



Award No. 16439

Docket No. MW-16232

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

Nicholas H. Zumas, Referee

**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**SOUTHERN PACIFIC COMPANY**

**(Pacific Lines)**

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

(1) The Carrier violated Rule 10 of the current Agreement when it failed to advertise position of Work Train Foreman, which was established November 5, 1964, and that it further violated the Agreement, particularly Rules 1, 5, 12 and 28, when it failed to call the senior furloughed Track Foreman not working in the class, Mr. Dolores Rodriguez, Assistant Foreman, Extra Gang No. 26 Bealville, California, to fill position of Work Train Foreman pending assignment, and instead permitted and used General Foreman, Henry Kilpatrick, who is an official of the Carrier and whose position is not covered under the Scope of the Maintenance of Way Agreement, to perform the supervisory duties that rightfully belong to claimant, Mr. Rodriguez, by virtue of his seniority in the class of Track Foreman.

(2) The Carrier now bulletin the position of Work Train Foreman, and that the successful applicant be paid the difference in rate of pay between that of the rate he did receive and that of the rate applicable to Work Train Foreman's position, including all overtime worked from November 5, 1964, until the position of Work Train Foreman is bulletined, assigned and the successful applicant is placed on the position; that claimant, Mr. Rodriguez, be paid the difference in rate of pay between that of the rate he did receive and that of the rate applicable to Work Train Foreman's position, including all overtime worked from November 5, 1964, until the Work Train Foreman's position is bulletined, assigned and the successful applicant is placed on the position; and that the Organization's representative and the Carrier's representative make a joint check of the Carrier's records to determine the amount of work, including overtime, that was worked by General Foreman Kilpatrick in performing the supervisory duties in violation referred to in Part 1 of our Statement of Claim.

**EMPLOYEES' STATEMENT OF FACTS:** On November 5, 1964, the Carrier placed a work train into service, utilizing laborers from an extra

5. By letter dated January 22, 1965, Carrier's Division Superintendent denied the claim (Carrier's Exhibit B).

6. The District Chairman rejected the Superintendent's decision, and by letter dated March 17, 1965 (Carrier's Exhibit C), Petitioner's General Chairman appealed the claim to Carrier's Assistant Manager of Personnel, adding to the claim the further contention that Carrier violated Rule 10 when it failed to advertise position of "Work Train Foreman," and that Carrier should be required to bulletin position of "Work Train Foreman," pay the successful applicant the difference in rate of pay between that of the rate he did receive and applicable rate of "Work Train Foreman" position, including all overtime worked from November 5, 1964, until the position is bulletined, assigned, and the successful applicant placed on the position; this portion of claim was first presented to Carrier by the General Chairman, in letter dated March 17, 1965, more than 60 days from the date of occurrence on which claim is based. Petitioner further asked that a joint check of Carrier's records be made to determine the amount of work, including overtime, that was worked by General Foreman Kilpatrick in performing supervisory duties.

7. By letter dated April 22, 1965, Carrier's Assistant Manager of Personnel denied the claim (Carrier's Exhibit D).

(Exhibits not reproduced.)

**OPINION OF BOARD:** The controlling issue in this dispute is whether, in the absence of a provision in the Agreement and in the absence of evidence of past practice, a foreman must be present to supervise the work of laborers on a work train detail.

On the dates in question Carrier assigned laborers from an extra gang to perform duties with a work train. Their function was to operate ratchets which control the flow of clean ballast from the ballast car, and to arrange ties in front of the rear wheels of the ballast car to allow an even spread of the ballast. A General Foreman, a Carrier official, was in overall charge of the work train operations.

Petitioner contends that the utilization of laborers on the work train detail created a position of Work Train Foreman, and under the terms of the Agreement Carrier was required to assign a Work Train Foreman. Failure to do so, and assigning such duties to a Carrier official, was a violation of the Agreement.

The Board finds that there is nothing in the Agreement and no evidence of past practice which requires that a foreman be physically present to supervise the performance of duties by laborers assigned to a work train.

In Award 13573, between the same parties, we said:

"No provision of the Agreement, including the Scope, requires Carrier to assign a Foreman to be present and to supervise the track laborer in the performance of all of his duties. . . ."

". . . In the absence of provisions in the Agreement requiring a Foreman to be present to supervise the track laborer in performing

the work and in the absence of proof of past practice, it is in the discretion of Carrier to determine when and under what circumstances a Foreman is to be assigned to supervise the workers. In this instance, Carrier exercised its prerogative in determining the amount of supervision he required. The claim is therefore denied."

**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 the Agreement was not violated.

#### AWARD

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 20th day of June 1968.