

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32619
Docket No. MW-32285
98-3-95-3-97**

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company
((Eastern Lines)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Machine Operators A. A. Esparza and A. Cordero to perform track laborer's work (high spiking ties and cutting rail) at various locations on the El Paso District on November 9, 10, 11, 12, and 15, 1993 (System File MW-94-65/BMW 94-246 SPE).**
- (2) As a consequence of the violation referred to in Part (1) above, furloughed Track Laborers C. S. Carrillo and S. Lopez shall each be allowed forty (40) hours' pay at their straight time rate and they shall each be credited with five (5) days for vacation qualifying purposes.”**

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.

On the dates indicated in the claim, Machine Operators Esparza and Cordero, who normally worked a ballast regulator and tamper, respectively, were assigned to high spiking ties at various points on the Carrier's El Paso District in connection with routine track maintenance. At issue here is the Organization's contention that Carrier should have recalled two furloughed Track Laborers to perform the work in dispute.

The record indicates that for five consecutive workdays, Claimants spiked ties and performed other track labor, including assisting with welds and cutting rail, on a contiguous stretch of track approximately eight miles long. The Organization's challenge to these assignments is based upon several provisions of the Agreement, including those governing Scope, Seniority, Promotions and Filling of Vacancies and Roadway Machines. The facts of record implicate chiefly the last two of those provisions. Article 8 reads in pertinent part:

"ARTICLE 8 - PROMOTIONS AND FILLING OF VACANCIES

Section 4. New positions and vacancies (including temporary vacancies of more than thirty (30) days) will be bulletined at home stations of the employees concerned within thirty (30) days previous to or fifteen (15) days after the date such vacancies occur. New positions or vacancies including temporary ones may be filled pending bulletin. Vacancies and positions of more than thirty (30) calendar days and less than ninety (90) calendar days duration and vacancies caused by granting leaves of absence of thirty (30) days or more, will be considered as temporary and bulletined as such."

Article 17 reads in pertinent part as follows:

"ARTICLE 17 - ROADWAY MACHINES

Section 4 - Employees of roadway machines will be required to work with gangs under the foreman in charge and perform any work they are able to handle under direction of the foreman when their machine is not actually being used. Machines will not be idled for the sole purpose of supplementing the force on a gang."

The Carrier defends its actions on the grounds that the challenged work was incidental to and part of the normally assigned duties of the Machine Operators involved. It asserts that during the days immediately preceding the dates in question, Esparza and Cordero were fully occupied with tamping and regulating track, and that completion of their track surfacing required certain backwork, including high spiking. Thus, the crew was at no time used to "supplement" a track group - the work at issue was an integral part of their Machine Operator duties, and expressly allowed under Article 17. Lastly, Carrier maintains that it has no obligation to recall furloughed employees unless there is a vacancy of "more than thirty (30) days," which there clearly was not.

Based upon a careful review of this record, the Board concludes that the Organization's assertion of non-compliance with Article 8 is mistaken. No temporary vacancy anticipated to last in excess of 30 days was presented on the facts of this case, and thus no obligation to bulletin was triggered.

With respect to the Article 17 contention, while it is indisputable that track machines were idle and track labor performed during such downtime, the factual issue of whether the machines of Esparza and Cordero were actually idled "for the sole purpose" of having them do track labor was never resolved on the property. If their machines were down for lack of immediate work, no violation would be established. It is, of course, the Organization's burden to demonstrate a violation - and an essential component of a violation here is proof that machines were "idled for the sole purpose of supplementing the force on a gang." Resolving this fact question is crucial to that proof.

Because the record does not provide a basis for determining if there was a causal connection between the idling of machines and the spiking and other functions complained of, the Board finds an irreconcilable dispute on an essential fact issue, and must dismiss the claim.

AWARD

Claim dismissed.

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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 23rd day of June 1998.