Award No. 5830
Docket No. MW-5871

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

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

(1) The Carrier violated the effective agreement when it abolished Track Foremen positions and established positions of Assistant Track Foremen covering relatively the same class and kind of work as was formerly comprehended in the assignments of Track Foremen;

(2) The abolished Track Foremen positions be re-established and the duties comprehended in the assignments of Assistant Track Foremen be restricted to assisting a Foreman in directing the work of men under the immediate supervision of the Foremen;

(3) All employes adversely affected by the abolishment of the Track Foremen positions and the improper establishment of Assistant Track Foremen positions, be compensated for all wage loss suffered.

EMPLOYES' STATEMENT OF FACTS: On September 2, 1949, Mr. John J. Berta, General Chairman of the Brotherhood of Maintenance of Way Employes, addressed the following letter to Mr. H. M. Overpeck, Roadmaster of the Elgin, Joliet & Eastern Railway Company:

"September 2, 1949

Mr. H. M. Overpeck
Roadmaster, E. J. & E. Ry. Co.
Joliet Building
Joliet, Illinois

Dear Sir:

Please refer to Bulletins No. 339 and 340, dated at Joliet on September 2, 1949, advertising two positions, rather two new positions of Assistant Track Foremen, one at Section 17, Plainfield, Illinois and one at Section 38, Griffith, Indiana.

We believe these positions are being established in violation of Rule 33 of our current agreement and respectfully request that they be withdrawn. Our basis for this protest is that the track foremen positions at Normantown, Warrenhurst and the Coal Branch are being abolished, and all of that territory except for a part of Warrenhurst section is being transferred to Section 17, Plainfield, for a

Therefore, the Carrier submits that the third part of the claim, relating to payment of compensation to employes adversely affected cannot be construed to pertain to the track foremen whose positions were abolished—as a group—but rather, can at most be applied only to two track foremen, whose work it is contended has been performed by the assistant track foremen. The Carrier raises this point because the theory of the Organization in conference and in correspondence apparently has been that all track foremen whose positions were abolished had been improperly treated under the agreement. This theory is evidenced in the Statement of Claim prepared by the Organization, in which it requests that the abolished positions of track foremen be re-established.

Accordingly, if the Board should find that Rule 33 was violated, the Carrier feels that no more than two employes whose positions as track foremen were abolished would qualify for payment under the award.

In the event the Board decides that Rule 33 was violated, the Carrier wishes to submit for consideration of the Board the second paragraph of Rule 62 of the agreement effective between the parties, which is as follows:

> 'Time claims shall be confined to the actual pecuniary loss resulting from the alleged violation.'

It follows from the operation of this provision that the measure of damages imposed upon the Carrier in such event should be confined to the difference between the amount of compensation actually earned by such employes since the abolishment of the track foremen positions, in their performance of other duties in the employ of the Carrier, and the amount which such employes would have earned had they been continued in the positions of track foremen; but such amount will be restricted, in any case, to remuneration for days actually worked.

(b) If the Board should find that the duties presently comprehended in the assignments of assistant track foremen may validly be performed only by track foremen, the measure of damages to be imposed upon the Carrier with respect to such positions would be the difference between the compensation earned by the assistant foremen on Sections 17 and 38 and the compensation such employes would have earned had they been paid at the rate established for the position of track foreman. In the event of such decision, the Carrier requests that the Board include a Finding in which it interprets the term "immediate supervision" used in Rule 56 II(c), and another Finding in which it defines which duties it considers properly may be performed by assistant track foremen, in order that the Carrier may implement the Award without need of further interpretation."

The data herein have been discussed with the Organization either in conference or in correspondence.

OPINION OF BOARD: The facts relevant to a determination of this dispute appear to be as follows: On September 2, 1949, the Carrier bulletined two new positions of assistant track foreman to be created, respectively, on consolidated Sections 17 and 38 of its lines. Section 17 had been established through consolidation of former Sections 12, 14, 16, 19 and old 17. Section 38 had been established by a consolidation of former Sections 38, 39 and 41.

Obviously both new track sections were considerably longer than any of the previous components. Such groupings were made possible by various technological innovations, including the use of welded heavier rails and power-driven equipment, which made maintenance work more simple and less arduous and demanding. Considerably fewer laborers came to be nedded for a

given span of track, sidings, etc., on both main and branch lines. Management decided also that fewer track foremen were needed. Thus, whereas in 1942, on the average, 23 laborers and 5 foremen were employed on the five sections later consolidated into Section 17, in 1951 only 8 laborers, one foreman, and one assistant foreman were being used. Similarly, on the three sections merged into Section 38 in 1949, the 1942 employment averaged 16 laborers and 3 foremen, while the average 1951 employment was 8 laborers, one foreman and one assistant foreman. Man-hours of work dropped even more spectacularly.

