

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement on Saturday, August 14, 1954, when it permitted Assistant Supervisor H. Jones to perform work of a Section Foreman on Section 3-NA, Memphis Division, from 11:00 A. M., to 2:00 P. M.;

(2) Section Foreman G. M. Blanton, regularly assigned to position of Foreman on Section 3-NA, Memphis Division, be allowed three (3) hours' pay at his time and one-half rate account of the violation referred to in part one (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Section Foreman C. M. Blanton is regularly assigned to and in charge of Section 3-NA, Memphis Division. On Saturday, August 14, 1954, a rest day of Section Foreman Blanton, a Sperry Car was operated over the Memphis Division. Three defective rails were found on Section 3-NA. Assistant Supervisor H. Jones called two (2) track laborers regularly assigned to Section 3-NA, and personally supervised and directed the work of drilling holes and applying joint bars to the three defective rails by these two track laborers, which work required three (3) hours time.

Section Foreman Blanton was available for duty on Saturday, August 14, 1954, but was not called.

The Agreement in effect between the two parties to this dispute dated August 1, 1947, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The Scope Rule of the effective Agreement, reads as follows:

(f) Claim is clearly **not** supported by the contract in evidence, the Board cannot do other than make a denial award.

All factual evidence submitted in support of Carrier's position has been made known to employe representatives.

Carrier, not having seen the Brotherhood's submission, reserves the right to present such additional evidence and argument as necessary.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts briefly stated are that on Saturday, August 14, 1954, Assistant Supervisor, admittedly not under the current agreement, called two section laborers, members of claimant's crew, to make some temporary repairs to track on claimant's section. The work took 3 hours and two laborers were paid. On the following Monday, claimant and his crew made the repairs permanent.

Claimant relies on Rule 30-1 of the Forty Hour Week Agreement which reads as follows:

"(13) **Work on Unassigned Days**—Where work is required by carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employe."

There is no doubt that claimant was covered by this rule. But, says the Carrier, past practice has not followed the rule insofar as track foremen are concerned in circumstances such as appear here because such practice has taken the work here involved out from under the Scope Rule of track foremen. Carrier has filed 71 affidavits to support this contention.

We do not believe that they are effective in accomplishing the result that the Carrier contends in this case.

Whatever else this involved work may have been, it was in its very essence track supervision which has been the peculiar, if not the exclusive function of a section foreman, and the fact that it was temporary (not an emergency) did not take it away from the claimant in this case.

In a special memorandum agreement, copy of which is printed on page 148 of the "Agreement between Southern Railway Company * * * and Maintenance of Way Employes, effective August 1, 1947" it states inter alia "Applicable to Foremen's and Laborers' Agreements * * * It is understood that we have no qualified men in this work except those recently taught, but they are to be considered as coming within the scope of the agreement with the Maintenance of Way employes."

This is made specifically applicable to foremen. Would anyone attempt to argue that the work of these new employes should be placed "within the scope of the agreement" and that of the older employes taken out? Hardly.

Anyone at all familiar with the railroad industry in this country knows that supervision of section laborers by the section foremen is as old as the industry itself, and if it were necessary for the identical work on Monday, it was necessary on the preceding Saturday. In one of the awards (6699) relied upon by the Carrier (a denial award) appears this language—

"Neither is this a case such as was before us in Award 3822, cited by the Organization. There a Foreman from another section was called for overtime work on Claimant's section in a non-emergency, thus depriving the Claimant of extra work. The claim was properly sustained. * * *"

Denial in Award 6699 was predicated upon an emergency. An emergency is not claimed in the instant case.

Our conclusion is that the Carrier violated the Agreement and the claim should be sustained.

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 Employee involved in this dispute are respectively carrier and employee 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 violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 18th day of June, 1959.

DISSENT TO AWARD NO. 8849, DOCKET MW-8063.

In this Award, the majority has compounded error upon error;

In the first paragraph of the Opinion, the mere unsupported assertion of Employees that the Assistant Track Supervisor called two section laborers to make temporary repairs to track is accepted as fact. The only alleged support furnished for that assertion is letter of "eye-witness W. L. Norwood", Vice Chairman-Secretary of the M. of W. Organization, wherein he states,—

"* * * the Ass't. Supervisor called two laborers * * *."

