Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12120
Docket No. 11649-T
91-2-88-2-146

The Second Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

PARTIES TO DISPUTE: (International Association of Machinists and
(Aerospace Workers
(
(CSX Transportation, Inc. (Seaboard System Railroad)

STATEMENT OF CLAIM:

1. That CSX Transportation, Inc. violated Rules 51 and 26(a), but not limited thereto, of the controlling Agreement when it assigned other than Machinists to perform Machinist work including the inspecting and testing of mechanical equipment (engines, running gear, brakes, controlls, etc.) on locomotives Nos. 3275, 3250, 2591, 1975, 4774 and 5619 which were prepared for out-bound service on May 8, 1987 in the Yard (track H-19) at Waycross, Georgia.

2. That in addition thereto, CSXT continued said violations on locomotives being prepared for out-bound service at certain yards and other locations in the vicinity of Waycross subsequent to May 8, 1987, as hereinafter listed.

3. That accordingly, CSXT be ordered to pay Machinist T. E. Chittenden 4 hours overtime account of said violations on May 8, 1987 and in addition thereto, pay a Machinist Claimant, as hereinafter named, 4 hours overtime account of each subsequent violation on the following dates: May 9, 1987 pay F. R. Shuman: May 26, 1987 - J. M. Griffin; May 31, 1987 - D. E. Griffin; June 1, 1987 - C. Strickland; June 12, 1987 - R. L. Carter; June 13, 1987 - N. W. McCain; June 21, 1987 - F. R. Shuman; June 21, 1987 - Joe Segrest; June 21, 1987 - F. R. Shuman; July 1, 1987 - N. W. McCain; July 12, 1987 - T. W. Woods.

FINDINGS:

The Second 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.

As Third Party in Interest, the Brotherhood of Locomotive Engineers and United Transportation Union were advised of the pendency of this dispute, but did not file a Submission with the Division.

This dispute concerns the Organization's Claim, filed pursuant to Rule 30(2), that the Carrier violated Rules 51 and 26(a) of the Agreement by assigning Machinist's work to non-Machinists.

The Organization asserts that the disputed work is specifically covered by Rule 51 of the Agreement. In addition, the Organization claims that the Carrier has not denied that this work was performed by employees other than Machinists, and that Machinists performed these tasks before May 8, 1987. The Organization further maintains that the disputed work has been historically and exclusively assigned to Machinists at all locations on the Carrier's system where there is sufficient work to justify the employment of at least one Machinist. The Organization also stresses that this work is not limited to set-up and checking brakes, and that such work in the Yard is the same work which Machinists have historically performed in the shop at Waycross. With respect to the remedy, the Organization contends that the requested relief is not excessive.

The Carrier states that the Organization has failed to sustain its burden of proving a violation of the Agreement. In particular, the Carrier maintains that this work is the same as that which the Second Division earlier determined was not exclusive to the Organization in Second Division Award 10805. In addition, the Carrier claims that the disputed work encompasses tasks that are part of the jurisdiction of the Engineers and Firemen, and that, as a result, the Carrier is free to determine which employees will perform this work. Without prejudice to its position on the merits, the Carrier contends that the remedy requested by the Organization is excessive and without contractual basis.

This Board has concluded that the Organization has advanced sufficient evidence to sustain its Claim, and that the Carrier has not rebutted this evidence. The Board therefore sustains the Organization's position, and remands the matter to the parties, as described below, to determine the number of hours to be awarded to the employees specified in the Claim.

The July 3, 1987 Claim stated that the work performed "included the inspection and testing of mechanical equipment on the locomotive (engines, running gear & etc.) and the inspection and testing of certain controls on the lead unit (bell, horn & etc.). Additionally, the brakes were set-up and tested for out-bound service." This Board agrees with the Organization that this case is not covered by Second Division Award 10805, in which this Board denied a Claim by this same Organization against this Carrier. That Award resolved the following issue:

"In this case, the Machinists must demonstrate conclusively that the coupling and uncoupling of locomotives and the testing of brakes is exclusively and traditionally Machinists' work. See Awards Nos. 9236, and 7174." (Emphasis added)

Thus, Award 10805 ultimately resolved only part of the work in the case now before this Board e.g., that part of the July 3, 1987 Claim that "...the brakes were set-up and tested for outbound service." The remainder of the work was not decided by that case. This Board notes that the Organization had proposed that Award 10805 cover a broader issue e.g. "setting up brakes and mechanically testing locomotives for outbound service..." (Award No. 10805, at Page 2). However, the Carrier framed the issue in terms of "testing brakes" and "coupling or uncoupling locomotives", and asserted that "[n]o inspection of the locomotive at issue was required, nor was an inspection form completed in this case." Id., at Page 3. It is clear that this Board resolved that earlier dispute on the more narrow issue proposed by the Carrier.

