

Award No. 4803

Docket No. MW-4772

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
ILLINOIS CENTRAL RAILROAD COMPANY**

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

(1) That on January 13, 1948, the Carrier violated the provisions of the agreement dated September 1, 1934, when they called Section Foreman Moyers and crew to patrol and inspect the territory regularly assigned to Section Foreman S. N. Beasley and crew.

(2) That Section Foreman S. N. Beasley and Section Laborers, Josh Jackson, Mel Baker, Rufus Williams, and Otha Warren be paid for a call of two hours and forty minutes each at the time and one-half rate because of the Carrier's violation of the agreement referred to in part (1) of this claim.

STATEMENT OF FACTS: On January 13, 1948, the "Freedom Train" on authority and under the auspices of the U. S. Government carrying historical documents involving the history of the United States, arrived at 1:00 A.M. at Cherry Street Station, Vicksburg, Mississippi. The train moved from point to point throughout the United States exhibiting to the public these important historical documents referred to.

To protect against destruction either by accident or intent of fanatics the movements of this "Freedom Train" were closely guarded and protected. The Carrier issued instructions to Section Foreman Moyers whose headquarters were at Vicksburg, Mississippi, to be at Cherry Street Station to meet and then proceed in advance of this train on his motor car accompanied by four of his section laborers for the purpose of inspecting the track and switches.

Foreman E. L. Moyers carried out instructions and partolled the Carrier's tracks in advance of the movement of this "Freedom Train" between Cherry Street Station to junction switch and thence north to Levee Street depot, Vicksburg, Mississippi. Following the arrival of the "Freedom Train" and its being placed in siding at Levee Street depot, the foreman then spiked the switches at each end of this side track and was released.

The section of track between Cherry Street Station south to junction switch and thence north to Mile L 221.16 is 1.58 miles and is contained within the section limits of section assigned to Foreman S. N. Beasley. The section of track from Mile L 221.16 to Levee Street depot is 1.41 miles long and within the section limits of section assigned to Foreman E. L. Moyers.

Section Foreman S. N. Beasley was available for duty on the early morning of January 13, 1948, but was not called by the Carrier to patrol the

efficiency and reduction of operating costs. The Commission further said it was aware of 'the many efforts which railroads individually and to some extent collectively are making to increase the efficiency of particular operations,' but it added: 'Opportunities of this kind extend from the multitude of minor day to day operations to large scale change in practices which require both careful planning and substantial capital investments. A thorough searching out of better ways of doing these lesser things which constitute a railroad's day's work must be undertaken. Bold experimentation with new devices and methods seems to be required in some instances.'"

If the Carrier was required to call two section foremen and eight section men to perform approximately thirty (30) minutes' work, such action would establish by interpretation a new rule contrary to the Railway Labor Act and the intent of the Interstate Commerce Act.

Since employees in the Track Department have rights to bid in any position bulletined within the territory over which one Division Engineer has jurisdiction, the foreman certainly has by the same reason a right to the work in that territory, and any change therein can be made as provided in the agreement and the Railway Labor Act.

In conclusion Carrier asserts:

1. It has been shown by past practice of many years without prior complaint that in maintenance of tracks and facilities, section foremen and laborers work in each other's territory in performing their duties.
2. The Board is without authority to change the agreement.
3. The claim should be declined.

OPINION OF BOARD: This case comes before the Board on an agreed Statement of Facts. On January 13, 1948, pursuant to Carrier's instructions, Section Foreman E. L. Moyers accompanied by four section laborers patrolled track in advance of the movement of the "Freedom Train", a train carrying exhibits of historical documents of the Government of the United States. Of the trackage patrolled, 1.58 miles thereof was in the section regularly assigned to Foreman S. N. Beasley, claimant herein. Employees assert that the performance of this work by Foreman Moyers was in violation of the Agreement and file claim as indicated.

Awards of this Board are clear on the principle that, in the absence of Agreements, understandings or established practices to the contrary, work on a section belongs to the regularly assigned foreman and his crew. In the light of this principle, the contention of the Carrier to the effect that Moyers was properly assigned to this work because he was senior to Beasley on the Division, is untenable. Beasley's right to the work on the section arises from his having bid in the section foreman's position and being the holder of the same. The work of the position, therefore, belongs to him and his right thereto while he is the incumbent of the position cannot be defeated by an employee who has greater seniority on the division. The practice of doubling or intermingling adjacent foremen and their gangs to work on other sections is not inconsistent with this conclusion since it appears that when such doubling or intermingling has occurred, the regularly assigned section foremen and their crews were working.

Carrier cites several instances where section gangs followed detector cars over territory assigned to other section gangs when such gangs were not on duty and asserts that necessary servicing was performed by the gang following the detector car. Carrier asserts that such a practice has been in effect since 1934 and has continued without prior complaint. Employees, however, emphatically insist that they have protested such actions of the Carrier. Repeated violations of an Agreement do not change it, although a long period of acquiescence by the employees in a practice may, under certain circumstances, be sufficient to bar a monetary award.

In this case, it is clear that the only work performed by Section Foreman Moyers and the four section laborers on the section regularly assigned to Foreman Beasley was inspection and the amount of time was less than thirty minutes. The violation was more or less of a technical nature. However, should it have been discovered that repairs were necessary on the section to which Beasley was regularly assigned, it is not inconceivable that a more substantial violation may have resulted.

It follows from what we have said above that an affirmative award is in order.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 28th day of March, 1950.