

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32387
Docket No. MW-31419
97-3-93-3-369**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Elgin, Joliet and Eastern Railway Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier abolished twelve (12) trackman positions, advertised five (5) assistant foremen positions on the same date and thereafter, beginning on January 3, 1992, it assigned Assistant Foreman D. Hilley, C. Papaevangelou, E. Malia, D. Davis and E. Vargas to perform trackman's work, instead of recalling and assigning trackmen to perform such work (System File SAC-2-92/TM-7-93).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants M. Cortes, J. Cabrera, I. Perez, D. Theodorakas and F. Costello shall be compensated for all wage loss suffered as a result of the Carrier abolishing the trackmen positions and assigning junior employees, in a higher classification (assistant foreman), to perform trackman's work beginning January 3, 1992 and continuing until the violation ceases."**

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 were given due notice of hearing thereon.

As a result of fluctuations in track work requirements, presumably seasonal in this instance, the Carrier effected a force reduction to the Track Subdepartment commencing January 3, 1992. Six Track Foreman and 12 Trackman positions were abolished. This was announced by bulletin dated December 23, 1991. On the same date, the Carrier bulletined a vacancy for Track Foreman (filled by one of the six Track Foreman and not at issue here) and vacancies for five Assistant Track Foremen.

As a result of the posting, the five Assistant Track Foreman positions were awarded to the five remaining unassigned Track Foreman whose positions had been abolished.

It is the Organization's position that the five Assistant Track Foreman positions were bulletined simply to provide continuing active employment for the Foreman whose positions were abolished and, more significantly, that these employees were assigned work as Trackmen. As a result, the Organization argues the Carrier violated the seniority provisions of the Agreement by utilizing as Trackman less senior employees whose position as Foreman had been simultaneously abolished.

There is extensive discussion by the Carrier, in the claim handling correspondence and in its Submission, as to factors which are not at issue here. There is no dispute as to the Carrier's right to determine its number of Foremen and Assistant Foremen and the division of assignment between them. There is no dispute that the proper assignment of either Foreman or Assistant Foreman includes, at times, working in the same duties as Trackman as an adjunct to their prescribed supervisory responsibilities.

The sole issue is whether the newly created Assistant Track Foreman were, during the period following January 3, 1992, actually working as Trackmen and thus displacing furloughed Trackmen.

The Board concludes that the Carrier simply has not overcome the burden of explaining why, at a time of substantial force reduction, it would increase or create five new Assistant Track Foreman positions. It is not for the Board to determine whether this was done, as the Organization contends, for the sole purpose of retaining these employees in service because of previous Foreman qualifications and service. It is sufficient to find that the Organization has demonstrated, by logic and evidence, that the five employees were assigned, with certain exceptions, to perform Trackman duties exclusively.

The Carrier maintained that the Assistant Track Foreman were utilized primarily to "assist" Foremen, but there is little proof of this assertion. Examples were provided of a small proportion of Foreman Field Reports for the period under review. Many of these show that the Assistant Foreman was utilized to replace temporarily an absent Foreman; this, as the Organization points out, is not "assisting" but simply an temporary upgrading of a qualified employee.

The Board finds the Organization has presented convincing evidence that the filling of five Assistant Track Foreman positions at a time of significant force reduction resulted in the assignment of these employees to work in place of senior Trackmen in furlough status. This is clearly in violation of the Agreement, although, to repeat for emphasis, it does not concern the occasional assignment of a Foreman or Assistant Foreman to the work of those supervised.

The question of remedy requires further review. The Organization seeks compensation "for all wage loss suffered as a result of the Carrier abolishing . . . Trackman positions and assigning junior employees, in a higher classification (Assistant Foreman) to perform Trackman's work."

In response to this, the Carrier notes that two of the Assistant Foreman were senior to the most junior Claimants, and thus those named by the Organization are not the proper Claimants. The Organization argues that, in a finding of Agreement violation, the determination of the Claimants' identity can be made by the Organization.

Here, however, the facts do not call for selection of any five employees as the appropriate Claimants. Since the merits of the claim will be sustained by the Board, it follows that the retention of five senior employees would have included two of the employees whose positions as Foreman were eliminated. As a result, there remains the improper assignment of three – not five – employees in the classification of Assistant Foreman.

In addition, the Carrier points to Rule 58 which states:

“Time claims shall be confined to the actual pecuniary loss resulting from the alleged violation.”

By being recalled as needed from furlough, the three remaining Claimants worked as many or more hours as the three junior employees who were given the Assistant Foreman classification. Thus, the Carrier argues that under Rule 58, no monetary remedy is appropriate.

As it works out under the particular facts here under review, the remedy of back pay is not appropriate. The “pecuniary loss” came from the “violation” – that is, the retention of three less senior employees in Trackman work. The remedy would be limited to the hours of work they performed, which became irrecoverable to more senior, qualified Trackmen.

According to undisputed information supplied by the Carrier during the claim handling procedure, the three remaining Claimants were recalled from furlough to work 1715 straight time and overtime hours. The three junior “Assistant Foreman” worked 1144 straight time and overtime hours in the same period. Had they not been designated as Assistant Foreman, they would have been next in Trackman seniority to share the available work. Thus, no “pecuniary loss” is perceived. The claim is sustained on the merits, but no monetary remedy is therefore appropriate.

AWARD

Claim sustained in accordance with the Findings.

Form 1
Page 5

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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 30th day of December 1997.