Award No. 15804
Docket No. MW-16108

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE 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 assigned Assistant Extra Gang Foreman Louis J. De Fronze to perform Extra Gang Foreman's work during the period from May 29, 1964 to June 9, 1964 inclusive and failed and refused to compensate him therefor at the Extra Gang Foreman's rate of pay.
(System Case No. 22.64 MW.)

(2) The Carrier further violated the Agreement when it did not assign Mr. Stephen Mazzarella to perform the Extra Gang Foreman's work referred to in Part (1) of this claim.

(3) Assistant Extra Gang Foreman Louis J. De Fronze be allowed the difference between what he should have been allowed at the Extra Gang Foreman's rate of pay and what he was paid at the Assistant Extra Gang Foreman's rate for the service rendered during the period referred to in Part (1) of this claim.

(4) Mr. Stephen Mazzarella be allowed the difference between what he should have been allowed at the Extra Gang Foreman's rate and what he was paid at the Assistant Extra Gang Foreman's rate during the period from May 29, 1964 to June 9, 1964 inclusive because of the violation referred to in Part (2) of this claim.

EMPLOYES' STATEMENT OF FACTS: On May 29, June 1, 2, 3, 4, 5, 8 and 9, 1964, Assistant Extra Gang Foreman Louis J. De Fronze performed the customary and traditional work of an extra gang foreman when he directed the activities of the operators of a spot tamper and a track liner in performing the work of raising (surfacing) and lining track. For this service he was compensated at the Assistant Extra Gang Foreman's rate of pay.

On each of the above mentioned dates, Claimant De Fronze was not working with or under the supervision of any track foreman.

Claimant De Fronze has established and holds seniority rights as a foreman as of May 21, 1953. On the above mentioned dates, Claimant Mazzarella, who has established and holds seniority rights as a foreman as of October 16, 1938, was working as an assistant extra gang foreman. He was available, fully qualified and would have performed the subject work if the Carrier had assigned him to it.

Claim was timely and properly presented and handled at all stages of appeal up to and including the Carrier's highest appellate officer.

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

CARRIER'S STATEMENT OF FACTS: The named claimants were assigned as Assistant Extra Gang Foreman in Extra Gang No. 214 at Schenectady, New York. On May 28, 1964, and for some time prior thereto, the regular number of employes assigned to this extra gang consisted of nine men, that is Extra Gang Foreman Joseph Moffre, the two named claimants as Assistant Extra Gang Foreman, and six (6) trackmen. Effective May 29, 1964, three additional employes who were assigned as Track Equipment Operators, were assigned to work along with Extra Gang No. 214, together with certain mechanized equipment consisting of a Power Ballaster (Spot Tamper) PB-13, two Ballast Regulators, BR-4 and BR-6, and a Track Liner, TL-8. Therefore, as of May 29, 1964, there were a total of twelve (12) men assigned to Extra Gang No. 214, with overall supervision being provided by Extra Gang Foreman Moffre, and specific supervision as required by the two named claimants under the direction of Extra Foreman Moffre.

Carrier records indicate that one of the primary reasons for the assignment of three Track Equipment Operators and four pieces of power equipment to Extra Gang No. 214 was the fact that Bridge 3790 at Mile Post S-3.5, was to be exchanged on Monday, June 1, 1964, thus requiring the use of a Power Ballaster, Ballast Regulators, and a Track Liner. During the seven working days involved in this dispute, claimant DeFronze, as instructed by Extra Gang Foreman Moffre, worked with certain members of the gang in utilizing the maintenance machinery assigned in maintaining the track structure within the assigned limits of responsibility of Extra Gang No. 214.

The Organization filed claim on behalf of Assistant Extra Gang Foreman DeFronze and Mazzarella, contending that claimant DeFronze, in performing the work assigned to him by Extra Foreman Moffre, was actually performing work "which heretofore has been performed by an Extra Gang Foreman," and that therefore, he was entitled to the difference in salary between the rate of an Extra Gang Foreman and what he was paid as an Assistant Extra Gang Foreman. In addition, the Organization made an identical money claim on behalf of Assistant Extra Gang Foreman Mazzarella, not for any service performed by him, but based upon the fact that he was senior to claimant DeFronze as a qualified extra gang foreman, and that he was entitled to have been allowed to perform the disputed work.

The Carrier has denied the claims at all levels of handling on the property.

OPINION OF BOARD: On May 29, June 1, 2, 3, 4, 5, 8 and 9, 1964, Claimant DeFronze, an Assistant Extra Gang Foreman, directed the activities of the

operators of a spot tamper and a track liner in performing the task of raising and lining track. According to the Brotherhood in its Ex Parte Submission, he was not working with or under the supervision of any track foreman. However, the Carrier asserted in its Submission that he was working under the supervision of Extra Gang Foreman Moffre, and the Carrier supported this assertion with some evidence. No evidence was supplied by the Brotherhood to rebut this; therefore we find that on the dates of the claim DeFronze was under the supervision of Moffre.