In addition, in the case now before this Board, the Carrier did not rebut the evidence submitted by the Organization that "...the application and release of the brakes is only a very small portion of the work performed in this dispute," and that setting-up and pretesting the brakes during a trip inspection is different than the brake checks performed by Engineers and Hostlers. The Organization relied on Carrier's regulations entitled "FRA-2A and Service Center Inspection - Standard Definitions" and "Outbound Inspection Standard Definitions" dated November 11, 1986.

The Board further concludes that the Organization submitted sufficient evidence to support its Claim that the work at issue in the instant case has "...historically and exclusively been performed by the [Machinists] ... systemwide." In such cases, "...the burden of proof is on the Organization to show exclusivity of practice system-wide." Second Division Award 6867. See also Second Division Award 2255. The Organization submitted signed statements from Machinists in the locations listed below, stating that they had exclusively performed the work at issue for the time periods indicated:

"Tampa (1969 to 1986)
Waycross (1959 to 1988)
Rocky Mountain, N.C. (1942 to 1987)
Hamlet, N.C. (1943 to 1987)
Savannah, Ga. (1969 to unspecified date)
Jacksonville (1948 to 1988)
Erwin, Tennessee (1974 to 1988)"

For example, a Raycross Machinist stated that "...Machinists are exclusively assigned to inspect and replace brake shoes (where needed), inspect and test all mechanical equipment including the engine, air compressors, running gear, governors and etc., apply lube oil where needed and test certain controlls on the lead unit (bell, horn, etc.) on all trains set out and scheduled for outbound service", as well as setting-up and testing brakes on such locomotives. He further states that "[t]o the best of my knowledge, this work has never been assigned to other than Machinists at Waycross, Ga."

The Parties' Submissions characterize the dispute work in the same general terms as this statement. The Organization describes it as "the routine daily inspecting and testing of locomotives being prepared for outbound service at Waycross, [Georgia]." The Carrier similarly refers to "prepar[ing] locomotives for outbound service", and "setting up brakes and mechanically testing locomotives for outbound service...."

The Carrier did not submit any evidence to counter these Machinists' statements. Rather, as in the earlier correspondence between the Parties in this case, it contended that Award 10805 governed the issue now before this Board. The Carrier further asserted that the Engineers and Firemen "...have this work specified in their Agreements." However the portions of those Agreements cited by the Carrier do not cover trip inspections of outbound locomotives. Rather, they are restricted to "...mak[ing] the necessary disconnections and/or connections and adjustments (as required by the operating department) to effect the set out or pick up..." (Article 14, Section 1(a) of the Engineer's Agreement) and "set-up brake equipment and assemble diesel units as required" and "couple and/or uncouple jumper cables, air hoses and appurtenances (but not steam hose) between diesel units." (Article 48(f)(2) of the Firemen's Agreement). While this work is involved in assembling a locomotive consist and pretesting the brakes -- tasks which were at issue in Award 10805, these non-Machinist Agreements do not govern the broader tasks at issue in this case.

In addition, the Carrier did not submit any evidence to support the assertion first made in its Submission that "[i]t is only when locomotives do not consist or the brakes do not operate properly that a mechanic inspects for mechanical defects...." The Carrier thus argued that the Machinists' exclusive jurisdiction over "repairs" is not implicated because the Hostlers did not make repairs. However, this Board cannot credit that belated, unsupported contention, which is contradicted by the statements reviewed above that Machinists' work does include inspections.

The Organization has also demonstrated that Machinists at Waycross historically performed trip inspections on out-bound locomotives in the Yards and other locations in the vicinity of Waycross. It is this work that was assigned to the Hostlers at Waycross in the Claims now before this Board. However, such work is "proximate[ly] relat[ed] to the main function..." at issue here. That fact is "a significant pivotal consideration," and outweighs

the fact that the work was performed in the Yard. Second Division Award 10049. The Carrier did not rebut the Organization's evidence in this regard.

