

Award No. 12291
Docket No. MW-11679

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Joseph S. Kane, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**LOS ANGELES UNION PASSENGER TERMINAL
(Southern Pacific Company (Pacific Lines), the Atchison,
Topeka and Santa Fe Railway Company and the Union
Pacific Railroad Company)**

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

(1) The Carrier violated the effective Agreement, when on or about July 21, 1958 and on days subsequent thereto, it permitted company officials or supervisors, who hold no seniority under the provisions of this agreement, to issue instructions to and supervise members of the Track Sub-department who came under the jurisdiction of Section Foreman Vito Carone.

(2) Section Foreman Vito Carone be paid a call in the amount of 2 hours and 40 minutes at his time and one-half rate of pay for July 21, 22, 25, 28, 29, 31, August 4 and 7, 1958 because of the violation referred to in Part (1) of this claim.

(3) Relief Section Foreman Manuel S. Tinoco be paid a call in the amount of 2 hours and 40 minutes at the Section Foreman's time and one-half rate of pay for August 14, 15, 18, 19, and 26, 1958 because of the violation referred to in Part (1) of this claim.

(4) Section Foreman Vito Carone be paid a call in the amount of 2 hours and 40 minutes at his time and one-half rate for all supervision of Maintenance of Way employes in the Track Sub-department done by company officials or others who do not come under the scope of this agreement for all subsequent days from August 30, 1958 until such time that Mr. Carone is called to perform his rightful duties, account of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Mr. Vito Carone is assigned as Section Foreman at the Los Angeles Union Passenger Terminal and is regularly assigned to supervise the work, keep the time rolls of an Assistant Foreman, Sweepers, Trackwalkers and Trackmen employed in the Los Angeles Union Passenger Terminal.

the Board were to attempt to recognize and adjudicate a claim worded as vaguely and indefinitely as paragraph 4 of the Statement of Claim in this case.

IV.

CONCLUSION

Terminal respectfully requests that the claim be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The Claimant, Carone is assigned as Section Foreman at the Los Angeles Union Terminal and keeps the time records of an Assistant Foreman, Sweepers, Trackwalkers and Trackmen employed. He also supervises the work of the above mentioned employees. The Claimants regular assignment was from 6:00 A.M. to 10:00 A.M. and from 10:30 A.M. to 2:30 P.M.

The Claimant, Tinoco is the regularly assigned Assistant Foreman under Foreman Carone and was assigned to relieve Carone while on vacation from August 11 through August 29, 1958.

It is alleged in the record that on various dates in July and August 1958, the Carrier used the Terminal Engineer, Assistant Superintendent, Yardmasters and Yardmaster Clerks, to issue instructions and supervise the Sweepers assigned to the foreman's jurisdiction in the work of placing and removing sanitary cans from Pullman and business cars arriving or departing during overtime hours.

Claimant, Tinoco, who was relieving the regular foreman while on vacation during the period from August 11 through August 29, 1958 was available to have issued instructions and performed the supervision in connection with the performance of this work during overtime hours but was not called.

One of the duties assigned to sweepers was the removal and placement of soil cans for certain official cars and occupied Pullman cars parked at the terminal. From Monday to Friday, the foreman is furnished forms filled out by the Yardmaster's Clerk showing location, time of movement, and number of car or cars to be canned by sweepers on his shift which he, in turn, hands to sweepers who perform the work. On Saturday when the foreman is not on duty the work form is left at the time clock or given to the sweepers by the clerk.

The claim in question here arose when cars were to be canned on the second shift, after the foreman had completed his tour of duty on the first shift, the clerk then gave the forms directly to the sweepers rather than call back the foreman and have him give them to the sweepers.

It was the contention of the Claimants that it is the foreman's duties to issue instructions to and supervise the work of the members of his crew. If such work is required during hours outside of the foreman's regular assignment, he is entitled to compensation in accordance with the overtime rules of this Agreement.

The Carrier contended that the sweepers were not supervised, checked upon or advised in any manner with respect to how to do this work on any of

the dates alleged in the claim. Further, the information forms submitted to the sweepers by the Yardmaster's Clerk were properly prepared by the clerk. In addition the giving of the work forms to the sweepers directly, or by placing at the time clock by the clerk has been the "unquestioned procedure on Saturdays for years."

The issue in the dispute is: Did the supervisors referred to by the employes exercise supervision, issue instructions or direct the work of the sweepers in any manner in the absence of the foreman?

