

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY CO.
JOSEPH B. FLEMING AND AARON COLNON, TRUSTEES

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

(1) That classifying and paying E. E. Desmond, Atlantic, Iowa, as a track patroller is erroneous and that since in substance he is performing the service of a section foreman, he shall be classified and paid as a section foreman;

(2) That E. E. Desmond shall be paid the difference in pay between what he received as track patroller and that which he should have received as a section foreman retroactive to September 1, 1942.

EMPLOYEES' STATEMENT OF FACTS: The Griswold branch is a line of railroad some fifteen miles in length extending from the Carrier's main line at Atlantic, Iowa. Prior to September 1, 1942, the Carrier employed a section crew on this branch with headquarters at Lewis, Iowa. During the summer of 1942 the section foreman in charge of the Lewis section with jurisdiction over the Griswold branch had no men but was working alone. Effective September 1, 1942 the Carrier discontinued the position of section foreman and issued bulletin for a track patroller for assignment to the Griswold branch. E. E. Desmond bid for and was assigned as track patroller. Since assignment as track patroller on the Griswold branch, E. E. Desmond has performed same service as the section foreman, whose position was abolished September 1, 1942, had performed.

The agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: As stated in the Employees' Statement of Facts, prior to September 1, 1942, the Carrier employed a section crew on the Griswold branch with headquarters at Lewis, Iowa, the section foreman receiving a rate of \$151.60 per month. This monthly rate was increased by the wage settlement consummated at Washington, January 17, 1944. As further stated in the Employees' Statement of Facts, during the summer of 1942 the section foreman at Lewis, Iowa with jurisdiction over the Griswold branch had no men but was working alone. Then, effective as of September 1, 1942, the Carrier discontinued the section foreman's position and assigned in his place a track patroller at the rate of \$115.00 per month, which rate like that

The above classes include positions in which the preponderant duties of incumbents are to have immediate supervision of the work of a gang of common or semi-skilled laborers engaged in the construction and maintenance of roadway, tracks, and structures; and to perform related work."

After reading the above "description," how can it be said Mr. Desmond, the track patroller, from September 1 to November 29, 1942, was, in fact, a section foreman, as he claims, or that Mr. Parsons, although paid as a section foreman, April 1 to September 1, 1942, was actually performing section foreman duties, when neither had any laborers under their jurisdiction or supervision.

Assuming both of these gentlemen did perform some work (but did not supervise), let us see what the same rules of the ICC say about it.

On pages 173 and 174, for "description of classes" Symbol LMS 16, Reporting Division 42, the following is shown:

"Grade 1—Maintenance of Way and
Structures Worker Group"

. . . .
Track and Roadway Section
Laborer—LMS 16.

The above classes include positions in which the preponderant duties of incumbents are to perform, under supervision, unskilled or semi-skilled manual labor in connection with the construction and maintenance of roadway, tracks, bridges, buildings, signals, telegraph and telephone lines, water service facilities, and similar work, including labor in connection with the cleaning and maintenance of station yards and grounds; cleaning, filling, lighting and caring for switch and other signal lamps and guarding bridges, tunnels and equipment used in connection with such work."

and under "Illustrative Examples of Positions" under Group 1 is shown on Page 174—

"Track and Roadway Laborer:
Track Patrolman"

which definitely classes such work as might be claimed was performed by section foreman Parsons April 1 to September 1, 1942, and by Track Patroller Desmond, September 1 to November 29, 1942, merely as work properly to be performed by a track patroller under the "track and roadway laborer class," and not that of a section foreman.

We maintain Mr. Desmond actually performed duties of a Track Patrolman from September 1, 1942 to November 29, 1942; that while section foreman Parsons was permitted to remain on this branch line, April 1, 1942 to September 1, 1942, the duties he performed were not those over which a section foreman has a monopoly, but were duties that could properly have been performed by a Track Patroller.

Claim of the employees is without merit and it should be denied.

OPINION OF BOARD: Was the Claimant, from September 1 to November 29, 1942, a track patroller or a section foreman? This question is to be resolved upon a consideration of the facts contained in the record and the legitimate inferences to be drawn therefrom.

Among the indications that the Claimant was a section foreman are the following: that the Claimant performed the same service as his predecessor, who was classified and compensated as a section foreman; that Claimant re-

ceived instructions from and made reports to the roadmaster, as section foremen do; that Claimant had charge of and was responsible for a motor car and tools, which is consistent with the duties of a section foreman; that, while Claimant worked alone, so did his predecessor, and that it is not uncommon for section foremen so to do; and that the apparent reason why the Carrier bulletined the position occupied by the Claimant as a track patroller, rather than as a section foreman, was merely to gain the advantage of a lower rate for the service performed.

The facts relied upon to sustain the Carrier's contention that the Claimant was properly classified as a track patroller are these: that as early as April, 1942, it had been decided to abandon the branch line on which the Claimant worked, and this was finally consummated on November 29, 1942; that from April to September 1, 1942, the incumbent section foreman was permitted to continue in service without demotion because the position was about to expire; that Claimant was duly assigned to the position of track patroller by bulletin; that the classification of track patroller was one recognized by the contracting parties; that as such track patroller, Claimant was duly accredited to a regularly assigned section foreman; that Claimant had no supervisory functions and his duties were the same as other track patrollers; that among the duties of a section foreman are to make up payrolls and certain reports and that Claimant had no such responsibilities; and that the service rendered by the Claimant conformed to the reporting service classification rules of the Interstate Commerce Commission relating to the subject of track patrollers.

The resolution of a factual controversy from a formal record is always a perplexing problem. Some of the isolated facts summarized above lend support to the contentions of each of the parties. Under such circumstances, we can only adopt that conclusion which appeals to us to be sustained by the preponderance of the evidence, keeping in mind, also, on which side the burden of the proof belongs. After carefully weighing these matters, we find ourselves unable to say that the Claimant was substantially performing the service of a section foreman. In the light of all the facts, we cannot attach as much importance as the Petitioner does to the circumstance that the services performed by the Claimant were not unlike those rendered for a time by the formerly employed section foreman. The probative value of that part of the evidence is materially weakened by the showing that it was contemplated at the time that the branch line would soon be abandoned. The Carrier should not be penalized because it was slower than it might have been in reclassifying the position so as to apply a lower rate.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary.

Dated at Chicago, Illinois, this 31st day of January, 1946.