Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 29262
THIRD DIVISION Docket No. MW-28417
92-3-88-3-193

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Railroad Company
(former St. Louis-San Francisco Railway Company)

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

(1) The Agreement was violated when the Carrier assigned Track Supervisor L. Prichard instead of Foreman H. L. Woodward and Trackman T. M. Freeman to perform curve oiling work beginning February 9, 1987 (System File B-1118-1/EMWC 87-4-29I).

(2) As a consequence of the aforesaid violation:

> '... we request that Mr. W. L. Woodward be paid at the foreman rate of pay and T. M. Freeman be paid at the trackman rate of pay for 8 hours each for each day that Track Supervisor Prichard works from February 9, 1987 and continue to be paid for as long as the above violation continues.'"

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 instant dispute centers around the Carrier's decision to use a Track Supervisor to perform certain track lubrication work from Springfield, Missouri to Hoxie, Arkansas. The Organization contends that this is work which heretofore had been performed by employees within the Track Sub-department covered under Rule 5(b) of the Agreement. The Organization further avers that supervisory employees may not be assigned to perform work encompassed within the scope of the Agreement.

Carrier asserts that the Track Supervisor applied grease to curve rails on his assigned territory with a new, fully automated system attached to his standard track inspection hyrail pickup. This is new technology, Carrier stresses, whereby grease is applied simply by flipping an electronic switch mounted in the cab. Carrier maintains that the operation is complementary to the supervisor's inspection duties. Moreover, Carrier argues that in the past, only high degree curves have been lubricated by trackside mounted oilers, work that continues to be performed by members of the bargaining unit. However, since the particular work at issue is a new concept that has not been done before, and since it is an automated process made possible by new technology, and has never been performed by BMWE personnel in this particular fashion, Carrier submits that the claim is without merit and must be denied.

The threshold question to be determined in the instant case is whether the controlling Agreement reserves to the Organization the work now in dispute. We find that the work in question is the track oiling system operated on the hyrail. The Employees claim that track lubrication work has historically been performed by its forces, and the utilization of a new device to perform the work does not, in and of itself, operate to make a new or different operation or to remove it from the scope of the Agreement. Carrier, on the other hand, points out that the Agreement nowhere mentions the particular work at issue, and therefore it acted properly and within its managerial prerogative by assigning the work as it did.

It is true, as the Carrier points out, that the Scope Rule of the Agreement does not make express mention of the work at issue. It is general in nature, and therefore it was the Organization's burden to show that the work was reserved to its employees by custom or past practice. Our review of the record reveals that Carrier never refuted the Organization's contentions regarding historical practice. To the contrary, Carrier on the property acknowledged that track lubrication has been performed by BMWE employees in the past, though only on high degree curves because of the mechanical difficulties involved in covering the entire system using the old technology. To that extent we find that the Organization has met its prima facie burden of proof.

The question becomes, then, whether a change in the technology justifies the performance of the disputed work by supervisory personnel. We think not. The purpose of the work and the reason for doing it remain the same; it is the manner or method of performance that has been affected, and it was the Carrier's burden to show as an affirmative matter that it was justified in assigning such work to supervisory employees not covered by the Agreement. We find neither Agreement support nor Board precedent to substantiate Carrier's position. Accordingly, Section 1 of the instant claim must be sustained.

With respect to remedy, however, Claimants were fully employed on the claim dates in question and suffered no loss of earnings as a result of the Carrier's improper action. Therefore, Section 2 of the claim requesting monetary compensation is hereby denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 12th day of June 1992.

CARRIER MEMBERS' DISSENT
TO
AWARD 29262, DOCKET MW-28417
(Referee Goldstein)

As noted at page 2 of Award 29262, it was only "high degree curves" that were and continue to be lubricated by the Maintenance of Way.

On the property, Carrier advised the Organization as follows:

> "The concept of lubricating all curves is a new one on this railroad made possible by the advent of new automated mobil delivery systems. Some of the other regions are lubricating their rails with locomotive borne lubricating systems. Traffic on the above mentioned territory is not heavy enough to justify the locomotive mounted system so we have modified it to operate from a standard track inspection truck." (Emphasis added)

Organization never challenged the facts that such work was NEW and had not been done by the Organization at all except on the "high degree curves"; and that it was being done on other regions of this Carrier as an adjunct to locomotive operations. Here, the same application was an adjunct to the supervisor's proper assignment of track inspection.

This matter was not just a "change in technology" but new work. In PLB 2208, Award 8 which was supplied to the Majority as precedent and involved the same parties:

> "The record evidence shows that employees represented by the Organization performed car cleaning at Darling Pit and at many other locations on the former NP. However, employees represented by the Clerks, the Firemen and Oilers, and the Carmen crafts also performed such work on the former NP....it is established that, in addition to Maintenance of Way Employees, employees represented by the Clerks, the Firemen and Oilers, the Carmen, as well as outside forces, performed car cleaning"

It is clearly erroneous to conclude that the Organization has substantiated its burden of proof. The only historical practice in

the record is as noted by the Carrier above and that substantiates that this work was already being performed by other on the carrier.

We dissent.

P. V. VARGA

M. W. FINGERHUT

R. L. HICKS

M. C. LESNIK

J. E. YOST

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 29262, DOCKET MW-28417
(Referee Goldstein)

The dissent represents the same twisted logic previously presented and that which the Majority rejected. The Carrier attempted to paint this claim with a broad brush in hopes of combining class and craft disputes with that of a supervisor performing scope covered work. This attempt is clearly evidenced by the citation of Public Law Board No. 2208, Award 8 which dealt with a class and craft dispute rather than a claim involving a supervisor performing Maintenance of Way work. In addition, the Minority attempted to characterize the work performed as "new work". Neither presentation was accepted by the Majority and it properly ruled that:

> "The question becomes, then, whether a change in the technology justifies the performance of the disputed work by supervisory personnel. We think not. The purpose of the work and the reason for doing it remain the same; it is the manner or method of performances that has been affected, and it was the Carrier's burden to show as an affirmative matter that it was justified in assigning such work to supervisory employees not covered by the Agreement. We find neither Agreement support nor Board precedent to substantiate Carrier's position. Accordingly, Section 1 of the instant claim must be sustained."

However, a dissent is needed to address the Referee's findings that no monetary remedy is warranted since the Claimants were "fully employed" and suffered "no loss of earnings". This ruling is an anomaly that diverges from a virtually unbroken string of

Third Division Awards that allowed monetary claims for so-called fully employed claimants when the carrier assigned supervisors to perform scope covered work. Such is apparent by the Referee's failure to cite any precedent to support its reasoning.

The correct reasoning was clearly set forth in recent Third Division Awards 23580, 25469, 28185, 28231, 28349, 28457 and 29036. Award 28185 stated it thusly, "*** Clearly a monetary remedy is appropriate on two grounds: loss of work opportunity and, further, in order to maintain the integrity of the Agreement. ***"

Respectfully submitted,

D. D. Bartholomay
Labor Member