

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Frank J. Dugan, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

DELAWARE AND HUDSON RAILROAD CORPORATION

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

(1) The Carrier violated the Agreement when it failed and refused to compensate Trackman William Fanning at the Assistant Foreman's rate of pay for services and duties performed in assisting the Foreman of Extra Gang A-39 on and subsequent to May 2, 1955.

(2) Trackman William Fanning be reimbursed for the difference between what he was paid at the trackman's rate and what he should have been paid at the assistant extra gang foreman's rate of pay for services and duties performed on and subsequent to May 2, 1955 as assistant to the Foreman of Extra Gang A-39.

STATEMENT OF FACTS: The claimant, Mr. William Fanning, was regularly employed as a trackman in Extra Gang A-39 on the Carrier's Pennsylvania Division.

On May 2, 1955 and on each workday subsequent thereto, the Carrier assigned the claimant to perform Assistant Extra Gang Foreman's duties in assisting the Foreman of Extra Gang No. 39 by preparing all reports required of the Foreman by the Carrier. For this service the claimant was paid at the trackman's rate of pay.

Claim was filed in behalf of the claimant requesting that he be reimbursed for the difference between what he received at the trackman's rate and what he should of received at the assistant extra gang foreman's rate of pay for services as rendered on and subsequent to May 2, 1955.

The Agreement in effect between the two parties to this dispute dated November 15, 1943, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

POSITION OF CARRIER: The employes contend that Rule 18 of their current agreement, reading as follows, supports this claim:

RULE 18 — "Employes assigned to higher rated positions shall receive the higher rate while so engaged; if assigned to a lower rated position, their rate will not be changed."

The assistant foreman of a Maintenance of Way gang assists in directing employes in the manner in which the work is to be done. Mr. Fanning did not in any way direct the work being performed. He merely completed reports and kept a record of work accomplished for which he was paid his trackman's rate and for which the employes are claiming the assistant foreman's rate. There was ample supervision in that a foreman and two assistant foremen directed activities of the gang.

In Award 2702, an identical claim involving the same parties as involved in the instant case was denied. The following is quoted from the Opinion of Board in that award:

"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 following is quoted from the employes' Statement of Facts when handling this claim on the property:

"This work consisted of making various reports."

Particular attention is directed to the fact that the employes are basing this claim on work which they describe as "making various reports." It was clearly established in Award 2702 that such work did not qualify an employe for the assistant foreman's rate under the agreement covering Maintenance of Way Employes.

It is the carrier's position that Trackman William Fanning was not engaged in directing employes in the performance of their work and is not entitled to the assistant foreman's rate of pay.

Carrier respectfully requests that claim be denied.

Management affirmatively states that all matters referred to in the foregoing have been discussed with the committee and made part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The Claimant is a trackman assigned to Extra Gang A-39 which has a foreman and two assistant foremen. Claimant voluntarily made out the clerical reports required of the foreman. He was paid as a trackman and is claiming pay as an assistant foreman. The Claim was initially denied on the ground that Claimant was doing clerk's work and did not direct or supervise any of the other trackmen.

The Carrier maintains that Claimant was not an assistant foreman because he did not supervise other trackmen and that a similar claim involving the same parties was denied in Award 2702. The Organization claims that a foreman's job consists of two parts, one supervising, the other making out the necessary reports and one is just as much a part of the job as the other. As to Award 2702 the Organization urges that the Memorandum of Understanding of May 5, 1950 showing the making of reports is work of a foreman's classification was not in evidence when that Award was made and, furthermore, the Carrier admits that the Claimant assisted the foreman. It does not otherwise deny that the award is directly in point.

In Award 7968 the Board held:

"The result reached in Award 5182, which is given some additional support by Awards 5181 and 5660, makes the following statement in Award 6833 relevant here:

'In the instant case, the following is applicable: "Unless palpably wrong this Board is never warranted in overruling, in a subsequent dispute between the same parties, a previous award construing the identical provisions of their contract." See Awards 2517, 2526.'

"While there are some distinctions between the present case and the cases covered by Awards 5181, 5182, and 5660, those distinctions are not sufficiently significant to entitle this Board to sustain the present claim in the face of said Awards, which definitely are not 'palpably wrong.'"

Rule 20 does not, as the Organization alleges, distinguish Award 2702 from the present case because it is merely a pay classification section. Nor does the fact that the Claimant assisted the foreman change the situation for so did the Claimant in Award 2702. Hence since Award 2702 is not palpably wrong and the distinctions claimed are not sufficiently significant to entitle this Board to ignore Award 2702 the claim is denied.

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 Employee involved in this dispute are respectively Carrier and Employee 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 the Agreement was not violated.

AWARD

The Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 6th day of September, 1961.