NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21374
THIRD DIVISION Docket Number MW-20882

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Baltimore and Ohio Railroad Company

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

(1) The Carrier violated the Agreement on November 18, 20 and 21, 1972 and on January 3, 4, 5, 8, 9, 10, 11, 12, 22, 24, 25 and 26, 1973 by assigning other than trackmen to perform trackman's work while furloughed trackmen were available for service. (Carrier's File Nos. 2-MG-387 through 2-MG-411 and Files 2-MG-415, 2-MG-416 and 2-MG-418 - a total of 28 files).

(2) As a consequence of the aforesaid violations, the Carrier shall allow eight hours' pay to each of the following named furloughed trackmen for each of the dates as listed below:

(a) Roy C. Walker (15 days)	Nov. 18, 20, 21, 1972 Jan. 3, 4, 5, 8, 9, 10, 11, 12, 22, 24, 25 & 26, 1973
(b) Lee F. Sterner (6 days)	Nov. 18, 20, 21, 1972 Jan. 3, 4, 5, 1973
(c) Joseph S. Neimiller (10 days)	Nov. 18, 20, 21, 1972 Jan. 4, 5, 8, 9, 10, 11 & 12, 1973
(d) James F. Emerick (3 days)	Nov. 18, 20 & 21, 1972
(e) Ronald Benford (3 days)	Nov. 18, 20 & 21, 1972.

OPINION OF BOARD: This voluminous docket involves claims that Carrier on various dates in November 1972 and January 1973 violated the controlling Agreement "by assigning other than trackmen to perform trackmen's work while furloughed trackmen were available for service." Some 28 claims have thus been combined for processing because the rules allegedly violated are essentially the same in each. Close analysis of the record, however, shows that two separate and distinct classes of claims are herein presented. These claims may be differentiated chronologically and factually and each presents a different issue for our consideration herein.

One set of claims, alleging violations on November 18, 20 and 21, 1972 arose out of alleged wrongful performance of certain "trackmen work" by supervisory personnel and welders at the scene of a derailment on the Berlin Branch. These claims originated on November 24, 1972 when furloughed trackmen sought 8 hours pay account not being recalled to make track panels, clean up the derailment and repair track. The unrefuted record shows that Carrier assigned forces comprising six Foremen, seven Trackmen, a Machine Operator, a Welder and a Welder Helper to perform work on the three days in November 1972 assembling track panels and repairing track. Three of the trackmen called for the job declined to work on all or some of the days (November 18, 1972 was a Saturday). The record shows that the trackmen and the Foremen together assembled rail panels. It is not shown with precision in this record the quantum of actual hands-on track assembly performed by the Foremen nor is the proportion of actual production work to supervisory work indicated. There is no question, however, that the Foremen did perform some work of track assembly along with the trackmen under their supervision. As we read the record, this is the major gravamen for a number of the claims herein alleging violations on November 18, 20 and 21, 1972. Several of the other claims relating to the derailment work on those November dates allege that the Track Supervisor and Assistant Track Supervisor also performed the physical work of assembling track panels. Also the Organization asserts that the Machine Operator, the Welder and the Welder Helper performed "track work" in violation of the Maintenance of Way Agreement on those dates. In terms of the factual record, the Carrier concedes that several of the Foremen worked alongside track forces in building panels on November 18, 20 and 21; denies that the Track Supervisor and his Assistant performed any work other than supervisory; and, asserts that the Machine Operator and the Welder and his Helper respectively, performed only work appropriate to their positions, to wit operating the Spiker Machine in building panels and building up rail ends by a welding method so the rail ends would match at joints. The foregoing constitutes the factual detail developed on the property in handling of the claims relative to November 18, 20 and 21, 1972.

The balance of the claims allege violation of the Agreement on several dates in January 1973 because Foremen performed various aspects of track work alongside their forces e.g. moving, digging out and spacing ties, changing rail, pulling a tie plate, driving a boom truck handling ties. As far as we can determine from the record, Carrier does not deny that the Foremen did perform some such work on the various January dates but the quantum of work and the proportion of physical to supervisory work is not shown. The foregoing constitues the factual record as developed in handling of all of these claims on the property. Voluminous additional data presented de novo in the ex parte Submissions to our Board have not

been considered. It should also be noted that a proposed settlement of some of the claims failed of adoption on the property and accordingly may not be permitted to affect our arbitral judgement and final disposition of the case.

The Organization relies apparently upon Rule 1, the Classification Rule of the Agreement in support of these various claims. Especially cited as supportive of the Organizations position are certain sustaining Awards of S.B.A. No. 488, construing the same Agreement between these parties in similar factual situations. In addition to Rule 1 and SBA No. 488 the Organization on the property presented only general assertions that Foremen cannot be used to perform any trackmen work alongside their forces when there are furloughed trackmen. Many other rule citations and theories of the case were proferred for the first time at the appellate level before our Board and accordingly cannot be considered by us. See Awards 20620, 20598, 20468, 20255, 20121, 18442 et al. Similarly, we confine our review of Carrier's position to only those theories and issues joined on the property and not to material presented as "new evidence" to our Board. For its part Carrier on the property asserted that the Agreement nowhere prohibited and, indeed, practice and Addendum 7 contemplated that Foremen may perform some actual physical track work in addition to and in the process of supervising track forces. Carrier flatly denied that the Track Supervisor and Assistant Track Supervisor performed other than supervisory work. Also, Carrier asserts that the Machine Operator, Welder and Welder Helper did not perform work of track laborers but rather did only their own work on claim dates.

We have reviewed with care the entire voluminous record together with the many authorities cited by each of the parties. It is our considered judgement that the claims must be denied. Turning first to that bloc of claims alleging violations by Foremen performing some track work alongside their forces, we are guided by principles announced in our Awards 13083 and 20425 which are "on all fours" with this case. On the basis of these authorities, which we do not deem palpably erroneous, we cannot find the Carrier violated the Agreement by not calling a furloughed trackman instead of permitting a Foreman to assist his forces in building rail panels and doing other tie and rail work. The Organization has not shown how this activity violates Rule 1 of the Agreement, a general Classification Rule. Nor has the Organization shown exclusive reservation by practice, custom and tradition. Especially is this an evidentiary inadequacy in the face of Carrier's repeated assertions of practice to the contrary and the language of Addendum 7. Therefore, given the state of this record as developed on the property we are led to the conclusion that the Petitioner has failed to prove by substantive evidence that a violation has occurred. Nor are the Awards of SBA No. 488 of comfort to the employes herein because we do not have in this case proven instances of assignment of work clearly

classified as Trackman's work to another employe classified as a machine operator under the same Agreement. Indeed, the Organization offers no evidence whatever to prove that the Machine Operator, Welder and Helper performed work other than their own under the Classification Rule. Similarily, there is no evidence to counter Carrier's repeated general denials that the Track Supervisor and Assistant performed trackman's work on claim dates.

We must take the record as we find it from processing on the property. Upon rigorous review of that record we are unable to find sufficient evidence to sustain the Organization claims of violation. We have no alternative but to deny the claims.

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 the Agreement was not violated.

A W A R D

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 28th day of January 1977.