

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(CSX Transportation, Inc. (formerly The Chesapeake
(and Ohio Railway Company)

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

(1) The Carrier violated the Agreement when it assigned Foreman R. Peppi instead of furloughed Trackman T. Burchett to perform trackman's work in the vicinity of Shelby, Kentucky on a regular daily basis beginning November 30, 1987 and continuing through February 12, 1988 [System File C-TC-2568/12-(88-461) COS].

(2) As a consequence of the aforesaid violation, Mr. T. Burchett shall be allowed compensation at the applicable trackman's rate for all straight time and overtime hours worked by Mr. Peppi beginning November 30, 1987 and continuing through February 12, 1988."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Claimant is a Trackman who was in furlough status at the time this Claim was initiated. The Claim is that a Foreman was assigned Trackman's work for the period between November 30, 1987, and February 12, 1988. Rule 3 establishes separate seniority rosters for Track Foremen and Trackmen.

Of central importance here is a letter from the Director of Labor Relations, agreed to by the General Chairman, dated September 9, 1987, and reading as follows:

"This refers to our conference of September 9, 1987, in which we discussed the application of that portion of the Memorandum Agreement of February 20, 1986, pertaining to Track Foremen and B&B Foremen participating in work of their forces.

The February 20, 1986 Agreement reads, in part, as follows:

'Foreman will participate in the work of the force to which they are assigned to the extent that this does not conflict with their foreman duties; however, they will continue to have complete control of their force.'

It is not the intent of the foregoing that the Foremen replace Trackmen or B&B Mechanics. They are to only assist in unusual situations or sporadically when needed, it being the intent of the parties that employees assigned Foreman positions will be productive when not otherwise engaged in the performance of their Foreman's duties.

If the foregoing correctly reflects our understanding of this matter will you please indicate below."

The basis of the Claim is found in the statement provided by a Track Foreman, which stated as follows:

"I filed an agrierance (sic) sometime ago about foremans (sic) being put into certain situations to where he is being forced to labor, such as sending me to a job with one man, where it required three or more men to do the job.

Sonny Walters also filed a statement that Roger Layne said that all of his foremen would labor as long as they worked at Shelby.

Sonny Walters & I have been sent out with only one labor on more than many occasions to gauge track, surface track and put in ties, while the rest of our crew was sent elsewhere.

Mr. Rahmes, should know that one man can't do this type of work without the assistance of a full time working laborer.

I would appreciate it if Mr. Rahmes would define for me what assist means.

You said Mr. Layne said he had discussed these responsibilities with me on several occasions. 'This is not true.' The only type of communication we had about this matter was not discussed at all, he simply stated to me that I would work as a full time laborer, no discussion took place."

Throughout the claims handling procedure, the Carrier did not refute this allegation, except to state that "the Roadmaster had never instructed [the Foreman] to work as a laborer eight hours a day."

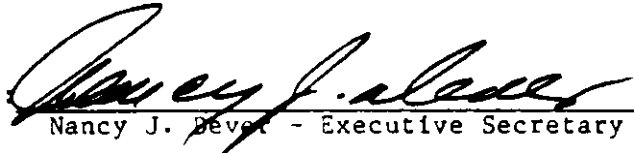
The right of the Carrier to permit Foreman "to assist in unusual situations or sporadically when needed" is not disputed. In this instance, however, the record indicates the use of a Foreman to a substantially greater extent. This is supported by the unrefuted allegation of the Foreman being required to work short-handed as to his crew complement.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1991.

DISSENT OF CARRIER MEMBERS
TO
AWARD 28684, DOCKET MW-28726
(Referee Marx)

The Majority erred in sustaining the claim in Award 28684. The February 20, 1986 agreement is crystal clear that "Foremen will participate in the work of the force to which they are assigned to the extent that this does not conflict with their foreman duties; however, they will continue to have complete control of their force."

The Majority based its decision on a totally unsupported and self-serving letter of the track foreman, which, contrary to the Opinion of the Majority, Carrier did refute in handling on the property. The Carrier satisfied the burden of proof in this respect when it furnished a statement to the Organization from the Roadmaster advising that the foreman had not been instructed to perform trackman's work as he alleged. Furthermore, the statement of the track foreman is obviously not evidence that a foreman performed work of a trackman for eight hours a day during the period covered by the claim. There is absolutely no evidence in the record that the foreman was relieved of any of his responsibilities as a foreman. Those responsibilities, among many others, include obtaining track time when needed, maintaining payrolls and supervising the work of subordinate employees. We reiterate, there is no evidence that the foreman did not perform all the foreman's duties assigned to him and that the alleged work in question, whatever that may have been, conflicted with the required duties of the foreman.

The evidence upon which the Majority relied was simply a vague assertion by the track foreman in what he erroneously alleges to be a general practice

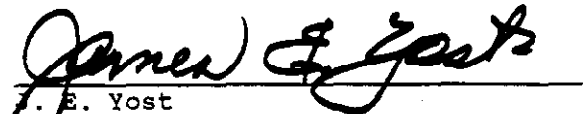
of sending him and another employee out to perform trackman's duties. It is quite obvious he is simply campaigning for an additional employee on the work force by the use of the claims and appeals route rather than by negotiations. That route is not the proper route to follow in this effort.

The foreman's statement was refuted by the Carrier in the handling on the property when it furnished the Organization with the statement of the Roadmaster wherein the roadmaster clearly stated that, "At no time has R. Peppi been instructed by Roadmaster Roger Layne to work as a laborer (8) hours a day." That the statement of the track foreman and the roadmaster conflicted is evident and, therefore, the track foreman's statement cannot be considered credible evidence to support the Organization's asserted violation of the agreement.


The decision of the Majority dilutes a negotiated agreement and changes the meaning and interpretation thereof. The Majority commented concerning the Carrier's right to permit a foreman "to assist in unusual situations or sporadically when needed," and completely ignored the language in the letter of interpretation, which completed the sentence and states, "...it being the intent of the parties that employees assigned Foreman positions will be productive when not otherwise engaged in the performance of their Foreman's duties."


The Organization did not meet its burden of proof in this case. The Organization did not prove that the foreman worked as a trackman for eight hours a day as alleged. The track foreman's statement is most general and

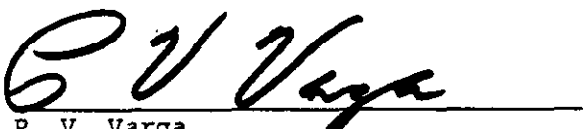
vague and certainly cannot be considered proper support for this claim.
Award 28684 is palpably erroneous and, therefore, we vigorously dissent to
same.


James E. Yost


M. W. Fingerhut


R. L. Hicks


M. C. Lesnik


P. V. Varga