

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
CLINCHFIELD RAILROAD COMPANY**

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

- (1) That Mr. C. E. Davidson be allowed the difference in pay between what he did receive at the Apprentice Foreman's rate and what he should have received at the Section Foreman's rate for all time that he has been required to perform the duties of a Section Foreman subsequent to April 11, 1944, and that C. E. Davidson be allowed a seniority date as Foreman as of April 11, 1944.

EMPLOYEES' STATEMENT OF FACTS: During the period April 11, 1944 to May 1, 1947, Mr. C. E. Davidson had been assigned to direct the activities of four or five section laborers working on the Nora Branch, with headquarters at Nora Junction. He has performed all of the duties commonly recognized as section foreman duties, including the preparation of time and work distribution reports. In allowing Mr. Davidson pay for this service, the Carrier has paid him at the Apprentice Track Foreman's rate.

Effective September 1, 1947, a position of Section Foreman was advertised on the Nora Branch, which position was awarded to Mr. D. M. Wolfe.

Agreement between the parties dated December 16, 1944, is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: On April 11, 1944, Apprentice Foreman C. E. Davidson was assigned to make his headquarters at Nora, Virginia, and supervise a crew of four men in maintaining the portion of track known as Nora Spur. This piece of track is approximately seven miles long. C. E. Davidson, prior to his assignment, was working with Otis Castell, Section Foreman of the Allen Section which has about nine miles of main line track. Section Foreman at Allen has his regular crew and tool house at Allen. C. E. Davidson has his own separate crew and with headquarters at Nora. C. E. Davidson carried on his duties of maintaining the Nora Spur without the supervision of any other foreman. The Employees are attaching as their Exhibit "A" a letter from C. E. Davidson dated March 5, 1947, in which Davidson in his own words describes the kind of service he was performing during the period mentioned in our claim.

It will be noted that C. E. Davidson says: "I handle the job on Nora Branch just same as if I was Foreman. I do all the surfacing, lining, and in fact, look after the job just as though it was assigned to me . . .

If such were the case, Carrier would be placed in the position of being required to pay certain men at the rate provided for apprentice foremen for performing duties no greater and involving no more responsibility than those of the laborer.

The employees claim foreman's pay for Mr. Davidson from April 11, 1944. The first time the management of Carrier was advised of the fact of this claim was a letter from the General Chairman written on April 11, 1947. At no time during this three year period was Carrier advised of any dispute, claim or misunderstanding concerning the duties being performed or the rate of pay being received by Mr. Davidson. The last communications which the management of Carrier had concerning Section 4, and any requests relating thereto, were the letters herewith exhibited by Carrier, one from the foreman of Section 4 and one from the General Chairman of employees, both complaining of the track mileage under the exclusive supervision and control of Foreman Casteel, and not once mentioning Mr. Davidson.

Carrier contends that it has not violated the agreement between it and its maintenance of way employees, and that it has followed both the letter and the spirit of the agreement in placing certain employees in the positions of apprentice foremen allowing them seniority as such, paying them at a higher rate of pay than that of laborers, assisting them to become qualified for promotion and in furnishing all possible conveniences.

(Exhibits not Reproduced.)

OPINION OF BOARD: The controlling facts in this case are not in substantial dispute. The point in issue is the application of sub-section (g) of Article 3 of the Maintenance of Way Agreement between the Petitioner and the Carrier, effective December 16, 1944, to those facts. Said sub-section reads:

"Employees temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such positions. Employees temporarily assigned to lower rated positions shall not have their rates reduced."

The Claimant was first employed by the Carrier, in its Maintenance of Way Department, as a track laborer. On March 1, 1944, he was advanced to the position of Apprentice Section Foreman, working under Section Foreman, Otis Casteel, who was foreman on a nine mile section of main line, with some spurs leading into said main line. Early in 1944, a spur or branch, called Nora Spur, and about 6¼ miles in length, was put into service, and added to the section over which Casteel had charge. This spur served a mining operation, and, in the beginning, the traffic was light, not exceeding twenty-five cars per day. The section of which Casteel had charge, known as Allen Section, had its assembly for work station at Allen. On April 11, 1944, the Claimant was assigned to work on the Nora Spur line, as, the Carrier contends, an Apprentice Foreman, and given charge of four or five track laborers, under the general supervision of Foreman Casteel, of the Allen Section; and, as a convenience to employees working on the Nora Spur, they were permitted to assemble for work at Nora Spur junction, some two miles from Allen, and given a hand car for their work. Reports of work done, time earned, and track conditions were, from time to time, made by Claimant to Foreman Casteel, who, on rare occasions, visited and inspected Nora Spur. Claimant made no reports to any railway official or employee, other than Casteel; and, was at all times under his control and supervision. This situation continued until April 26, 1947, when Claimant was assigned to another section of Carrier's line, as a Section Foreman. In the meantime, during the three years covered by the claim, Claimant was called, temporarily, to work as Section Foreman on other sections, for which he was paid the Section Foreman rate for all time he acted as such.

