

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Coburn, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CENTRAL OF GEORGIA RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when, on April 7, 1958, a work train was operated on Savannah Division between Macon and Tennille, Georgia, for the purpose of picking up old cross ties and other scrap track material with a crew of three track laborers, but no section or extra gang foreman assigned; the track supervisor being permitted to perform the duties of a track foreman.

(2) Track Foreman Carlton Murphy be paid extra gang foreman's pay for each work day in the month of April, 1958, beginning with April 7th, at the rate applicable to extra gang foreman's position as set forth in Rule 34 establishing rates of pay.

EMPLOYEES' STATEMENT OF FACTS: On April 7, 1958, the Carrier assigned Track Supervisor M. C. Chitty to supervise Track Laborers F. Salters and W. King, who were regularly assigned on M S Gang No. 2 and Track Laborer H. Lewis, who was assigned to Section No. 1 at Millen, Ga., in the performance of the work of picking up or loading old cross ties and other scrap track material on a work train operated on the Savannah Division between Macon and Tennille, Georgia, on that date.

The Claimant, Mr. Carlton Murphy, who holds seniority as a Track (Section and Extra Gang) Foreman on the Savannah Division, but who was in furloughed status, was available, fully qualified and could have performed the extra gang foreman's duties assigned to the track supervisor.

The Agreement violation was protested and the instant claim filed in behalf of the Claimant. The Claim was declined as well as all subsequent appeals.

The Agreement in effect between the two parties to this dispute dated September 1, 1949, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Rule 1, captioned "Scope," reads as follows:

For example, in Third Division Award No. 6007, Referee Messmore, it was held:

"In determining the rights of the parties, it is our duty to interpret the applicable rules of the parties' agreement as they are written. It is not our privilege or right to add thereto. See Award 4435."

In Third Division Award No. 6828, Referee Messmore, it was held:

"The authority of this Division is limited to interpreting and applying the rules agreed upon by the parties. If inequities among employes arise by reason thereof, this Division is without authority to correct them, as it has not been given equity powers. In other words, we cannot make a rule or modify existing rules to prevent inequities thus created. Renegotiation thereof is the manner provided by the Railway Labor Act, which is the proper source of authority for that purpose. See Award 5703. See, also, Awards 4439, 5864, 2491.

"The burden of establishing facts sufficient to require or permit the allowance of a claim is upon him who seeks its allowance." See Awards 3523, 6018, 5040, 5976."

And there are many more identical awards on this point, such as Third Division Nos. 7870, 7718, 7653, 7440, 7422, 7153, 7166, 7101, 7093, 7068, etc.

The Board, having heretofore recognized the limitations placed upon it by law, and that it does not have authority to grant new rules, and will therefore not attempt to further restrict Carrier's rights, there is ample reason for a denial award for this sole reason, if for no other.

CONCLUSION

It having been proven that—

(1) The Carrier did not violate the effective Maintenance of Way Agreement on Monday, April 7, 1958, in having 3 laborers perform their customary work of helping load second-hand cross ties on Carrier's Savannah Division;

(2) The management has not negotiated away its inherent right to determine its supervisory requirements and thus determine when supervision is needed in the utilization of laborers to load cross ties;

(3) Performance of the work in the manner indicated was in conformity with past, accepted and agreed-to practices, all of which is proven by probative evidence;

(4) The Board is without authority to grant the new rule here demanded, and has so recognized in numerous prior awards;

(5) Claim is clearly not supported by the Agreement in evidence; the Board cannot do other than make a denial award.

(Exhibits not reproduced.)

OPINION OF BOARD: On April 7, 1958, three track laborers were detached from their respective gangs and assigned to a work train engaged in loading cross ties by means of a dragline. Their work consisted of hooking the dragline cables onto bundles of ties and unhooking them after the ties had been loaded on gondola cars. No track foreman was assigned to supervise the laborers, but a track supervisor (not covered by the Agreement) was present and in charge of the overall operation.

In addition to the basic Agreement effective September 1, 1949, there is in evidence a special Agreement dated January 30, 1957. Paragraphs numbered 1 and 2 of Section 6 are applicable here, and read as follows:

"6. In lieu of the Employees' Proposed Rules 7½ and 19½ is adopted:

1. Work will be assigned to the proper classes of employees of their respective seniority sub-departments as provided for in Rules 1 and 2 and other rules relating thereto of agreement effective September 1, 1949, and except as provided in Paragraph 5 will be under the supervision of a foreman of their respective class who will also be required to keep the time of all employees under his supervision.

2. It is agreed that on or before March 1, 1957, a section foreman together with such force as deemed necessary by the management will be initially assigned to each supervisor's district as now established. In addition to the laborers assigned to the section foremen at their headquarters, there may be additional laborers assigned to outlying points not to exceed two (2) at any one location and not to exceed six (6) on the Savannah Division, fourteen (14) on the Macon Division and fourteen (14) on the Columbus Division. The laborers assigned to outlying points will be a part of some designated section gang."

There are two dispositive questions confronting the Board in this dispute: First, whether the quoted language of the 1957 Agreement required the Carrier to assign a foreman to supervise the work of the laborers; second, whether the track supervisor did, as alleged, actually supervise the laborers.

As to the first question, it appears from the record that the Brotherhood during negotiations leading to the consummation of the 1957 Agreement, sought unsuccessfully to include a requirement that the work be performed under the "direct" supervision of a foreman. Had that requirement been agreed to, the rule would have to be read to mean that a foreman must be present at all times and at every place where covered employees worked. That requirement was considered and rejected by the parties when they entered into the Agreement. This Board may not now supply what the parties themselves failed to include. (Awards 5079, 7153, 10425, 12192.) Accordingly, we find that the applicable and controlling rule (*supra*) does not contemplate the direct supervision of covered employees by foremen. Nor does it require the presence of a foreman to direct and supervise the work wherever or whenever it is performed. This conclusion stems from the Board's examination of the language of paragraph 2 of the Agreement which, on its face, indicates that covered employees may perform assigned work without a foreman being present.

As to the second question, the Petitioner has the burden of showing by evidence of probative value that the track supervisor did, in fact, supervise the actual work performed by the laborers. The undisputed fact that he was present is not sufficient. Nor is it enough merely to assert that he did; particularly where, as here, the assertion is denied. The lack of evidence of probative value to support Petitioner's allegation leaves the Board in the position of having to decide the issue on speculation and assumption. This we cannot do. It must be held, therefore, that Petitioner has failed to meet the requirements of the burden of proof doctrine. (See Award 12244, same parties and similar facts.) Accordingly, we find that the track supervisor did not supervise the laborers, as alleged.

In view of the foregoing, this claim is denied.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of April 1964.