America

Consolidated Rail Corporation

STATEMENT OF CLAIM: Yardmaster J. J. Murphy, Jr. be allowed one day's pay on October 20 and 21, 1979 account unassigned Yardmaster V. R. Smolsky working on relief days at which time he was not available under the controlling agreement.

OPINION OF BOARD: Claimant, J. J. Murphy, Jr., at the time of the claim dates indicated, Saturday, October 20 and Sunday, October 21, 1979, was regularly assigned as a Relief Yardmaster at Frankford Junction Yard, Philadelphia, Pennsylvania, with a tour of duty, Friday, Saturday and Sunday on the first trick, hours between 7:00 AM to 3:00 PM, and Monday and Tuesday, with hours between 3:00 PM to 11:00 PM, and rest days of Wednesday and Thursday.

On the claim dates in question, Carrier mistakenly filled the vacancy of an open Yardmaster position on the last trick with employe V. R. Smolsky, an unassigned Yardmaster regularly assigned as a Yard Clerk at the Frankford Junction Yard, with relief days on Saturday and Sunday. Carrier readily acknowledges the Trainmaster at Frankford made the misassignment based on a misapplication of Rule 2-F-1 of the Controlling Agreement effective July 1, 1978. Carrier explains the Trainmaster believed Rule 2-F-1 gave him the right to use Smolsky in this position, as he wanted to groom Smolsky for a Yardmaster position and possible future promotion to Assistant Trainmaster. Carrier admits that the open position in question did not qualify, literally, as one to which Rule 2-F-1 applies. Rather, Carrier notes that the open position in question was an extra assignment subject to filling in accordance with Rule 5-A-2, Covering Extra Lists.

In response to this misassignment, the Organization, on behalf of Murphy, filed the subject claim, contending Claimant was eligible and available for the work pursuant to Agreement Rule 5-A-2(m). This Rule reads in pertinent part as follows:

> "(m) When no extra yardmaster is available to work at the straight time rate of pay, yardmaster vacancies, if filled, and extra work will be performed by qualified employees as follows:
>
> (1) By the senior available unassigned yardmaster, except that such employee will not be used as a yardmaster on the rest days of his regular craft assignment, or, if an extra employee after working five (5) straight time days in such craft.
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> (2) By an available substitute yardmaster except that such employee will not be used as a yardmaster on the rest days of his regular assignment, or, if an extra employee, after working five (5) straight time days in such craft.

(3) By the senior available yardmaster who has indicated in writing, his desire to be considered for overtime."

Carrier argues that even though it misassigned the work in question, it did not violate Rule 5-A-2(m) insofar as Claimant is concerned. Carrier asserts that paragraph (m) is applicable when first, there is an extra list at the location and second, the extra list is exhausted, that is, when there is no extra Yardmaster to be used at the straight time rate of pay. Carrier acknowledges the fact that there is an extra list at Frankford Junction but that under the given circumstances on the claim dates in question, the extra list had not been exhausted. More specifically, Carrier asserts there were three (3) extra Yardmasters at Frankford Junction, but at the time, two (2) of the three (3) were not available for the work. However, the third Yardmaster, W. J. Cunnane was available, but because of employe Smolsky being used to perform the work, Cunnane was not called. Thus, Carrier contends, Cunnane is the aggrieved employe as a result of its misapplication of Rule 5-A-2(m) and not the Claimant. Carrier takes the position that Cunnane is the only one who stood for the work and therefore Claimant is not the aggrieved party as he would not have stood for the work until after the extra list had been exhausted. With regard to this latter point, Carrier contends that Claimant, at best, would have stood third in line for filling the vacancy; but given the fact there were two (2) other Yardmasters senior to Claimant who also requested overtime assignments, Claimant would have more realistically been sixth in line. In view of the fact Claimant is not the aggrieved employe for the reasons stated, Carrier contends he is not entitled to any adjustment arising from the wrongful application of the Controlling Agreement and that this position is supported by Agreement Rule 4-K-1(k) which deals with compensation for claims and reads in whole as follows:

"Any adjustment growing out of claims covered by this rule shall not exceed in amount the difference between the amount actually earned by the yardmaster and the amount he would have earned from the Company if he had been properly dealt with under this agreement."

Carrier contends that had it properly filled the position in question by someone off the extra list, Claimant would not have been entitled to the work and therefore, under the provisions of Rule 4-K-1(k), since Claimant would not have earned any money, he is not entitled to receive any money now. In further support of its position Claimant is not entitled to any compensation, Carrier cites the following excerpt from Award Number 1 of Public Law Board 2035, wherein Referee Seidenberg enunciated the following:

"The Board, however, finds the Claimant's claim for three hours pay on the claim dates not well founded. There is no clear evidence that he was directly and immediately damaged or harmed by the Agent performing the work in question. The record suggests that the likelihood of the Carrier utilizing his services on an overtime basis to perform the work in question, was extremely remote and tangential. The Claimant has not made a persuasive case showing any causal relationship between him and any

injury as a result of the contract breach. A Claimant has to prove causally that he has been damaged by the Carrier's delictual conduct. There is no such showing in this record."