This Board notes that its conclusion in the instant case is based soley on the historical practice supported by the Organization's unrebutted evidence reviewed above, and does not rest on Rule 26(a), Rule 51 or the December 20, 1967 Letter Agreement between the Parties. As a result, the Carrier's arguments on these issues are not dispositive of the ultimate issue in this case.

Insofar as the remedy is concerned, this Board has concluded that the dispute must be remanded to the Parties to determine the number of hours, calculated at the overtime rate, to which each employee is entitled. The Organization's proposed remedy of four (4) hours of overtime for each employe is not accepted. This Board has further concluded that Machinists who were on duty at the time the Hostlers were utilized will be eligible for overtime pay, unless the Carrier can present clear and convincing evidence that the employee would not have performed both the trip inspection and the other work to which he was assigned. Such a remedy is not excessive, contrary to this argument of the Carrier. The Carrier violated the Agreement when it assigned other than Machinists to perform Machinist work including the inspecting and testing of mechanical equipment (engines, running gear, brakes, controlls, etc.) on Locomotive Nos. 3275, 3250, 2591, 1975, 4774, and 5619 which were prepared for outbound service on May 8, 1987 in the Yard (track H-19) at Waycross, Georgia, and on the other occasions specifically listed below:

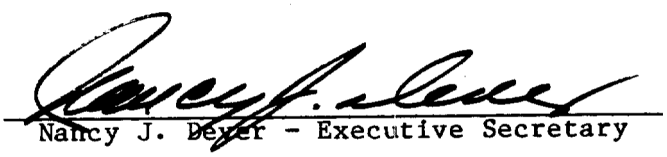
> "May 8, 1987 - T.E. Chittendren; May 9, 1987 - F.R. Shuman; May 26, 1987 - J.M. Griffin; May 31, 1987 - D.E. Griffin; June 1, 1987 - C. Strickland; June 12, 1987 - R.L. Carter; June 13, 1987 -N.W. McCain; June 21, 1987 - F.R. Shuman; June 21, 1987 - Joe Segrest; June 21, 1987 - F.R. Shuman - July 1, 1987 - N.W. McCain; July 12, 1987 - T.W. Woods".

The case is remanded to the parties for calculation of backpay, as set forth in this decision. This Board retains jurisdiction to resolve any disputes concerning the remedy that cannot be resolved by the parties.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 11th day of September 1991.

CARRIER MEMBERS' DISSENT
TO
SECOND DIVISION AWARD 12120, DOCKET 11649-T
(REFEREE LAMONT E. STALLWORTH)

The decision reached by the Majority in Second Division Award 12120 is palpably erroneous and cannot be accepted as a precedential Award. It is obvious that the Majority has confused an operating inspection that is performed in train yards with a mechanical inspection that is performed at locomotive shops, service areas or ready tracks.

This dispute involved outbound trains for which Hostlers were assembling and testing locomotive consists in Rice Yard at Waycross, Georgia, a location on the former SCL, and three separate claims of the Organization alleging that Hostlers were performing "the inspection and testing of mechanical equipment on the locomotives (engines, running gear & etc.) and the inspection and testing of certain controls on the lead unit (bell, horn & etc.)" work allegedly reserved to the Machinist Craft. It was the Carrier's position that the hostlers were performing operating functions associated with setting up and testing locomotives for outbound trains, which were the same functions the Organization attempted to claim at Rocky Mount, North Carolina, another former SCL location, in the dispute covered by Second Division Award 10805.

The Majority employed a different standard for reviewing the parties' evidence which transgressed the well established principle that the burden of proving all essential elements rests with the Petitioner. The Majority ignored the Carrier's emphatic statements that (1) the Organization presented no evidence in support of a systemwide practice (pages 7 and 10 of the Carrier's submission) and (2) the work in dispute is the same as Second Division Award 10805 found not exclusive to the Organization and, instead, relied on a misinterpretation of employee statements and Carrier's Instructions included as exhibits to the Organization's Submission (Exhibits O and Q) - exhibits which had not been presented to the Carrier during handling on the property.