After Nora Spur was put in service, Early in 1944, and added to Allen Section, Foreman Casteel complained to his General Chairman, J. E. Evans,

that the duties imposed on him were too heavy, and asked for relief. This complaint was made by letter to the General Chairman, dated August 18, 1944, and in that letter Casteel refers, among other things, to the fact that Nora Spur or branch had been added to his territory. The General Chairman promptly forwarded said letter to Carrier's assistant General Manager, who wrote the General Chairman concerning the matter on August 21, 1944. The complaint of Casteel was finally disposed of on December 28, 1944, when the Carrier's Chief Engineer, to whom the matter had been referred by the Assistant General Manager, wrote Carrier's General Manager, with a copy to Claimant's General Chairman, as follows:

"Referring to your of December 5th in regard to complaint of Otis Casteel, Section Foreman, Allen, Virginia, in regard to length of track maintained by his force.

We are at this time reducing his main line mileage from nine to eight miles.

I am instructing Mr. Lynch to allow him the necessary labor to properly maintain the Nora Spur, which is included on his section."

This correspondence, and the action taken by the Carrier, may not, technically, bind Claimant; but it clearly shows that not only the Carrier, but Claimant's then General Chairman, understood as late as December 28, 1944, that Nora Spur was included in the Allen Section, over which Foreman Casteel had complete charge. It should be noted that another General Chairman, G. W. Holley, now represents the Claimant and other Maintenance of Way employees on the Carrier's property.

Following the adjustment of the Casteel complaint, no complaint appears to have been made by anyone, and certainly not by the Claimant, until March 5, 1947, when, in response to a letter written him by G. W. Holley, his General Chairman, dated on the next preceding day, Claimant set out, at some length, the situation on Nora Spur, as it had existed since April 11, 1944, and on which his present claim is based, and in which he contended, in substance, that during all of said period he had performed the work of Section Foreman on said spur. He does admit, however, that Foreman Casteel called him on the telephone, that he turned into him the time of the men working on the spur, but says Casteel "hardly ever comes into the Hollow at all." On the basis of this letter, the General Chairman, on April 11, 1947, first presented the matter to the proper Carrier official, and the claim was progressed on the property, resulting in its denial, and its subsequent presentation to this Board under notice dated November 28, 1947.

It should be stated at this point, not as important to a decision, but to present the entire picture, that in August, 1947, after the pending claim was presented on the property, the Carrier, in view of increased traffic on Nora Spur, as it avers in its submission, created a new section composed of Nora Spur, Wakenva Spur and other industrial sidings, and bulletined a Section Foreman position therefor. At that time, Claimant having bid for and being assigned as Foreman on another section did not bid for the new position so established.

The claim is that Claimant be allowed the difference between the pay he received as an Apprentice Foreman, and what he contends he should have received as a Section Foreman, during the period covered by the claim; and, in effect, that he should be treated as though the job of Section Foreman on Nora Spur had been bulletined and assigned to him on April 11, 1944. Corollary to this is the contention that the position of Section Foreman on said spur, should have been bulletined and awarded on that date, with seniority rights as a Section Foreman from that date. In support of that contention, we are referred to Articles 8 and 9 of the Agreement.

As stated above, we think sub-section (g) of Article 3 must control in this case. If, as a factual matter, Claimant was, on April 11, 1944, assigned the work and responsibility of a Section Foreman, a higher rated position

than that of an Apprentice Foreman, the position should have been bulletined, as required by Article 9 of the Agreement; and when assigned, the seniority of the person selected for the position should date from the day of such assignment, as provided by Article 8 of the Agreement. On the other hand, if Claimant was not, on said date, assigned to a higher rated position, neither Articles 8 and 9, nor sub-section (g) of Article 3 can have any application to this case.

In our opinion, Otis Casteel continued as Section Foreman on the Allen Section, including Nora Spur, until August, 1947, when a new section, including Nora Spur, Wakenva Spur, and other industrial sidings, was set up as a new section. Both the Carrier and the then General Chairman were committed to this situation by the correspondence and action growing out of the Casteel complaint in 1944; and the same could not, in the circumstances of this case, in any event, be charged, and made the basis of a contrary claim, prior to the date when a new General Chairman brought the matter to the attention of the Carrier, on April 11, 1947, only fifteen days before Claimant was assigned to a Section Foreman position on another section.

We are further of the opinion, that the work performed by Claimant on the Allen Section, including Nora Spur, was at all times performed under the general direction and supervision of Section Foreman Casteel, and was Apprentice Foreman work. That Claimant so considered it, is attested by his failure to make complaint until, apparently, his attention was called to his situation by his new General Chairman, on March 4, 1947. We do not say that this conduct on his part absolutely precludes him from making his present claim, but it has a strong bearing on the solution thereof. We do not deny the claim on the ground that we consider it stale, but because we do not believe Claimant did any work on the Allen Section, including Nora Spur, other than that of an Apprentice Foreman.

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 there was no violation of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 10th day of August, 1948.