The basic problem to determine in this dispute is was any of the ordinary and generally understood work of the foreman given to other employes. It is generally considered that the work of the foreman is the direction of the work force. What work is to be performed, how it is to be performed, each employe's part in the work and record keeping of time, equipment and materials used.

In the matter before us evidence is presented by both sides on the subject of instructions issued and the supervision performed on this job by the Carrier. A letter from an employe on behalf of the Claimant in its pertinent parts is as follows:

"... I have many men telling me what to do ... if something were to happen to me no one will want to be responsible ..."

"I remember on one occasion I was sent to set toilet cans at six o'clock in the morning and had to stay until 6:15 at night waiting for my foreman to come. ..."

Another letter reads in its pertinent parts as follows:

"... I receive my orders from McCue and Charlie Morrison once in a while, but most of the time, I receive written orders from Mr. Blake" (Latter name is Yardmaster's Clerk.)

The Carrier representatives emphatically deny that they supervise the work of the men. It is undisputed in the record that the Yardmaster's Clerk gives the sweepers or places on the time clock the written job order.

As the burden of proof is on the Claimants the above cited statements fail to show incidents of supervision. The time, place and circumstance. What were they told to do? Were any employes assigned to a particular job? Who made the assignments? Upon completion of the work was it inspected, approved and other work assigned? These are the characteristics of the duties of a foreman. The first statements offered shows a lack of supervision rather than supervision.

"I remember on one occasion I was sent to set toilet cans at six o'clock in the morning and had to stay until 6:15 at night waiting for my foreman to come. ..."

"... no one will want to be responsible ..."

The second statement admits that written orders are received from the Yardmaster's Clerk which is not denied in the record. However, we are of the opinion that this statement does not offer proof that the work in question was supervised in the absence of the foreman.

The Claimant also contends that the job order form in its printed heading recites:

"Line up for canning cars—Section Foreman to be given this line up by 3:15 P. M. on date canning to be done in order to be able to issue instructions to sweeper."

This statement is a presumption that the work entailed requires supervision, as instructions to the sweeper. However, it is not a conclusive presumption that does not permit the Carrier to reply which they have by saying: In practice the foreman hands the form to the sweepers and they go about their work. No instructions are necessary, the work is routine. In addition this work has always been done on Saturday without a foreman. In other words, the work done rather than the form is the controlling factor in determining the jurisdiction of the foreman. If the form was directed to the sweepers, foreman's title absent, and the work was supervised by others than the foreman the agreement would have been violated.

The statement in the record by the Carrier that the work has been performed on Saturday, without objection, by the Yardmaster's Clerk, by giving the job order to a sweeper or placing it on the time clock has been denied by the Claimant but no explanation given. Thus if the Carrier's statement is untrue the record, on behalf of the Claimant, doesn't inform as to how the work is done on Saturday.

Award 5225 has been offered by both parties to this dispute in support of their positions. In this award we quote pertinent parts:

". . . Most of the sweepers held assignment the hours of which were the same as those of claimants. Claimant checked their time in and out and gave them supervision as was necessary . . ."

". . . We find some of the things he did were supervisory in character . . ."

". . . If it decided no supervision thereof was necessary and, as a result thereof, only clerical work formerly performed by the foreman remained it could be assigned to clerks . . ."

In the record before us we are unable to find any statements of the employees that indicates any supervisory work was performed by the Carrier's representatives. The sweepers check themselves in and out by time clock and received a job order form from the clerk. No instructions were given, no work assignments were made by anyone other than, the directions on the job order, nor was the progress of the work checked. The preparation and issuance of the job order form was properly assigned to the clerk.

Thus we are of the opinion that the record and evidence presented fails to show that the sweepers were supervised in the absence of the foreman. The Findings in Award No. 5225 is not inconsistent with this conclusion.

In Award No. 12137 it was held that work performed on Monday to Friday is also work to be performed on Saturday and Sunday. The facts in the record before us concern a foreman who performed many duties Monday to Friday other than those alleged in the dispute, station sweepers, Trackwalkers and Trackmen. The record does not show that his duties as foreman on Monday

to Friday were taken over by others on Saturday and Sunday. Thus Award No. 12187 is not inconsistent with this conclusion.

Thus we are of the opinion that the record and the evidence presented does not prove that supervisory work was performed while the foreman was off shift.

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 Claimant has failed to prove by the evidence presented and the record that Carrier's employee performed supervisory work when cars were being canned in the absence of the foreman.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1964.