The Majority transgressed another well established principle in the industry that prior decisions on an issue prevail, unless palpably erroneous, when it rejected what the Organization itself said was the issue in Award 10805 - setting up and testing locomotives for outbound service - and substituted a more narrow issue of coupling/uncoupling locomotives and testing brakes. To compound the error, the Majority made a mysterious and totally unsupported assumption that setting up and pretesting brakes during a trip inspection is somehow different than the brake checks performed by Engineers and Hostlers and that Hostlers were assigned

to Machinist work of "inspecting and testing of mechanical equipment (engines, running gear, *brakes*, controls, etc.)".

The correspondence exchanged between the parties during handling of the three claims that were before the Board (exhibited by both parties), as well as the Carrier's emphatic statements in its Submission, should have alerted the Majority to the fact that the Organization's exhibits were new material. The Carrier cannot rebut what has not been presented. Organization Exhibits O through R were not presented during handling on the property, and the Organization did not even assert they were discussed. Organization Exhibit M was a letter from a claim file not before the Board, as evidenced by Organization Exhibit N; and Organization Exhibit R appears to be pages from a merger agreement on a foreign railroad.

Nevertheless, the statements were from employees at only seven locations - including Waycross, the location involved in this dispute, Rocky Mount (not Rocky Mountain), the location involved in Second Division Award 10805, and Erwin, not even a location on the former SCL - which obviously was not evidence of historical practice of exclusivity on a systemwide basis; and neither the employee statements nor the Carrier's Instructions - one applicable at Service Centers and one applicable at Ready Tracks - can be construed as applicable to locomotives assembled in train yards for outbound trains. Although the employee statements were intentionally vague, the inspections mentioned in those statements were performed at mechanical locations (Shops, Service Centers or Ready Tracks) and none mentioned inspections performed in train yards.

Confusing an operating trip inspection with a mechanical inspection such as performed at Service Centers, Ready Tracks or Shops is the unpardonable result of the Majority's inability to distinguish between operating functions (testing locomotives of outbound trains for operability) and mechanical functions (inspecting for mechanical defects) and, therefore, the inability to understand the issue in dispute. Even the Organization warned of confusing the two types of inspections in its Submission (page 13). A trip inspection to test operability of the locomotive or locomotive consist for an outbound train is exactly what Engineers or Hostlers do prior to departure; whereas, an inspection for mechanical defects is performed on both inbound and outbound locomotives when taken out of service and sent to Service Centers or Ready Tracks for that purpose. In fact, the mechanical inspection and testing of equipment cannot be performed on locomotives or freight cars on a yard track unless the track is disabled with blue flags and derails (protected switches), as required by FRA rules. The work the Majority asserts Machinists should have performed in the train yard was not and could not have been performed by Hostlers.

CARRIER MEMBERS' DISSENT
TO AWARD 12120

The Majority erred again on remedy for the purported Agreement violations. The Majority agreed that the claims for four hours' overtime pay were excessive (in response to Carrier's well supported position that the overtime rate is not payable for time not worked and the unrebutted assertion that 30 minutes was excessive) but remanded the case for the parties to determine the number of hours, calculated at the overtime rate, with another unorthodox instruction that a Claimant who was on duty at the time the Hostlers were utilized was entitled to overtime pay unless the Carrier could prove he could not have performed the claimed work in addition to his assigned work.

For the reasons stated, we dissent.

Michael C. Lesnik
Michael C. Lesnik

M. W. Fingerhut
M. W. Fingerhut

Robert L. Hicks
R. L. Hicks

P. V. Varga
P. V. Varga

James E. Yost
J. E. Yost

EMPLOYEE MEMBERS' RESPONSE TO CARRIER MEMBERS' DISSENT
SECOND DIVISION AWARD 12120, DOCKET 11649-T
(REFEREE LAMONT E. STALLWORTH)

The decision rendered by the Majority in Award No. 12120 is well reasoned and sound by any standards or established principles of contract interpretation. It requires no explanation or defense by the Employee Members. However, the Carrier Members' Dissent contains several errors and misleading statements which cannot be ignored.

In that regard, the initial attempt by the Carrier Members (first paragraph) to discredit the Award by alleging that the Majority Members were "confused" relative to the involved inspections is not only incorrect, it flies in the face of the clear and unambiguous language contained in the Award. Obviously, the Majority is not the party who is confused in this dispute as evidenced by the Carrier Members' continued effort (also in the first paragraph) to defend the indefensible by implying that the involved Machinist work can be properly assigned to others by simply changing the location of the work site from the shop to the Yard or the name of the work from "mechanical inspection" to "operating inspection".