"Mr. Blanton (Claimant Section Foreman) called me while this work was going on and I went over and stayed with them until the work was finished * * *."

and certainly this so-called witness did not witness the Ass't. Track Supervisor call the two section laborers as he had no knowledge of the work's performance until called by the Section Foreman "while this work was going on". Also, it is entirely out of reason to hold this letter to nullify Carrier's statement that the second laborer was called by the laborer accompanying the

Ass't. Track Supervisor on his motor car, and that both laborers actually performed the temporary repairs, not otherwise refuted in substance.

Since these temporary repairs were performed on Claimant Section Foreman's territory on the first of his rest days (Saturday), there is no question but that, had the Claimant Section Foreman been called to supervise its performance such service would have constituted work on an unassigned day. However, the work was performed at the direction, but not under the supervision of the Ass't. Track Supervisor. There can be no question but that an Ass't Track Supervisor and any other official, not embraced within the scope of a craft Agreement, may direct that certain work be performed. The laborers performed the temporary repairs without supervision. The defective rails were in yard tracks, and Carrier exercised its prerogative in determining that temporary repairs should be made at once to protect any movements made over them during the week-end (permanent repairs were not made until Monday during the regular assigned hours of the section gang); also, that Foreman supervision was not required. There is no showing as to what work the Foreman could have performed if he had been called. Neither the Scope Rule, nor any other Agreement rule, requires that a Section Foreman accompany laborers in his charge and supervise any and all work performed by them. Since such Foreman action is not required by rule and was not utilized here, this claim should have been denied under Rule 49—

"Except as provided in these rules, no compensation will be allowed for work not performed."

Ample Award authority was furnished that Section Foremen are not required, in general, to so accompany and supervise laborers in their charge, and many affidavits were furnished with respect to the practice on this property in that respect. Rather than follow the long established principle of this Board that practice controls when considering Scope Rules, such as here, that do not define the work reserved to job classifications listed, the majority has erroneously chosen to hold that the mere listing of the "Track Sub-department Foremen" job classification in the applicable Agreement's Scope Rule gives such Foremen the right, without exception, to accompany and supervise laborers in their charge in the performance of any and all work. This is absurd, and contrary to the express provisions of Agreement Rule 61,—

"It is understood and agreed that this agreement cancels all previous agreements, rules relating to working conditions and interpretations which are not attached hereto (except certain memoranda relating to veterans which are not attached but are continued in effect), **but does not, except where rules are altered, amended or changed, alter past, accepted and agreed to practices not in conflict herewith.**" (Emphasis added.)

of the Agreement here applicable, and which, in substance, was contained in Rule 62 of the Parties' September 16, 1929 Agreement and continued as Rule 58 of their last previous Agreement "Effective August 1, 1940."

It is common knowledge that Section Foremen's territories are comprised of several miles of track and that they are assigned varying numbers of section laborers. While admittedly there are many jobs required of a Section Foreman that require the use of all or most of the men in his gang at one point, there are also many instances where many jobs are required at various points during the same period of time and it would obviously be impossible for the Section Foreman to accompany and supervise each of the laborers in their

separate tasks at separate points, e. g., Section Foremen do not accompany Section Laborers patrolling track, tunnel watchmen, and crossing watchmen, among others.

The majority place themselves in a difficult and untenable position when they accept the obviously incorrect statement of the Organization's "eye-witness" W. L. Norwood as to the calling and supervision of these laborers, and entirely disregard the affidavits offered by Carrier, and not substantially refuted by the Employes, with respect to the practice of not having Foremen, in all instances, accompany and supervise laborers in their charge in the performance of work assigned to them.

The so-called "special memorandum agreement", listed at page 148 of the applicable Schedule Agreement, has absolutely no connection with this case and its introduction in it is ridiculous. That agreement is captioned "Track Repairmen" which is therein defined---

"This term embraces those men who are building up rail ends, repairing frogs and switches and doing other work in the track by the Oxy-Acetylene method."

There is not even a reference in this case to Oxy-Acetylene welding.

While the author of this Award attempts to speak as though entirely familiar with the Railroad Industry and its workings, all the conclusions reached in this Award bespeak a complete lack of familiarity therewith.

For the foregoing reasons, the undersigned dissent.

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ J. E. Kemp

/s/ J. F. Mullen