

Award No. 12844
Docket No. MW-12792

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Robert J. Ables, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
GEORGIA SOUTHERN AND FLORIDA
RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when, on July 30, 1960, it permitted an assistant division engineer, a track supervisor and an assistant track supervisor to perform the usual and customary work and duties of track foremen and track laborers.

(2) The decisions by the Division Engineer and by the Chief Engineer, MW&S, were not in compliance with the requirements of Section 1 (a) and 1 (c) of Article V of the August 21, 1954 Agreement because of failure to give reasons for disallowance of the above-mentioned claim.

(3) Because of the violations referred to above, the Carrier now be required to allow the claim as was presented in a letter reading:

"203-W-Moore St.,
August 13, 1960

Mr. P. A. Perkins, Division Engineer,
Southern Railway Company
Southern Railway Office Bldg.,
Atlanta, Georgia

Dear Sir:

I understand that Train No. 62, got two engines off of the track at Adel, Ga. on the Adel Warehouse track July 30, 1960 and Mr. John H. Hall, Assistant Division Engineer, Mr. J. R. Goodman, Supervisor, Mr. C. E. Byars, Assistant Supervisor, Henry Napper and Tommie Jackson, Laborers, helped re-rail these engines and repaired the track.

Will you please accept this as a time claim for the following employees as they should have been called to do this work that was done by officials who do not hold any seniority in the Roadway Department, R. J. Amerson, Julius Oliver, J. W. Troy, Laborers, and H. F. Mullis, Foreman. This claim is for three hours each at the overtime rate; please advise.

cc: Mr. J. H. Hall, Assistant Division Engineer
Mr. H. C. Crotty, President
Mr. J. H. Hadley, Vice-President

Very truly yours,

/s/ J. W. Simpson
General Chairman"

EMPLOYEES' STATEMENT OF FACTS: The Claimant employees are regularly assigned to work on Mondays through Fridays, with rest days of Saturdays and Sundays. They are regularly assigned to and held responsible for properly maintaining and repairing tracks on this Carrier's property and are generally used to assist in the rerailling of cars or locomotives which become derailed.

On Saturday, July 30, 1960, two diesel units were derailed on the Adel Warehouse track. Assistant Division Engineer Hall, Supervisor Goodman, Assistant Supervisor Byars and Track Laborers Henry Napper and Tommie Jackson were used to help reraill the Diesel units and to make necessary repairs to the tracks. In addition to assisting in the aforementioned work, the Assistant Division Engineer, the Supervisor and the Assistant Supervisor also supervised and directed the two track laborers in performing the aforementioned work. The Claimants were available but were not called.

Consequently, claim was presented as set forth in Statement of Claim and it was declined in a letter reading:

"Atlanta, Georgia
September 9, 1960

Mr. J. W. Simpson
General Chairman, BofMofW Employees
203 W. Moore Street
Valdosta, Georgia

Dear Sir:

Receipt is acknowledged of your letter dated August 13, 1960, reading as follows:

'I understand that Train No. 62 got two engines off of the track at Adel, Georgia, on the Adel Warehouse track July 30, 1960, and Mr. John H. Hall, Asst. Div. Engr., Mr. J. N. Goodman, Supervisor, Mr. C. E. Byars, Assistant Supervisor, Henry Napper, and Tommie Jackson, Laborers, helped reraill these engines and repaired the track.

Will you please accept this as a time claim for the following employees, as they should have been called to do this work that was done by officials who do not hold any

fit. For wrecks and derailments within the yard limits sufficient carmen will be called to perform the work if their services are needed."

If the Board has any notion of giving serious consideration to the contention made by the Brotherhood's General Chairman, then employes of the carmen's class or craft would be involved in the dispute within the meaning of Section 3 First (j) of the Railway Labor Act reading:

"Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employe or employes and the carrier or carriers involved in any disputes submitted to them."

In this connection, however, Carrier emphatically denies that any of the persons named by the Brotherhood's General Chairman helped rerailed the two derailed diesel-electric locomotive units. In fact, as heretofore shown, the diesel-electric locomotive units were rerailed by 3:00 P. M., and the two track laborers called and utilized in making repairs to the damaged track were not called until 4:00 P. M. They were, therefore, not in the immediate vicinity of the derailed locomotive units when they were rerailed.

The evidence of record is crystal clear that the effective agreement was not violated as alleged by the Brotherhood and that the claim is without basis.

