

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

DELAWARE & HUDSON RAILROAD CORPORATION

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

1. That Mr. Anthony Savino be allowed the difference in pay between what he received at the Trackman's rate of 58¢ per hour and what he should have received at the Assistant Foreman's rate of 70¢ per hour, during the period May 25, 1942 to June 25, 1942, to be in accord with the provisions of rule 28-b of the current working agreement.

2. That Mr. Willis Arthur, furloughed Assistant Foreman, be allowed the difference in pay between what he received at the Trackman's rate of 58¢ per hour and what he should have received at the Assistant Foreman's rate of 70¢ per hour, during the period June 25, 1942 to July 23, 1942, to be in accord with the provisions of rule 28-a of the current working agreement.

3. That Mr. Thomas Cavanaugh be allowed the difference in pay between what he received at the Welder Helper's rate of 60¢ per hour and what he should have received at the Assistant Foreman's rate of 70¢ per hour, for all time worked during the period May 25, 1942 to July 23, 1942, both dates inclusive, to be in accord with the provisions of rule 19 of the current working agreement.

EMPLOYEES' STATEMENT OF FACTS: On May 25, 1942 welder helper, Thomas Cavanaugh, was assigned to assist Foreman E. J. Conway in the supervision of the work of extra gang No. A-39; in other words, assigned as Assistant Track Foreman, and worked in that capacity from the date assigned until July 23, 1942 inclusive.

The agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Schedule Rules 28 (a) and (b) define how vacancies and new positions, both temporary and permanent, shall be filled. Rule 19 provides that an employe assigned to a higher rated position shall receive the rate applicable to such position. These rules read:

"Rule 28 (a). New Positions, permanent and temporary vacancies will be bulletined any time within ten (10) days after they are created or occur for a period of ten (10) days. Bulletin will be posted at headquarters of employes entitled to consideration. Appointments will be made within ten (10) days after close of advertising period. Temporary vacancies of thirty (30) days or less duration need not be bulletined.

2. Because of the Carrier's failure to, in compliance with Rule 28 (a), bulletin the position of Assistant Foreman in gang A-39 when it was known that it would continue in excess of thirty days, Willis Arthur who, had the position been bulletined would have first right for assignment to that position, was deprived of the opportunity to earn the rate applicable to an Assistant Track Foreman, 70¢ per hour, during the period June 25 to July 23, 1942.

3. Welder Helper Thomas Cavanaugh is entitled to the rate applicable to an Assistant Track Foreman, 70¢ per hour, for all of the time that he worked in that capacity from May 25th to July 23, 1942 inclusive.

We maintain that these claims are just and reasonable and respectfully request that they be allowed.

CARRIER'S STATEMENT OF FACTS: On May 23, 1942, account considerable damage due to floods, it became necessary to hire a number of new men and combine large groups of employes at certain locations to restore track. Clerical work, which in normal times would be handled by the foreman, was so large in volume, due to forms to be filled out in connection with hiring new employes, and miscellaneous other forms, that the foreman selected Thomas Cavanaugh to aid in this work. Mr. Cavanaugh did certain clerical work, such as keeping reports necessary in connection with hiring new employes, keeping record of materials handled and keeping time. During this period, Mr. Cavanaugh was carried on the payroll as Welder Helper at rate of 60¢ per hour, his regular occupation and rate.

POSITION OF CARRIER: It is the position of the Carrier that Thomas Cavanaugh performed none of the duties during the period May 25 to July 23, 1942, for which an assistant foreman in the Maintenance of Way Department is paid 70¢ per hour. The Carrier contends that an assistant foreman in a Maintenance of Way section gang is one who assists in the direction of the work. Mr. Cavanaugh did not direct the work in any manner. All of the work he performed, for which the organization is claiming assistant foreman's rate of pay, was purely clerical work and could rightfully and properly have been assigned to an employe subject to the scope of agreement covering clerks.

In this connection, copies of affidavits of Extra Gang Foreman E. J. Conway and Thomas H. Cavanaugh are shown marked Exhibits "A" and "B" respectively, in connection with work performed during the period of this claim by Thomas Cavanaugh. These statements were obtained by the Carrier following conference with General Chairman McGuire on this case, during which Mr. McGuire stated that he saw Thomas Cavanaugh directing the activities of 10 or 12 men and that was the reason he was progressing the claim. The Carrier does not agree that Mr. Cavanaugh supervised any employes or directed any work during the period of this claim and this fact is supported by the attached statements of the foreman and the employe concerned.

The Carrier contends that rules of agreement do not support claim for rate of assistant foreman for clerical service performed in this case and respectfully requests claim be denied.

OPINION OF BOARD: On account of heavy floods and washouts in the territory where extra gang A-39 was working, the force in that gang was materially increased. One Thomas Cavanaugh, a welder helper having no seniority rights as an assistant foreman, was selected by the foreman to assist him in keeping the records in connection with the new employes, keeping records of material handled and in keeping time. The Organization contends that he also assisted in the direction of the work, a fact which the Carrier denies.

The Organization contends that the position to which Cavanaugh was assigned was that of assistant foreman, that the temporary assignment to the position belonged to Anthony Savino, the senior qualified employe working in the gang, and that the permanent assignment, it being a position of more than 30 days duration, belonged to Willis Arthur, a furloughed Assistant Foreman. Rule 28-b of the current agreement is cited as sustaining the above conclusions. Monetary loss accruing to Cavanaugh, Savino and Arthur is claimed.

We are convinced that the position held by Cavanaugh was a clerical one unless he engaged in the direction of employes in the performance of the work.

The evidence of the Foreman and of Cavanaugh shows that Cavanaugh did not direct the work and that his duties were to assist the foreman with clerical work which was incidental to his position as Foreman. The Organization presents the affidavits of four employes who say that Cavanaugh "did direct the work of certain Trackmen on various occasions." These affidavits are in identical language and are all dated July 7, 1944, more than two years after the work was done. They state conclusions of the employes without a recitation of the facts upon which they are based. We do not think they can have the effect of overcoming the positive affidavits of the Foreman and Cavanaugh that Cavanaugh performed clerical work only. We do not think the evidence is sufficient to sustain an affirmative award.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That no basis for an affirmative award exists.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 20th day of November, 1944.