

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 31002  
Docket No. MW-29795  
95-3-91-3-154

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. (former Chesapeake  
( and Ohio Railway Company)

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

- (1) The Agreement was violated when the Carrier assigned Foreman R. Peppi instead of furloughed Trackman W. Maynard to perform trackman's work for eight (8) hours on January 30, 1990, five (5) hours overtime on February 1, 1990 and eight (8) hours on February 7, 8, and 9, 1990 [System File C-TC-6035/12(90-372) COS].
- (2) As a consequence of the aforesaid violation, Mr. W. Maynard shall be allowed thirty-six (36) hours of pay at the trackman's straight time rate and five (5) hours of pay at the trackman's time and one-half rate."

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 employee 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 furloughed Trackman who, according to the Organization, had made known his availability for recall to temporary assignments. The contention here is that he should have been recalled for work performed by a Foreman on three separate days or series of days. These dates were stated in the initial claim as January 30, 1990 (including five hours' overtime) February 1, 1990; and February 7-9, 1990. (This is somewhat at variance with the claim as stated to the Board.) On these dates, according to the Organization:

"[T]he Carrier assigned Track Foreman R. Peppi to replace defective rails, gauge track and replace crossings at various locations including SV&E Fenn and Mile Posts 116 TCH and 108.4 in the vicinity of Shelby, Kentucky, on the Ash Division. The work of removing and replacing defective rails, spiking of ties to gauge track and removing and replacing crossings out-of-face is contractually reserved to and has customarily and traditionally been performed by track laborers. Track Foreman Peppi expended a total of thirty-six (36) straight time hours and five (5) overtime hours on the aforementioned dates performing the laborer's work in question."

That the Track Foreman is directly involved in causing the claim to be initiated is demonstrated by the inclusion of a memorandum from him detailing the work recounted above. As pointed out by the Organization, this is the same Track Foreman involved in a previous claim concerning work between November 30, 1987 and February 12, 1988 -- some two years earlier. That claim was sustained in Third Division Award 28684, on which the Organization relies strongly here.

These instances are based on a February 20, 1986 Memorandum Agreement and a mutually agreed interpretation dated September 9, 1987, which reads 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:

'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.'

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."

Award 28684 considered a situation in which the Organization contended that the Track Foreman had been performing Laborer work for a continuous period of more than two months. The defense that he was not ordered to do so was not given weight by the Board, since it is difficult to accept that the Track Foreman's superior would be unaware of the work accomplished during this extended period.

The situation here is at least quantitatively different. The claim involves three discrete short periods. There is no evidence that the Track Foreman failed or was unable to perform his Foreman responsibilities. The claim appears to acknowledge this, since it seeks pay for 36 straight-time hours rather than for the full 40 straight-time hours claimed to have been worked.

In the Board's view, the February 20, 1986 Memorandum Agreement clearly states that Foremen "will participate in the work of the force" subject only to being able to accomplish Foreman duties. The interpretation thereof is more ambiguous. On the one hand, there is reference to "unusual situations" and "sporadically." On the other hand, there is the requirement to "be productive" (presumably whether there is an "unusual" situation).

From this analysis, the Board remains satisfied that Award 28684 properly found that the continuous use of the Foreman for more than two months tended to represent a replacement of a Trackman. Here, the contention that the Track Foreman worked with a Laborer on three separate brief occasions does not indicate that he was performing a replacement function. Thus, there is no support here for the contention that the Claimant should have been recalled from layoff for these separate brief periods. In other words, here the requirement to "participate in the work" and to "be productive" is the more accurate description of what occurred.

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AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of July 1995.