A review of the on-property correspondence shows that the instant dispute was concerned with the misassignment of specific work, as listed in the initial claim, which had been historically performed by Machinists in the "Shops, Yards and general vicinity of Waycross." Accordingly, it is a bit late for the Carrier Members to advance new allegations, all of which are vigorously challenged by the Employees, relative to the name, location, type or amount of the work assigned to other than Machinists in the instant dispute. Obviously, the Carrier Members are attempting to lay the ground work for another bite of the apple. However, the new defense is just as far off-base as the one refuted by the Majority in Award No. 12120.

The instant dispute involves an attempt by the Carrier to transfer Machinist work to others by utilizing tactics which are at best, deceptive in nature. In that regard, the record shows that Machinists have historically performed the involved work, as listed in the initial claim, in the shops and yards at all locations (where Machinists are employed) on the Carrier's System. In fact, the involved work (commonly referred to as trip inspections) is the principal assignment of numerous Machinists who are regularly assigned to full time positions known as "Lead" or "Running Repair" positions. The existence of such positions in connection with the

preparation of locomotives for out-bound service is common knowledge on the Carrier's System and in the railroad industry. It is also common knowledge that a comprehensive brake test is performed by Machinists during trip inspections; however, the involved test does not constitute a major part of the work performed. Nevertheless, the Carrier has improperly alleged that since Engineers and others perform pre-departure brake tests, all of the work normally performed by Machinists during trip inspections can be assigned to others based on the "exclusivity" principle. In that regard, Operating Crews on locomotives, like all operators of heavy equipment, are comparatively simple in nature and cannot be properly utilized, as the Carrier attempted to do in the instant case, to show non-exclusivity relative to all the work normally performed by Machinists during trip inspections, as confirmed by the absence of a third party submission in this dispute.

While it is true that Carrier received a favorable Award (No. 10805) in a prior dispute, which also involved the preparation of locomotives for out-bound service, the record shows that it done so by improperly convincing the Majority in that case, as it attempted to do in the instant case, that the performance of a brake test was the principal issue and therefore, the work did not belong "exclusively" to the Machinists. While that approach was successful relative to receiving a favorable decision, it resulted in an Award which only addressed the "testing of brakes", as stated by the Majority in Award No. 12120, and therefore, has no precedential value relative to the preponderance of work historically performed by Machinists on locomotives being prepared for out-bound service. In that regard, the on-property correspondence by the Employees in the instant dispute, including the initial claim, clearly demonstrated that "brake testing" was not the principal issue. However, the Carrier, having successfully obtained one favorable award by improperly focusing on the performance of simple, pre-departure brake tests attempted to return to the proverbial cookie jar utilizing the same deceptive tactic.

Accordingly, the Majority in Award No. 12120 did not reject Award No. 10805, as alleged by the Carrier Members. To the contrary, they accepted the Award based on the specific language contained therein. However, they properly refused to expand its findings, as requested by the Carrier Members. Additionally, the

Majority properly accepted the findings of prior Award No. 10049, which also involved the preparation of locomotives for out-bound service and an unsuccessful attempt by the same Carrier at the same location to change the assignment of certain work based on a change of the work site (from the shop to the "yard").

Contrary to the Carrier Members' assertions relative to the Employees' Exhibits, the Carrier had full knowledge of the involved exhibits as evidenced by the on-property appeal which stated, "a survey conducted by this Organization shows that the involved work is in fact performed by Machinists at other locations on the System where Machinists are employed." Regarding the Carrier Members' comments from "left field" concerning the blue flag law (which is subject to periodic changes), the on-property handling shows that Carrier did not deny that the involved work was performed by other than Machinists, with or without a blue flag, in the "Yards and other locations" at Waycross on the dates listed in the initial claims. Regarding the Carrier Members' objection to the imposed remedy, this Board has held in the past that Agreements are not made to be violated and payment at the overtime rate is proper in certain cases and the instant case obviously falls within that category.

Accordingly, the record shows that it is the Carrier Members and not the Majority Members in Award No. 12120 who are confused relative to the issues involved in this dispute.

Respectfully submitted,

Mark Filipovic

R. E. Kowalski