CONCLUSION

Carrier has shown that:

(a) Claim should be dismissed by the Board for want of jurisdiction because (1) it was not presented and handled through the usual appeal channels on the property as required by the Railway Labor Act and Rules of Procedure of the Adjustment Board, (2) the Brotherhood has waived any right to now cite Article V of the Agreement of August 21, 1954, which it now relies upon, and (3) the Brotherhood is now barred from creating issues at variance with the issues from what they were on the property.

(b) The effective agreement was not violated as alleged by the Brotherhood, and the claim is without basis.

The above expressed conclusions under (a), being fully supported by prior awards of the several Divisions of the Board, claim should be dismissed by the Board for want of jurisdiction. However, if, despite this fact, the Board assumes jurisdiction, it cannot do other than make a denial award, for an award of any other type would be contrary to the effective agreements.

(Exhibits not reproduced.)

OPINION OF BOARD: The issue in this case is whether an unassigned track foreman and three Maintenance of Way Laborers should be paid at overtime rates for certain track repair work actually performed by two regular laborers on a Saturday, a rest day for these employes.

The essential facts are that two diesel units which had been derailed were rerailed by Mechanical Department forces; and, within a three-hour period, three rails in the track were re-spiked and guard rails adjusted by two track laborers who were regularly employed by the Carrier. All of this work was done under the supervision of management personnel.

Employees first based their claim on the work done to re-rail the engines and repair the track. Later, the claim was limited to the repair work. With respect to this work, the Employees maintain that it is traditional in the railroad industry for a foreman to direct and supervise the work of others and that, accordingly, it was not proper for the Carrier's officials to perform foreman's work. As for the track laborers, the Employees contend that the Claimants should have been called because they held greater seniority than the track laborers who were called.

The Carrier's position is that management reserves the right to use track foremen for rail repair work of this kind and that in this case a foreman was not required. Further, the Carrier maintains that since it called two regularly employed track laborers instead of unassigned employees, it had satisfied the requirements of the Laborers' Agreement.

In our opinion, the Carrier violated the Foreman's Agreement when it did not call a track foreman to supervise the work of the track laborers who repaired the track and guard rails. The Carrier, however, did not violate the Laborers' Agreement under these circumstances.

Although the Scope Rule for Foremen does not describe work, it is well established that work content for employees covered by the Agreement is determined by the work such employees customarily do. It is the very essence of track supervision that a foreman be on the job. See Award 8849. Except in unusual circumstances, not present here, such track supervision work cannot be performed by management. Therefore, the Carrier violated the Agreement when it used management officials to supervise the track repair work and did not call a track foreman to supervise the work of the laborers.

The Carrier was under no obligation to call Claimant laborers, however. All of these laborers were unassigned. The rules on work on Unassigned Days is that the Carrier may use available extra or unassigned employees who will otherwise not have 40 hours of work in a week. It could, however, as it did here, elect to use regular employees, where work is required by the Carrier to be performed on a day which is not part of any assignment, and pay the penalty overtime rate. Therefore, the Agreement as to the Claimant laborers was not violated.

The Employees and the Carrier discussed at length in the record before the Board the procedural question whether the claims should be sustained because of the Carrier's admitted failure to give reasons for denying the claims, as required by Article V of the August 21, 1954 Agreement. The Employees' contention that the claims should be so sustained was not advanced in the latter stages of this proceeding in recognition of recent awards (relied on here) which hold that rights under Article V are procedural and not jurisdictional in character and if not asserted on the property, as they were not asserted here, such rights are waived. Awards 10684 and 11178 and Second Division Award No. 3858. Accordingly, Employees' position that the claim should be sustained by reason of Carrier's failure to observe the requirements of Article V of the 1954 Agreement should be denied.

Another procedural question raised by the Employees in this proceeding is whether the time claim of the foreman and three Maintenance of Way Laborers for the track repair work should be sustained because—it is alleged by the Employees—the highest official designated to act on claims defended against the claim for re-rail work only, and, consequently, abandoned any defenses Carrier may have had against the track repair work.

Aside from the matter that this contention could not be sustained because it was not raised on the property, it cannot be sustained because the Carrier did not, in fact, abandon its defenses against the time claim for the rail repair work.

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 violated in part.

AWARD

The claim is sustained only with respect to the time claim of Track Foreman H. F. Mullis. It is denied as to the other Claimants.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of September 1964.