Carrier argues it is bound to abide by the contractual agreement but that such obligation does not mean that when the contract is violated someone must be paid regardless as to who that someone is, and regardless of the fact that, that person might or might not have been aggrieved. Carrier argues the Organization must prove Claimant has been aggrieved in order to support the claim and that this position is axiomatic in the field of Labor Relations. Further, the Organization has a duty to present a claim for the aggrieved individual, and not just anyone. Carrier submits the Organization full well realizes Claimant suffered no monetary loss when in correspondence to the Senior Director rejecting his denial of the claim, the Organization noted that Cunnane, the extra man who would have been called if the Agreement had been properly applied, was assigned to a guaranteed extra list, thus receiving a guaranteed amount of pay, whether he was or was not called to perform service. Thus, even though he was not called to perform this service, Cunnane suffered no monetary loss. Carrier concludes that even though a mistake was made, no one suffered any monetary loss or was in any other way harmed by the filling of the position in question contrary to the applicable Agreement terms.

Finally, Carrier contends, in initiating the claim on behalf of an improper Claimant, the Organization has incurred a fatal flaw in its position and therefore the claim must necessarily be rejected. In support of its contention on this latter point, Carrier cites the following excerpt from Award No. 54 of Special Board of Adjustment No. 894, wherein Referee Van Wart stated:

"It is clear from this record that Claimant did not stand first out. Thus, having an improper Claimant file a claim we need not review the merits of same. See First Division Award No. 12661 (Blattner) which held in part:

'In the instance case the man first out, Foreman Doyle, is not submitting claim but rather to second out man, the third out man and so on. We feel, therefore, that there is no valid claim before us. While Doyle did not make claim is not revealed in the docket. Award: Claim denied.'

In these circumstances, this claim will also be denied."

The Organization argues it is of no concern to the Carrier on whose behalf claims are filed for as the more important consideration is protection of the Controlling Agreement and that any violations thereof be remedied by imposition of a penalty. In regard to these two (2) latter points, the Organization cites excerpts from the following Awards:

Third Division Awards 10575 and 17801:

"Claimant was not the best or senior claimant which does not default the claim. It is of no concern of the carriers who claims are made for."

Fourth Division Award No. 2928 (R. O'Brien held:

"Having found a violation of the Yardmaster's Agreement during the period in question, we conclude that damages should be awarded even though no claimant suffered any monetary loss during this period."

Public Law Board No. 1790 - Award No. 85 (Dolnick) held:

"But carrier should not be permitted to violate provisions of the Agreement with impunity. This Board has no authority to order the carrier to re-establish the covered Chief Clerk position. In the absence of authority, a sustained award without an assessment of a penalty is an exercise in futility. Carrier could continue to disregard this finding and contract violation. Where there is a wrong there is a remedy."

The Organization maintains that whether or not Cunnane was a better Claimant here is beside the point as the Claimant was entitled to the work ahead of Smolsky who should not have been called under the given circumstances by Carrier's own admission. The Organization acknowledges that while Claimant may not have had the first demand right to the work nonetheless he certainly had a better "demand right" to the work than Smolsky who was restricted contractually from working the position in question. Moreover, the Organization submits that because Carrier is liable for damages in the instant case for having breached the provisions of the Controlling Agreement by precluding members of its Craft from work and earnings opportunities, application of Rule 4-K-1(k) as written, calls for payment to the Claimant of time and one-half (1½) rather than pay at the pro rata rate which is being claimed here. The Organization notes that in the instant case Claimant did not make or earn any amount during the hours in question and that under Rule 4-K-1(k) Claimant is entitled to premium pay which is exactly what he would have earned had he been properly called and used.

The Organization argues Carrier violated the Agreement and in doing so is obligated to make Claimant whole for depriving him of an earnings opportunity when it failed to assign him to the Yardmaster vacancy on the dates in question. In support of its position on this latter point, the Organization cites numerous Awards. In sum, the Organization maintains Carrier was obligated to call and use the Claimant ahead of Smolsky who Carrier admits should not have been used to fill the Yardmaster vacancy. For all of the reasons advanced, the Organization requests this claim be sustained.

We are persuaded from the record evidence that had Carrier properly administered the applicable Agreement Rule 5-A-2(m), there may have been a possibility, however remote, that the Claimant could have been reached to fill the Yardmaster position in question on the two (2) claim dates of October 20 and 21, 1979, whereas, employe Smolsky would never have been considered for this work at all. We are somewhat troubled by the fact Claimant is not the best employe

on whose behalf the Organization could have initiated and pressed this claim, but we are more troubled by the specter of Carrier's violating the Agreement with impunity. Furthermore, we find greater support in previous Awards to favor a positive ruling for compensating a less than best Claimant than we do for refraining from imposing damages upon a Carrier where it has been determined Carrier has violated the labor Agreement. Therefore, based on Carrier's own admission it violated the Controlling Agreement by not properly filling the Yardmaster vacancy in question and notwithstanding the fact Claimant is not the best possible Claimant under the prevailing circumstances, we rule to sustain the instant claim and direct Carrier to pay the claim as stated.

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

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute waived right of appearance at hearing thereon.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST: Nancy J. Dever
Executive Secretary

Dated at Chicago, Illinois, this 18th day of August, 1983.