Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award No. 4645
Docket No. 4608
88-4-87-4-4

The Fourth Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: (United Transportation Union - Yardmasters Department
(
(CSX Transportation, Inc. (The Baltimore and Ohio Chicago Terminal Railroad Company)

STATEMENT OF CLAIM:

Yardmaster Edward Milam is claiming one straight time day each for February 10, 11, 12, 13, 14, 1986 because he was required to supervise and instruct crews for work performed outside his zone. Requiring claimant to supervise outside his home seniority district violates Article 6(c) of the current agreement and February 11, 1982 Coordination Agreement.

FINDINGS:

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

The carrier or carriers and the employe or 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.

Parties to said dispute waived right of appearance at hearing thereon.

On February 10, 1986, a claim was filed for straight time for eight hours for five working days by the Claimant on the grounds that he was "doing work in two" districts. After the claim was denied it was appealed by the General Chairman of the Organization's Lodge No. 39. In that appeal the General Chairman alleged that the Claimant was being forced to do work outside of his home district. Since this was the case, the Chairman alleged further that the Carrier was in violation of Article 6(c) of the operant Agreement and Section 1 of a Coordination Agreement between the parties dated February 11, 1982.

The Rule from the Agreement and the Article from the Coordination Agreement read, in pertinent part, as follows:

Article 6

"(c) Yardmasters will be required to hold or acquire regular assignments as such in the district or districts which they select as their 'home' district whenever their seniority permits them to do so, or forfeit such seniority. Yardmasters whose seniority does not permit them to hold regular assignments in their home district or districts will be used to perform extra yardmaster service therein in accordance with their seniority standing; extra yardmasters declining to perform service as such, where available and qualified, will forfeit their seniority as yardmasters. For the purpose of this paragraph, the following districts are recognized:

District 1. Grand Central Terminal and Coach Yard.
District 2. Robey Yard, Homan Yard and Forest Hill Yard.
District 3. Barr Yard
District 4. East Chicago Yard, Sinclair Refining Yard and Whiting Yard.

A yardmaster will be considered as having selected the district in which he is employed as his 'home' district unless written selection to the contrary is filed with the Superintendent. Notice of change in district or districts selected must also be filed in writing with the Superintendent."

Coordination Agreement dated February 11, 1982

"Section 1. Effective on the date of the coordination, the districts set forth in Article 6(c) of the B&OCT Schedule Agreement will be eliminated and yardmasters thereafter must protect all yardmaster service available to them anywhere in the Chicago Terminal or forfeit their seniority as yardmasters; provided however, that all yardmasters on the coordinated seniority roster in existence on the date of coordination will continue to be governed by the provisions of Article 6(c) as it was in effect

prior to the coordination and will not be required for the purpose of protecting their seniority, protecting a guarantee, or for any other purpose to accept yardmaster work outside their 'home' district, but may accept yardmaster work outside their 'home' district if they so desire; and provided further, that any such yardmaster who does take a regular yardmaster assignment outside his 'home' district may not voluntarily demote himself from such a position without forfeiture of his yardmaster seniority." (Emphasis ours)

The Claimant's home district prior to the 1982 coordination was District 3, Barr Yard. On the dates in question the Claimant was required, in his capacity as Yardmaster, to instruct and supervise the switching, blocking and handling of cars by train crews 3 and 13 in both his home district and in District 4.

In the declination of the claim Carrier officers argued various lines of reasoning, including the following. First of all, the Terminal Superintendent argued that the districts outlined in Article 6(c) were established to regulate "the exercise of seniority between the locations specified and at no time did they define areas of responsibility for individual yardmasters." Secondly, this same officer argued that by the 1982 Coordination Agreement the "districts set forth in Article 6(c)...of the Schedule Agreement were eliminated...."

The Organization responds that the interpretation of Article 6(c) which the Carrier's officers are proposing could amount to a Yardmaster being assigned concurrently to any combination of seniority districts irrespective of which is his chosen home district. Such reasoning, the Organization argues, would nullify the meaning of seniority districts as outlined in Article 6(c). Further, the Organization argues that the Coordination Agreement of 1982 does not change in any way the intent of Article 6(c) because of the clear proviso found in Section 1 of the latter.

There is no dispute between the parties that crews 3 and 13 were instructed by the Claimant on the dates in question to supervise switching, classifying and interchange of cars in the East Chicago Yard which is in District 4, as outlined under Rule 6(c). The argument of the Carrier appears to be that such district no longer existed after the 1982 coordination, and it further adds in later declinations of the claim that the Yardmaster position itself had been abolished at the East Chicago Yard and that by being assigned to supervise work there the Claimant could not, therefore, have been exercising seniority in the East Chicago district.

