

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 24903
Docket No. 44606
98-1-97-1-S-6733

The First Division consisted of the regular members and in addition Referee Rodney E. Dennis when award was rendered.

(Brotherhood of Locomotive Engineers

PARTIES TO DISPUTE: (

(Southern Pennsylvania Transportation Authority
((SEPTA)

STATEMENT OF CLAIM:

"This claim, BLE-95-021-T2, is on behalf of Milton G. Harmon and Floyd C. Lewis is for 8 hours pay at the straight time rate. Account being required to work Passenger Attendant assignments on May 30, 1995 in violation of Article I section 101 of the agreement."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

Claimants Harmon and Lewis are Extra Board Engineers employed by Carrier in a Commuter Train Operation serving Philadelphia and surrounding areas. On May 30, 1995, Claimants were assigned as safeties on Passenger Attendant runs, assignments normally protected by United Transportation Union members. As a result of being assigned work of another craft, the BLE filed a grievance protesting the work

assignment. It asked that this Board find that Carrier does not have authority to require Engineers to fill train service vacancies and that Claimants be paid eight hours of penalty pay for each day they were required to fill a train service vacancy.

At the outset of the discussion of this case, Carrier took the position that the NRAB lacked jurisdiction to review it. The Board has concluded otherwise and will review the case on its merits.

Carrier contends that it has the authority to assign Engineers to train service work in emergency situations or to provide adequate service to the public. It cites a portion of Section 502(e) of the parties' Agreement to support its position.

"Section 502(e)

Engineers shall work the runs picked by them except in emergencies or exceptional situations when the Authority shall have the right to assign work to employees in addition to or in lieu of that picked or assigned to them when necessary to maintain scheduled operations or to provide adequate service to the public."

It claims such policies have been followed since 1990 with no protest by the Union. During the on-property discussion of the instant grievance, however, Carrier informed the BLE that it intended to discontinue the practice of assigning Extra Board Engineers as Safeties, thereby rendering the grievance moot.

Carrier further claimed that since there is no penalty provision in the Agreement, the BLE claim for an eight-hour penalty payment is misplaced.

The BLE argues that Engineers cannot be assigned to train service vacancies. It relies on tradition and practice in the railroad industry, as well as on the terms of Article I, Section 101, of the parties' Agreement to support its position.

"Article I, Section 101

This agreement will apply to work or service of transporting passengers performed by employees specified herein and governs rates of pay, hours of service, and working conditions of all such employees (sic) engaged in the

operation of engines or any other motive power used in performing the work or service provided by engineers, and other work recognized as the work of engineers performed on any track or physical property, resulting from the transfer of services from Conrail to SEPTA pursuant to the Northeast Rail Service Act of 1981."

The BLE also argues that a penalty payment of eight hours for each day an Engineer is assigned work out of his craft is the accepted and equitable price to assess Carrier so that future violations of the parties' Agreement will not occur.

This Board has reviewed the record and has concluded that the issue presented to the Board is moot. The Board interprets the Carrier letter of February 10, 1997 (letter duplicated below) to mean that because of the instant grievance, Carrier has reviewed its policy and has concluded that it may not be supportable. It has discontinued it and does not intend to reinstitute it in the future.

"Dear Mr. Bruno:

This is response to our discussions, concerning the use of Extra Board Engineers, as 'Safeties.' After further review of the long standing practice of assigning Extra Board Engineers as 'Safeties,' the decision has been made to discontinue the practice effective immediately.

If you have any questions, please call me.

Sincerely,

Robert R. Smithers"

Since the Board has concluded that Carrier has discontinued the practice complained of by the BLE, no further discussion of the issue is required.

In reviewing the BLE's request for eight hours' penalty pay for each day Claimants were assigned to the train service vacancy, the Board has concluded that the facts of this case do not support such a payment.

The record reveals that the practice existed for five years prior to the instant grievance. This five year period without a protest from the BLE could be interpreted by Carrier as acquiescence to the procedure. Carrier had no reason to conclude until the instant grievance was filed that it was improperly assigning Engineers. Once the instant grievance was filed, Carrier reviewed its position and discontinued the policy in question. There does not appear to be an arbitrary disregard of contract terms in this instance. When this situation is considered together with the fact that no penalty pay language is contained in the parties' Agreement, it is difficult for this Board to justify a penalty payment as a means to get Carrier's attention and force contract compliance. Carrier has agreed that it will discontinue the present policy. No further incentive need be directed.

If, however, the Board is confronted with the same situation in the future, a review of our decision of penalty pay would be appropriate.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 10th day of June 1998.