The Brotherhood included as part of the record in this case the entire records in the cases resulting in Award Nos. 12971 and 13264, the sustaining awards in which Brotherhood argues should be followed in this case because they were between the same parties regarding the same issue, rules and practice. Brotherhood claims that it has proved that the work in dispute is the customary and traditional work of extra gang foremen.

The Carrier argues that it has the right to determine the quality and amount of direct supervision to be provided for the involved work, and that delegation by Foreman Moffre of a specific portion of his overall supervisory responsibility to Assistant Foreman DeFronze was proper and formed no valid basis for a claim that DeFronze be paid for that work at the foreman's rate. According to the Carrier Award 12971 was palpably in error and should be considered a nullity, and Award 13264 is not relevant to the current case, the portion concurring with Award 12971 being merely dicta. Carrier argues that Award 12971 should be specifically overruled on the authority of Award Numbers 13305 and 14422 which were also between the same parties, and, according to Carrier, involved the same basic issue. These awards denied claims for foreman's pay for assistant foreman who directed the operations, respectively, of a Track Liner and a Bolt Tightening Machine on assignment, in each case, so to do by a foreman.

Each of the four awards cited as controlling precedent for these parties can be distinguished from the other three, and, in a way which turns out to be of critical significance, from the current case. In each case the evidence which was properly before the Board resulted in the presentation to the Board of a different set of facts. In the current case and in the cases involved in Awards 13305 and 14422, the Claimants were found to be working under the supervision of a foreman; we did not find this in the case involved in Award 12971 where Carrier failed on the property to assert or present evidence that Claimant was under the supervision of a foreman, and where Brotherhood correctly objected that such evidence when Carrier introduced it after the matter left the property belatedly introduced a new issue which should not be considered by the Board; in the case involved in Award 13264 we found that Claimant had taken the place of a foreman who had gone on vacation.

Different machines were involved in the various cases: Award 12971 involved a spot tamper; Award 13305 involved a track liner; Award 14422 involved a bolt tightening machine; and the present case involves a spot tamping machine and a track liner, with the complaint centering on the direction of the operation of the spot tamper.

While we will not find that Award 12971, for reasons we will recite below, is a binding precedent for us in this case, neither do we find that it was palpably in error. In making its award in any case the Board can rely only on such facts as are properly supplied in the record made by the parties. In the

record involved in Award 12971, the Brotherhood had placed before the Board: 1. that Claimant on the claimed dates had performed the involved work; and 2. the assertion, supported by evidence in the form of eleven bulletins dated shortly before the dates of the claim awarding advertised positions of Extra Gang Foreman to perform the involved kind of work, that the involved work had always been recognized as foreman's work. The Carrier had made a record of: 1. a comparison of language used by the Brotherhood in a case settled by the parties in 1956 in which Carrier paid, as requested by Brotherhood, Assistant Foreman's rate to Trackmen for directing other trackmen in the task of raising track with the language used by Brotherhood to describe the work involved in 1959 in Award 12971; Carrier argued that Brotherhood called work described the same way assistant foreman's work in 1956 and foreman's work in 1959; the comparison:

In 1956 case:

> "The work consisted of sighting track and directing the activities of other trackmen . . ."

In 1959 case:

> "This work consisted of directing the activities of track equipment operator; raising track at various locations for spot tamper and making various reports."

and 2. Carrier's assertion, supported only by three signed statements which were in that case inadmissible as evidence because they had not been timely made or presented, that supervising of the spot tamping machines was work which had since the introduction of the machine in 1958 been assigned to both foremen and assistant foremen. Carrier's point 1 fails because the work descriptions are not the same: the spot tamping machine was first introduced on this property, according to Carrier, in 1958, so could not have been covered in the 1956 case; and making reports, a critical point in Awards 13305 and 14422 cited by Carrier, is not mentioned in the 1956 case job description by Brotherhood. Carrier's point 2 fails because it was an assertion unsupported by evidence in that record. Consequently in Award 12971 the Referee and the Board were able reasonably to find:

> "The record is sufficient to establish that this work is customarily considered that of an Extra Gang Foreman. We do not find evidence advanced by the Carrier to substantiate the exception which they claim by attempting to draw the distinction mentioned supra.
>
> (i.e. that Carrier had an option to have the operation of the spot tamper supervised by an extra gang foreman over a territory beyond that supervised by a foreman over his section, or to assign the machine to be worked a section under the supervision of a section foreman, in which case direction of the operation of the machine could be assigned by the foreman to an assistant foreman.)"

We are nevertheless not bound blindly to follow Award 12971; we are bound to analyze the somewhat more full record before us in this case, because, first, Awards 13305 and 14422 which are not claimed to be in error deal with at least similar issue between the same parties but with different results; and, second, because we find from the record before us a different set of facts from

those shown in the record in Award 12971. Our decision in that case was on the basis of the facts proved in that case; our decision in this must be on the basis of the facts proved in this record.

In this case, Claimants were proved to be under the supervision of a foreman at the times in the claim; we made no such finding, although Brotherhood claims we did, in Award 12971. So we did not in Award 12971 dispose of this issue, which was critical to our decisions in Awards 13305 and 14422. Were it not for other critical new evidence in this record, it might be a critical point for us in this case, too. But the inclusion of the complete records from the two prior cases add other facts which, absent any claim to the contrary, we must consider as having been part of this case as it developed on the property; there are the statements of three supervisors, dated in July 1961, of no value as evidence in the case involved in Award 12971; and there is General Chairman Farro's letter dated May 21, 1962, introduced too late in that case to be considered as evidence.