The Board must conclude that since the Claimant's home district prior to the coordination was District 3, as outlined in Article 6(c), that remained his home district after the coordination. The Coordination Agreement of 1982 neither changed that, nor did it abolish the four districts outlined in that Article. Nor did the abolishment of the Yardmaster position at East Chicago

Yard change the intent and applicability of Article 6(c). Further, the Board must agree with the Organization that the argument by the Terminal Superintendent which states that exercise of seniority in a district does not define areas of responsibility is one which renders the concept of districts obscure. Apparently this argument was put forth because the Yardmaster position in District 4 had been abolished.

Article 6(c) places responsibilities on Yardmasters to select a home district or districts or "forfeit such seniority." The latter must be of no small concern to all members of this craft. Section 1 of the 1982 Coordination Agreement clearly states that Article 6(c) continues to hold for all Yardmasters on the coordinated roster on the date of the coordination and that they will not be "required to accept Yardmaster work outside their 'home' district." That latter is what the Carrier was requiring the Claimant to do on the dates in question. The Carrier officers apparently thought that the two Agreements at bar, in tandem, permitted assignment of a Yardmaster from his home district to work in another, even if the Yardmaster did not choose to do so. The Agreements do not say that. For the Carrier to imply such represents arbitrary changes in seniority districts which the Board has held, under other but comparable circumstances, to be improper (Fourth Division Award 4306.) Should the Carrier wish to implement the procedures which it argues for in this case, the proper manner to do this would be to file a Section 6 Notice under the Railway Labor Act and negotiate such with the Organization, rather than attempt to gain such advantage from this Board whose sole function under Section 3 of the Act is to interpret labor agreements "as written" (Third Division Awards 21459, 21697, 23135).

The Carrier presents a number of new arguments and proposes various new evidentiary matters in its Submission to this Board which are not found in the exchange between the parties on the property. The Board may not consider such when framing its conclusions in this case. This firmly entrenched doctrine, codified by Circular No. 1, has been articulated by many Awards of various Divisions of this Board (Third Division Awards 20841, 21463, 22054; Fourth Division Awards 4132, 4136, 4137).

The Agreement was violated.

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 20th day of October 1988.

CARRIER MEMBERS' DISSENT
TO
AWARD NO. 4645, DOCKET NO. 4608
(Referee Suntrup)

The Award not only misconstrues the application of the provisions of the Agreements that are involved in this dispute, but compounds the misinterpretation by assessing a monetary penalty that is not founded on fact, evidence or agreement provision.

The original claim as filed by the Claimant reads as follows:

> "Claiming 8 hrs for each date 2-10 - 2-11 - 2-12 - 2-13 - 2-14-86 for doing work in two Zones."

In his May 21, 1986 appeal, the General Chairman alleged:

> "On these days listed above, Mr. Milam was force (sic) to perform services outside of his home district zone 3.
>
> These violations occur when Mr. Milam or any yardmaster protected with the coordination agreement rules, are required to instruct and supervise yard crews in zone 4 or outside of their zone."

To support the claim for five (5) days' pay, the Organization presented as evidence an undated "...typical train list from Barr Yard to E. Chgo. Yard" which was machine classified and produced. The Organization furnished no supporting documentation that the alleged violation occurred on one of the dates claimed. Even if it was a violation for the Claimant to supervise the crew switching the 39 cars listed therein, such is a minuscule task - a function which only takes minutes - when compared to the total responsibilities of the Claimant's Yardmaster position on whatever date was involved when the 39 cars were handled.

Furthermore, the Organization did not point to any agreement provision entitling the Claimant to payment of "a day's pay" for each of the five (5) days claimed. As stated in the Director of Labor Relation's July 29, 1986 declination:

> "...Mr. Milam was on duty and under pay at the time the alleged violations occurred and would not be entitled to any additional compensation."

Without evidence, documentation or agreement provision the Referee assessed the Carrier a monetary penalty that was obviously excessive and punitive, and by doing so, he greatly exceeded his authority.

