

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 25059

Docket No. 44748

99-1-98-1-S-6773

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: (

(Southeastern Pennsylvania Transportation Authority

STATEMENT OF CLAIM:

"This claim, BLE-97-021-T2, on behalf of Locomotive Engineer Harold Johnson, is for 8 hours pay at the straight time rate. Account being required to work Conductor assignment on June 6, 1997 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.

Claimant Harold Johnson is an Extra Board Engineer employed by Carrier in a commuter train operation serving Philadelphia and surrounding areas. On June 6, 1997, Claimant was required to work a Conductor assignment on a Freight/Special 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 did not have authority to require

Engineers to fill train service vacancies and that Claimant be paid eight hours of penalty pay for each day he was 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. (See Award No. 24905 and Memorandum and Order of Judge J. M. Kelly, dated February 24, 1999, Civil Action No. 98-CV-4385, USDC for the Eastern District of PA, SEPTA-V.-BLE.)

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 also cites SEPTA and NORAC Operating Rules, as well as Award No. 298 of SBA No. 933, Arbitrator Gerald E. Wallin, as instructive in this matter.

The Organization bases its grievance on the wording of Article 1, Section 101, Union Recognition, of the parties' Collective Bargaining Agreement:

ARTICLE 1

Section 101. Union Recognition

- (a) 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 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.

In the event new type motive power is placed in service to replace or add to the present equipment, Engineers will be fully instructed in operation of same, as well as to operate it.

- (b) SEPTA recognizes the Brotherhood of Locomotive Engineers' General Committee of Adjustment as the designated bargaining representative of and for all engineers employed by SEPTA. The identity of said representative appears signatory hereto.

This Board has reviewed two prior cases on this property it has rendered Awards Nos. 24903 and 24904 involving the same issue as presented to us in this instance. The gravamen of this dispute is whether Carrier can, with impunity, assign Engineers to protect Conductor positions when it thinks it appropriate. In the two prior Awards rendered by this Board on the subject, the Board denied the claims on the basis that they were moot. The record in those cases revealed that when the claims were filed, they were the first claims filed on the subject since 1990. During discussions of these claims on the property, Carrier indicated that it would discontinue the practice of assigning Engineers as "Safeties," a job normally protected by UTU members. The Board's position as stated in Award No. 24903 is as follows:

"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."

This same reasoning was applied to Award No. 24904. As can be clearly seen by the wording of this Award, the Board was persuaded that Carrier was aware that it had no authority to assign an Engineer to a Conductor's position; thus, it took it upon itself to stop the practice. This Board considers such behavior to be an act of enlightened labor relations on the part of Carrier. The Board did not expect to see identical cases before it in the future. Carrier, however, is obviously not satisfied with the approach taken on the subject by Mr. Robert R. Smithers, its Director of Transportation Personnel, Personnel Assignment Office, Railroad Division, in his letter (quoted above) to Mr. Bruno, the BLE General Chairman, wherein he indicated that the practice complained of would stop. Carrier, however, chose to assign Engineer Johnson on June 6, 1997, and again on July 8, 1997, to work normally covered by UTU employees. At the point of these assignments, Carrier was fully aware of the Organization's position on the issue and of the February 10, 1997, Smithers' letter indicating the practice would stop.

After an extensive review of the record, this Board has concluded that in spite of Carrier's new arguments presented in this case (as compared to the position and contentions presented in Dockets Nos. 44606 and 44607, Awards Nos. 24903 and 24904), Carrier has no authority to assign an Engineer to work as a Conductor. The Board will address the arguments of the parties in order to make its conclusions clear.

Initially, the prevailing condition in the railroad industry is that Engineers and Conductors are two separate classes and crafts. Traditionally, each group has seniority in its own craft and is assigned work in that craft. In order for Engineers and/or Conductors to be assigned across craft lines, an agreement between the craft representatives and Carrier must exist that allows such cross craft assignments.

1. Article 1, Section 101(a) and (b), of the Agreement defines Engineers as those employees specified to perform the service of transporting passengers and operating engines and any other motive power used to perform work provided by Engineers and work recognized as Engineer work. It goes on to state that if new motive power is put in service, Engineers will be educated to operate it. It is difficult not to construe this Article as the Engineers' Scope Rule. It essentially states that Engineers operate engines in the service of transporting passengers and performing other work recognized as Engineers work on any track or physical property. Section 101(b) states that the BLE General Committee of Adjustment is the designated bargaining representative for all Engineers. Section 101(a) and (b) cannot be construed to allow employees classed as Engineers to be assigned as Conductors. It makes no mention of performance of work other than Engineers' work.

2. Carrier's argument that Section 502(e) of the Agreement authorize it to assign an Engineer to perform a Conductor's work because a Conductor is not available to cover an assignment is not persuasive. Carrier's interpretation of Section 502(e) is strained. A reasonable analysis of the meaning of Section 502(e) would be to authorize Carrier to assign an Engineer to a run other than the one he bid without penalty in an emergency situation or when it is concluded by Carrier that maintaining a schedule or providing adequate service to the public is required. To construe this language to authorize Carrier to assign an Engineer to a Conductor's position is not supportable. Given the importance of this issue to the parties, it is logical to conclude that if, as a result of bargaining, it was even remotely agreed that under some conditions Engineers could be assigned as Conductors, it most certainly would have been mentioned in the Agreement.

3. At the hearing before the Board in this matter, Carrier's representative placed special emphasis on a recent arbitration Award that supports Carrier's position that Supervisors can perform Engineers work when no bargaining unit Engineer is available. This Board can find no fault with the conclusion reached by Arbitrator Wallin in this Case, SBA No. 933, Case No. 298. The Board, however, cannot extend the Wallin

decision to support the notion that an Engineer can be assigned to cover a Conductor's position when no Conductors are available. Based on the Wallin decision, this Board would conclude that Carrier would be more on point if it assigned a Supervisor to cover the Conductor's position when no Conductor is available rather than assign an Engineer to the job.

4. Carrier also contended that the NORAC Operating Rules and Carrier's own operating rules require that two people capable of operating a train must be assigned to the train. This usually means an Engineer and a Conductor. This Board, however, does not conclude that these rules authorize Carrier to use an Engineer across craft lines to fill a Conductor's job. When a Conductor is not available to cover a job, Carrier has numerous options in regard to the job other than assigning an Engineer to it. For example, it can assign a Supervisor to cover the job.

Finally, the issue of an appropriate remedy to be awarded when an employee is improperly assigned to a position has come up in the instant case, as in Award Nos. 24903 and 24904 and Award No. 298, SBA No. 933. A number of other cases from other properties on the subject of appropriate remedy have been included in this record. A review of all of these cases reveals that the general consensus on the issue is that a basic day's pay should be awarded to employees improperly assigned. While this Board did not adopt such a position in Awards Nos. 24903 and 24904, we did indicate that if such cases were presented to us in the future (as the instant case has been), a review of the remedy to be assessed would be appropriate.

In summation, it is this Board's conclusion that Carrier has violated the Agreement by assigning Claimant to work as a Conductor. It is also this Board's decision that Carrier shall be required to pay a penalty day's pay for this violation.

AWARD

Claim sustained in accordance with the Findings.

Form 1
Page 7

Award No. 25059
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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 7th day of October 1999.