

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31223
Docket No. MW-30849
95-3-92-3-712

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company

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

- (1) The Agreement was violated when the Carrier assigned Sectionman C. D. Taylor to perform the duties of a track foreman (getting track and time for the locomotive crane and supervising the work assigned thereto) during the seventy-eight (78) day period of February 7 through April 26, 1991, instead of assigning Track Foremen G. L. Purkey, M. L. Balls or J. W. Wigington (System File S-537/910685).
- (2) The Agreement was further violated when the Carrier failed and refused to advertise and assign a track foreman's position for the performance of the track foreman's duties described in Part (1) above, as contemplated by Rule 20.
- (3) As a consequence of the violation referred to in Part (1) above,
 - (a) Track Foreman G. L. Purkey shall be compensated for the difference in pay between that of a track machine operator and that of a track maintenance gang foreman for the period of February 18, 1991 through and including March 1, 1991 and he shall be allowed a per diem allowance of thirty dollars (\$30.00) per day.

(b) Furloughed Track Foreman M. L. Balls shall be compensated for all wage loss suffered, at the applicable track maintenance gang foreman's rate of pay for the periods of February 7 through 17, 1991, March 2 through April 14, 1991 and at the track machine operator's rate of pay from February 18, 1991, through March 1, 1991.

(c) Track Foreman J. W. Wigington shall be compensated for the difference in pay between that of a welder helper and that of a track maintenance gang foreman for the period of April 15 through 25, 1991.

(4) As a consequence of the violation referred to in Part (2) above, the Carrier shall be required to advertise and assign a track maintenance foreman position for assignment to Locomotive Crane 903081 in compliance with the provisions of Rule 20."

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 Organization filed a claim contending that the Carrier violated Rules 6, 9, and 20 when it allowed a sectionman to perform the duties of a track foreman. In addition, the Carrier allegedly did not bulletin the position. Claimant Purkey was working as a machine operator, Claimant Balls was furloughed, and Claimant Wigington was working as a welder helper. All were fully qualified and available to perform the work in question.

The Carrier denied the claim contending that the initial claim was untimely filed and later it was improperly altered. In addition, the obtaining of track and time is not exclusive to any one craft. And, finally, the Carrier stated that "The claim was to be considered excessive as expenses (per diem allowances) are only paid for expenses incurred."

This Board has reviewed the record in this case and we find that the Carrier violated the Agreement by assigning Sectionman Taylor to perform the duties of a track foreman instead of a track foreman to do that work. The Carrier argued that its action was within the scope of Rule 5 because the work involved was not sufficient to justify the assignment of an employee from the foreman classification. However, the record reveals that the Carrier had the work performed over a period of 78 days from February 7 until April 26, 1991. The language of Rule 5 envisions work that is *de minimis* in nature and only then can the Carrier use an employee from another classification to perform the modest amount of work. However, in this case, since the Carrier needed someone to perform track foreman work over the course of a 78-day period, the Carrier cannot simply justify its action by pointing to Rule 5.

The Carrier also takes the position that the Organization did not file the claim on a timely basis and, therefore, it should be dismissed. The initial claim was filed on April 4, 1991, and it alleges that on January 22, 1991, a sectionman was assigned the foreman duties. Since the Organization is required to file claims within 60 days after the alleged wrongdoing, the Carrier takes the position that the April 4, 1991, claim was untimely and should be dismissed by this Board.

However, this Board agrees with the Organization that the charge of wrongdoing in this case is a continuing violation. The record reveals that the Carrier violated the Agreement in the same way on each working day beginning February 7, 1991, and continuing until April 25, 1991. When a violation is a continuing violation, an Organization can file the claim at any time as long as it meets the time limit requirements set forth in the Agreement. Of course, the Organization is only entitled to relief during the claim period and if a great amount of time went by prior to the filing of the claim, there will be no relief granted for that period. In this case, the wrongdoing allegedly began on January 22, 1991, and this Board will only order relief for the period 60 days prior to the April 4, 1991, claim date.

Finally, the Carrier has not proven with sufficient evidence that the Claimants were fully employed and, therefore, not entitled to relief.

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For all of the above reasons, the claim must be sustained.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of November 1995.