Concerning the "merits" of the claim, the Referee stated:

> "Section 1 of the 1982 Coordination Agreement clearly states that Article 6(c) continues to hold for all Yardmasters on the coordinated roster on the date of the coordination and that they will not be 'required to accept Yardmaster work outside their "home" district.' That latter is what the Carrier was requiring the Claimant to do on the dates in question. The Carrier officers apparently thought that the two Agreements at bar, in tandem, permitted assignment of a Yardmaster from his home district to work in another, even if the Yardmaster did not choose to do so." (Emphasis added)

The language to which the Referee refers granted the "pre-coordination" employees of the B&OCT (who were the only employees covered by the application of the former Rule 6(c) of the B&OCT Schedule Agreement) "prior rights" to assignments which were on their seniority territory prior to the coordination, and provided that they "...will not be required for the purpose of protecting their seniority, protecting a guarantee, or for any other purpose to accept yardmaster work outside their 'home' district..." As clearly pointed out in the Terminal Superintendent's May 15, 1986 declination:

> "The districts were established to regulate the exercise of seniority between the location specified and at no time did they define areas of responsibility for individual yardmasters."

This fact was never refuted on the property.

Based upon the Referee's statement quoted above, it would appear that he understood the facts in this case to involve a circumstance whereby the Claimant was required to vacate his assignment in Zone 3 and accept an assignment in Zone 4 (which clearly violates the provisions of the implementing agreement covering this matter) and made his decision accordingly.

The fact of the matter is that there were no Yardmaster assignments headquartered in former Yardmaster's seniority Zone 4. As the Terminal Superintendent stated in his May 15, 1986 declination:

> "On June 29, 1983, the East Chicago Indiana Yard on the B&OCT was closed. It was the only yard in District 4 as defined by Article 6(c). The Yardmaster's position was abolished and the remaining yard crews were re-advertised to originate and terminate at Barr Yard. The function of instructing these crews (Runs No. 3 and No. 13) and any other crew was transferred to Ashland Tower at Barr Yard (District 3)." (Emphasis added)

Obviously, the Claimant in this case was not required to leave his assignment in the Yardmasters' "prior rights" seniority Zone 3 to take an assignment in seniority Zone 4 on the dates claimed. In fact, the Claimant was not required to even leave his work location in "prior rights" seniority Zone 3 on the dates claimed. The involved yard crew originated and terminated at Barr Yard, a location within Zone 3, and worked under the jurisdiction of the Claimant's Yardmaster position in Zone 3. During his tour of duty it was necessary for the Claimant, as the Yardmaster supervising this crew, to dispatch the crew to a location in the former seniority Zone 4 to perform switching functions. The Claimant, however, remained at his work location in Zone 3 and monitored the switching activities of his crew. After completion of the switching functions, the crew returned to Zone 3.

The Referee obviously did not understand the facts involved to be as outlined above. The effect of the decision not only misconstrues the Agreements, but also erroneously restricts the Carrier's Chicago operations which are covered by those Agreements. It subjects the Carrier to a penalty payment of eight (8) hours' pay to the Yardmaster on duty when it becomes necessary to have a yard crew working under the jurisdiction of a Yardmaster in a particular "prior rights" yardmaster seniority

Zone (e.g., Zone 3) accomplish switching work that requires the yard crew to cross an imaginary "line" representing another "prior rights" seniority Zone (e.g., Zone 4), even though the February 11, 1982 Agreement clearly provides:

> "Effective on the date of the coordination, the districts set forth in Article 6(c) of the B&OCT Schedule Agreement will be eliminated..."

In effect, the Referee rewrote the parties' contract by simply omitting one of its critical provisions.

For obvious reasons the above construction of the Agreements makes no sense at all and would be counterproductive. Further, there are no provisions of any agreement to support such a decision, or the penalty payments imposed in connection therewith.

The Honorable Justice J. Frederick Motz, in the United States District Court for the District of Maryland, in Civil No. JFM-84-3140 (B&O vs. BRAC) clearly established that this Board lacks authority to assess a penalty when he vacated Third Division Awards 24861, 24862, 24863, 24864, 24865 and 24866. In his Memorandum, Judge Motz ruled:

> "...The Fourth Circuit has held that penalty pay is proper only if the employer has been guilty of wilful or wanton misconduct or if the collective bargaining agreement provides for penalty pay.
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> * * *
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> Likewise, it is clear that the collective bargaining agreement does not provide for penalty pay. Indeed, BRAC does not argue to the contrary.
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> * * *
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> There is no authority in the Agreement to apply this rule to the alleged violation of Rule 87; by awarding penalty pay, the Fishgold panel was merely 'dispensing its own brand of industrial justice.'"

In the instant case, the Referee clearly exceeded the scope of this Board's jurisdiction by ignoring certain agreement provisions and thereby contravened the essence and purpose of the Schedule Agreement.

We vigorously dissent.

Michael C. Lesnik
M. C. Lesnik

M. W. Fingerhut
M. W. Fingerhut

P. V. Varga
P. V. Varga