

Award No. 15805
Docket No. MW-16109

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 John Pellegrino to perform Extra Gang Foreman's work during the periods from May 18, 1964 to June 12, 1964 inclusive and from July 13, 1964 to July 16, 1964 inclusive and failed and refused to compensate him therefor at the Extra Gang Foreman's rate of pay.

(System Case No's: 23.64 MW and 1.65 MW)

(2) The Carrier further violated the Agreement when it assigned Assistant Extra Gang Foreman Pietro Sparano to perform Extra Gang Foreman's work during the periods from June 17, 1964 to July 10, 1964 inclusive and from July 20, 1964 to August 28, 1964 inclusive and failed and refused to compensate him therefor at the Extra Gang Foreman's rate of pay.

(System Case No's: 24.64 MW and 2.65 MW)

(3) Assistant Extra Gang Foreman John Pellegrino 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 of pay for the services rendered during the periods referred to in Part (1) of this claim.

(4) Assistant Extra Gang Foreman Pietro Sparano 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 Assistant Extra Gang Foreman's rate of pay for the services rendered during the periods referred to in Part (2) of this claim.

EMPLOYES' STATEMENT OF FACTS: On May 18, 19, 20, 21, 22, 25, 26, 28, 29, June 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, July 13, 14, 15 and 16, 1964, Assistant Extra Gang Foreman John Pelligrino performed the customary and traditional

work of an extra gang foreman when he directed the activities of the operator of a spot tamper in performing the work or raising (surfacing) track.

On June 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, July 1, 2, 3, 6, 7, 8, 9, 10, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, August 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 1964, Assistant Extra Gang Foreman Pietro Sparano performed the customary and traditional work of an extra gang foreman when he directed the activities of the operator of a spot tamper in performing the work of raising (surfacing) track.

On each of the above mentioned dates, the claimants were **not** working with or under the supervision of any foreman.

For this service, the claimants were compensated at the assistant extra gang foreman's rate of pay.

The issue involved in the instant case is identical to the issue involved in the dispute adjudicated by this Division in Award 12971. Although the Carrier agreed to settle twenty-one (21) similar claims on the basis of the decision of this Division in Award 12971, it would not agree to a similar settlement with respect to the instant claim.

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: During the periods of the claims, all of the claimants were assigned as assistant extra gang foremen and paid the rate for such position. The facts and circumstances concerning the duties of the claimants during the periods of the claims are identical to those of the claimant in Local Case 22.64 MW, which dispute has been filed with the Third Division, NRAB, by the Brotherhood of Maintenance of Way Employees. Carrier's submission on Case 22.64 MW is dated April 7, 1966.

OPINION OF BOARD: The facts (except the dates and names), circumstances and issues are the same in this case as in the case we decided in Award 15804. Our decision is the same.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Employees that not even the Employees made and argued to the Board.

The Employees' 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 Employees on the basis of the alleged practice and in the instant dockets the Employees 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 Employees, 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 Employees argue their cases to the Board on the basis of a verbal agreement.** The Employees' 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 Employees. More important, the neutral referee possess no authority to make out a case—here, for the Employees, on a basis not even argued to the Board by the Employees.

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 Employees. 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 Employees, as an exhibit to their rebuttal in Docket MW-12663 and inadmissible under the Board's Rules of Procedure — The Employees' 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 Employees 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 Employees 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