

Docket No. 13573

Docket No. MW-12822

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**SOUTHERN PACIFIC COMPANY
(Pacific Lines)**

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

(1) The Carrier violated the effective Agreement when it assigned other than a Section and Extra Gang Foreman to perform the usual and traditional duties and responsibilities of a Section and Extra Gang Foreman on February 26, March 1, 2 and 30, April 6 and May 4, 1960.

(2) The senior furloughed Section and Extra Gang Foreman on the Portland Division be allowed the exact amount lost because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Traditionally, the duties and responsibilities of employees in repairing rail joints, including insulated rail joints, has been among the duties and responsibilities of Section and Extra Gang Foremen.

Nonetheless, on February 26, March 1, 2, and 30, April 6 and May 4, 1960, the Carrier assigned Signal Department employees, who hold no seniority rights under the provisions of this Agreement, to assume the responsibility and duties of a Section and Extra Gang Foreman in supervising employees in repairing insulated rail joints on the Portland Division.

Consequently, the subject claims were properly presented to the officer authorized to receive said claims, but were declined in letters reading:

"SOUTHERN PACIFIC COMPANY

Union Station, Portland 9, Oregon

013-293

May 2, 1960

**Mr. Van F. Peterson
Division Chairman, BofMofWE
737 East E. Street
Springfield, Oregon**

Building Supervisor. The Organization requests that Carrier be required to assign a painter foreman at Waterloo.

It is plain from the record that the B&B Supervisor designates the work to be done by the painter, but he does not instruct the painter or direct him in the details of the work. Under these circumstances, the B&B Supervisor is not doing the work of a painter foreman. We point out also that the agreement does not require the assignment of a foreman. The need of supervision, in the absence of agreement provisions to the contrary is a matter within the prerogatives of management. Awards 4235, 4992, 6114, 6699. It appearing that Carrier does not deem the assignment of a foreman necessary and there being no employee wrongfully performing the duties of a foreman, there is no basis for an affirmative award."

CONCLUSION

Carrier submits it has clearly shown the within claim to be entirely lacking in merit and asks that it be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: On February 26, March 1, 2 and 30, April 6 and May 4, 1960, Carrier assigned an extra gang laborer to accompany Signal Department employes and perform work of removing spikes, bolts and angle bars to permit the repair of insulated rail joints by the Signal Department.

The senior furloughed Section and Extra Gang Foreman makes claim that Carrier violated the Agreement when it failed to assign him to supervise the extra gang laborer in performing this work. He takes the position that the track laborer on the dates in question performed work under the supervision of a Signal Foreman or a Signal Maintainer, employes outside the Agreement. He contends that the Scope Rule reserves this work to Track Foremen and that track laborers' work must be performed under the supervision of the Foreman of the same classification group, namely, a Section Foreman or Extra Gang Foreman.

In its denial Carrier urges that since the Scope Rule is of the general type which does not reserve to the Track Foreman the exclusive right to supervise track laborer in performing work incidental to the repair of rail joints, Claimant must prove exclusively by custom, practice, and tradition. It maintains that this party has failed in its proof. On the other hand, it submits that past practice supports its own action of assigning track laborers to perform work in connection with the renewal of insulation joints by Signal employes without the presence of a Section or Extra Gang Foreman. It asserts that it is management's prerogative to determine the amount of supervision to be employed in the performance of work.

No provision of the Agreement, including the Scope, requires Carrier to assign a Foreman to be present and to supervise the track laborer in the performance of all of his duties. Although both parties have presented numerous affidavits to support their position of past practice, these documents cannot be considered because they were not presented on the property.

In the instant case, the extra gang laborer was directed by his Foreman to perform the required track work. The fact that his Foreman was not present and that his work was done in the presence of Signal Maintainer or Signal

Foreman does not lead us to the conclusion that he lacked supervision or direction from his Foreman or that he received supervision from Signal employees. In the absence of provisions in the Agreement requiring a Foreman to be present to supervise the track laborer in performing the work and in the absence of proof of past practice, it is in the discretion of Carrier to determine when and under what circumstances a Foreman is to be assigned to supervise the workers. In this instance, Carrier exercised its prerogative in determining the amount of supervision he required. The claim is therefore 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 of the parties 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 30th day of April 1965.