



Award No. 15733
Docket No. MW-16306

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when, beginning with October 22, 1964, it:

(a) used Assistant Track Inspector J. E. Moore as a track inspector, but compensated him therefor only at the assistant track inspector's rate of pay,

(b) used Extra Gang Laborer Virginus Pointer as an assistant track inspector and compensated him therefor only at the extra gang laborer's rate of pay.

[System Case No. N-907, File 53-431-2]

(2) For the period covered by the above-mentioned violation:

(a) Claimant J. E. Moore be paid the difference between what he should have been paid at the track inspector's rate (\$441.83 per month) and what he was paid at the assistant track inspector's rate (\$396.34 per month),

(b) Claimant Virginus Pointer be paid the difference between what he should have been paid at the Assistant Track Inspector's rate (\$396.34 per month), and what he was paid at the Extra Gang Laborer's rate (\$2.1778 per hour).

EMPLOYEES' STATEMENT OF FACTS: Beginning on October 22, 1964, the Carrier required Track Inspector Cloyce Templeton to temporarily leave his position as track inspector for the purpose of supervising the work of Extra Gangs Nos. 30 and 32, which were engaged in the work of surfacing switches, applying ties, and lowering tracks under various viaducts. He continued such supervision through December 9, 1964. Claimant J. E. Moore is the assistant track inspector regularly assigned to work with Track Inspector Templeton. During the period that Mr. Templeton was engaged in other duties with the extra gangs, Claimant Moore used a motor car to patrol (inspect) tracks on the territory assigned to Mr. Templeton. The Carrier assigned Extra Gang Laborer Virginus Pointer to assist Claimant Moore during this period (except on November 16, 17, 18, 19 and 20, when

The General Chairman disputed the facts stated by the Carrier, but offered nothing in support of the claim, and indicated the only definite knowledge possessed was the fact that Track Inspector Templeton was with an extra gang during the period claimed. Carrier pointed out that the agreement did not restrict the duties of track inspector to patrolling track on motor car, nor did it reserve exclusively to track inspectors and assistant track inspectors the work of patrolling track, and the fact that the track inspector did not patrol track on dates alleged was not evidence that the Assistant Track Inspector or anyone else patrolled the track, or if they did patrol track that they acted in the capacity of track inspector and assistant track inspector. Carrier also pointed out that the claim was barred, as it was vague as to dates of claim and work on which claim was based.

The claim was denied. Exhibits 2-11, inclusive, are copies of correspondence showing the handling of the claim on the property.

Exhibits Nos. 1 to 14, inclusive, are attached hereto and made a part hereof.

The applicable schedule agreement is that with the Brotherhood of Maintenance of Way Employees effective September 1, 1947, as amended by Supplemental Agreement effective September 1, 1949, relating to the 40-hour week, copies of which are on file with the Board.

(Exhibits not reproduced.)

OPINION OF BOARD: Petitioner avers that beginning October 22, 1964 through December 9, 1964, Claimants performed the regular duties of a track inspector while the regular incumbent of the position of track inspector was on temporary leave and performing other duties.

In the first instance, Carrier contends that the claim is defective in its entirety because Claimants did not perform the work alleged on October 22, 1964, the only specified date in the claim, and further that the parties do not agree concerning subsequent and intermittent dates on which disputed work was allegedly performed by Claimants.

Petitioner concedes that the parties are not in agreement as to all facts upon which the instant claim is bottomed, but insists that on some dates after October 22, 1964, Claimant Moore worked on the inspector's job and that Claimant Pointer worked with him as an assistant track inspector.

The record discloses that Petitioner presumed that Claimants worked together on the same dates that Track Inspector Templeton worked with an extra gang, but has failed to offer probative evidence to support its contentions. Carrier denies that Claimants performed disputed work during the entire period encompassed by the claim and contends that Claimants patrolled track only on specified dates during October, November and December, 1964. Although the instant claim lacks specificity, Section 3 of Article V of the August 21, 1954 Agreement allows the filing of one claim "for an alleged continuing violation of any Agreement." This Board previously has held that a "continuing violation" need not be on a "consecutive day" basis (Award 10379). Here, Carrier concedes that Claimants used a motor car to patrol tracks on the territory of an inspector on various dates between October 26, 1964, and December 9, 1964, and Petitioner asserts that such work belongs to Track Inspectors. Carrier has submitted information con-

cerning specific dates on which Claimants performed such work, which can be readily substantiated through Carrier's records. Consequently, we are compelled to deny Carrier's motion to dismiss the claim.

Petitioner asserts that a Memorandum of Agreement between the parties, effective December 1, 1963, requires the Carrier to assign the work of inspecting tracks to Track Inspectors, and that Carrier's use of Claimant Moore to perform such work entitled him to receive the higher rate of an Inspector. Furthermore, Petitioner contends that Claimant Pointer assumed the regular duties of Claimant Moore during the period in question because he worked with him on track inspection assignments. Carrier denies that the Memorandum of Agreement limits patrolling track to positions classified as Track Inspector. The pertinent language of said Agreement is found in Sections 1 and 2, which provides that Carrier "may establish one or more positions classified as Track Inspector . . ." and may assign "duties of inspecting tracks and ties . . ." to such positions. It is apparent that the applicable language is permissive, not mandatory, and cannot be construed as granting track inspectors an exclusive right to such work.

Carrier has offered competent evidence that other employees, such as section laborers, have been required to patrol track (Award 3435), and that some sections of its system are not inspected by track inspectors. Moreover, Carrier avers that the regularly assigned Track Inspector was not relieved from that position on October 22, 1964 or on other days during the claim period, but was merely assigned additional duties.

The Scope Rule of the basic Agreement between the parties is general in nature, and does not detail work which employees will perform. This Division has consistently held under similar Scope Rules that Claimants have the burden of establishing through competent evidence that disputed work is historically and customarily performed by a particular classification of employees to the exclusion of all others (Award 11598, 11128, and others). Here, Petitioner has failed to sustain its burden of proof, and the instant claim must be 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 14th day of July 1967.

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