The General Chairman's letter states that in early 1959 he and Carrier's Chief Engineer made an agreement that spot tamper work would be performed by Extra Gang Foremen:

> "In the early part of 1959, I was in conference with Chief Engineer Haight and we agreed verbally, as to the method to be used in performing work with spot tampers and it was decided, that work of this nature would be performed by Extra Gang Foremen . . . This work was performed by Extra Gang Foremen until such time Management abolished these positions and assigned this work to Assistant Foreman.
>
> The work which was performed in Case No. 3.56 MW (the 1956 case) is a complete different operation than the work involved in Case No. 10.60 MW (the case in Award 12971) and in my opinion has no bearing on this Case. (In Award 12971.) The work involved in Case No. 10.60 MW was agreed that it was to be performed by an Extra Gang Foreman." (Parentheses by Referee.)

The statements of the three supervisors dated in 1961 do not contradict the General Chairman's statement that he reached an agreement with the Chief Engineer in 1959 which he claims was violated subsequently; and no evidence has been introduced in this record to refute the General Chairman's statement that there was such an agreement.

Thus the facts established in this record differ in a critical respect from the facts established in the records for Awards 12971, 13305 and 14422; in this case, as in none of the others, the record establishes without dispute that the General Chairman and the Chief Engineer arrived at an agreement that the involved work with spot tampers would be assigned to Extra Gang Foremen. In view of this agreement, the fact that Claimants were on the claim dates under the supervision of Foreman Moffre is not decisive; however, we do not in this decision intend to differ from the sound reasoning and conclusions in Awards 13305 and 14422 — we decide this case on the basis of the special facts and circumstances which show in this record that a special agreement was reached with regard to directing the operation of spot tamping machinery which was not shown in connection with the direction of the operations of track liners or bolt tightening machines.

The record is clear that Claims numbered 2 and 4 are vaild if Claims numbered 1 and 3 are found valid.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of September 1967.

CARRIER MEMBERS' DISSENT TO AWARDS 15804, 15805, DOCKETS MW-16108, MW-16109
(Referee House)

In these awards the Referee made out cases for the Employes that not even the Employes made and argued to the Board.

The Employes' position in the instant dockets, as was their position in Docket MW-12663, was that, by practice, directing the operation of spot tamping machinery was recognized as foremen's work. The claim in Docket MW-12663 was decided, in Award 12971, in favor of the Employes on the basis of the alleged practice and in the instant dockets the Employes further contended that Award 12971 constituted a binding precedent.

The Referee did not consider Award 12971 to be a binding precedent and, hence, declined to follow it. Instead of basing his decision on what was argued to the Board, particularly by the Employes, the Referee based his decision on an alleged verbal agreement, evidence" of which he found in a statement in the General Chairman's letter of May 21, 1962, which statement was not refuted in the records in the instant dockets. But, **nowhere in the record in Docket MW-12663 (Award 12971) or in the records in the instant dockets did the Employes argue their cases to the Board on the basis of a verbal agreement.** The Employes' sole position, as stated, was that the work was foremen's by practice. The neutral referee possessed no authority to vary the issue from that

argued by the Employes. More important, the neutral referee possessed no authority to make out a case — here, for the Employes, on a basis not even argued to the Board by the Employes.

What makes these awards doubly obnoxious is the "evidence" upon which the Referee seized to find an alleged verbal agreement. From a reading of the Opinion one would gain the impression that the General Chairman's letter of May 21, 1962, was written to a Carrier officer, but that is not so. The fact is, the letter was written by the General Chairman to the Assistant to President, Brotherhood of Maintenance of Way Employes. In these circumstances, no Carrier officer had any obligation to deny or refute a statement therein made by the General Chairman.

Neither can the General Chairman's letter, and particularly the statement therein seized upon by the Referee to sustain the claims, be considered as "evidence." At best, its value, in the circumstances, is that of a self-serving declaration. Even then, the letter is subject to challenge on other grounds. The letter in question was attached, by the Employes, as an exhibit to their rebuttal in Docket MW-12663 and inadmissible under the Board's Rules of Procedure — the Employes' notice of intent in Docket MW-12663 was dated May 2, 1961, and the letter in question was dated May 21, 1962, over a year. Aside from the inadmissability of the letter, it is significant that in submitting the letter as an exhibit the Employes did not therein attempt to argue in any manner, shape or form that the work was foremen's under a verbal agreement. Further, even though the Employes made the record in Docket MW-12663 a part of their submissions in the instant dockets, it is difficult to understand how that which was inadmissible could thereby become admissible, and at that, as "evidence" to support the sustaining decisions made by the Referee.

In these awards the Referee transcended his function as a neutral and the awards are for naught. For these and other reasons, we dissent.

J. R. Mathieu
R. A. DeRossett
W. B. Jones
C. H. Manoogian
W. M. Roberts

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