On the same day on which the two assistant foremanships were bulletined the General Chairman of the Organization wrote the Carrier's roadmaster, requesting withdrawal of the new positions and implying the desirability of conference or bargaining thereon. Carrier's representative declined to so withdraw and bargain, and soon abolished the six "excess" foreman positions and established the two assistant jobs. After failure to obtain satisfactory adjustment from the Carrier, the Organization filed the above-stated claim with this Board. It is to be noted that the claim not only requests a decision that the Carrier has violated the agreement (by abolishment of the foremanships and by creation of assistant foremanships substantially similar in content to the former in September, 1949). It also asks restablishment of the abolished track foreman positions, restriction of assistant foremanships to the assignments defined in the agreement, and pecuniary compensation for all wage loss suffered by employes adversely affected by the abolition of the foremanships in September, 1949.

Both parties seem to agree that technological progress on the railroads is socially beneficial but that the legitimate interests of employes should be protected during times of technological change. So much is apparent from what is and is not contained in the agreement between them. There are no restrictions on carrier management's freedom to introduce and effectuate such changes at its own discretion. But Rule 33, quoted in the Parties' presentations, is designed to prevent managerial abuse of its prerogatives at the expense of the Organization's members. And, in respect to the instant case, Rules 56 II(b) and (c), also quoted above, attempt to promote this sort of protection by stating the contents of foreman and assistant foreman positions.

The question of whether in the instant case the Carrier has violated Rule 33 can receive a definite answer only if the work contents of foremanships and assistant foremanships in this branch of maintenance of way work existing before the change are known and can be compared with those existing after the change of September, 1949. From the evidence and arguments presented by the Parties such a comparison can not be strictly and precisely made. The Carrier argues that the new jobs conform to the requirements of Rules 56 II(b) and (c) while the Organization holds the reverse. The Carrier makes three main points: First, the average number of laborers under each foreman is not now very much larger than that under each foreman in the former component sections in 1942, and is somewhat less when the help of the assistant foremen is considered. Second, the present foremen do and the present assistants do not "report" to officials of the railroad; the present assistants are responsible to their respective foremen. Third, the present assistants on the consolidated sections are like all other maintenance of way assistant foremen, past and present; they help the foremen direct the work of laborers and they are under the "immediate" supervision of the foremen in the sense that the latter lay out the assistants' work and tell them what to do.

It is clear that the latter two arguments are based on the concept of relative role and status in a managerial hierarchy of line organization.

The Organization takes the position that, because a consolidated section can be as much as 40 miles long, a foreman cannot give immediate supervision to his assistant. The latter is too far away, too much on his own, even though subject to the general direction of the foreman and even though the assistant makes no written reports to any officials above his foreman.

It appears that under the Carrier's interpretation of Rule 56 II(b) and (c), lines of authority and responsibility can be rather easily adapted to technological change, whereas, under the Organization's interpretation, the minimum adaptation would be the creation of two foremanships in place of the two assistant foremanships. In other words, there would be two foremen on each of the consolidated sections. This might well be tantamount to creating two track sections in place of each of the consolidated sections which managerial discretion had decided were proper. Another possible adaptation might be the establishment of two rather than one assistant foremanships under the foreman on each of the new sections.

In any case the Organization is asking for a return to the pre-change status, presumably with a view to bargaining over the ultimate disposition of jobs under the consolidated set-up. It may well be regretted that, for the sake of good human relations, the Carrier did not confer with the Organization before instituting the changes. But the agreement between the Parties does not prohibit unilateral action by the Carrier, provided the protection of Rule 33 is maintained for the Organization's members. The main issue before this Board therefore has to be whether this Rule was violated.

On this question the burden of proof rests on the Organization. We do not think that the Organization has presented compelling reasoning or substantial factual evidence that the new positions of assistant foremen cover "relatively the same class or kind of work" as those of the discontinued foremanships. We do not agree that conceptually the term "immediate supervision" requires a foreman and his assistant on these sections to work in geographic adjacency in the sense stressed by the Organization. We presume that if the assistant foreman have in fact been doing foremen's work on these sections since 1949, the Organization would have collected and presented to us detailed factual information on the contents of the foremen's jobs and of their assistants' jobs which would establish beyond reasonable doubt that the respective positions are virtually the same. Actually the Organization's statements have been pretty much confined to deductive reasoning purporting to show that, because the new sections are much larger than the abolished ones, an assistant foreman **must** perforce operate like a foreman. It is almost as if the debate was over the prospective or anticipated results rather than the actual effects of the changes.

It follows, then, that in the light of the circumstances of this particular case as presented the Organization's claim must be denied in its entirety.

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 Employes involved in this dispute are respectively Carrier and Employes 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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 30th day of June, 1952.