

Award No. 16039

Docket No. MW-16541

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
THE DELAWARE AND HUDSON RAILROAD CORP.

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

1. (a) The Carrier violated the Agreement when it did not allow Assistant Extra Gang Foreman Pietro Sparano pay at the extra gang foreman's rate for work performed during the period of October 19, 1964 to November 20, 1964, both dates inclusive. (System Case 3.65 MW)
- (b) Assistant Extra Gang Foreman Pietro Sparano be allowed the difference in pay between what he did receive at the Assistant Extra Gang Foreman's rate and what he should have received at the Extra Gang Foreman's rate for the work performed during the period of October 19, 1964 to November 20, 1964, both dates inclusive.
2. (a) The Carrier further violated the Agreement when it did not allow Assistant Extra Gang Foreman Leland Glover pay at the extra gang foreman's rate for work performed during the period of August 27, 1964 to October 2, 1964, both dates inclusive. (System Case 4.65 MW)
- (b) Assistant Extra Gang Foreman Leland Glover be allowed the difference in pay between what he did receive at the Assistant Extra Gang Foreman's rate and what he should have received at the Extra Gang Foreman's rate for the work he performed during the period of August 27, 1964 to October 2, 1964, both dates inclusive.
3. (a) The Carrier further violated the Agreement when it did not allow Assistant Extra Gang Foreman Leland Glover pay at the extra gang foreman's rate for work performed during the period October 5, 1964 to November 20, 1964, both dates inclusive. (System Case 5.65 MW)
- (b) Assistant Extra Gang Foreman Leland Glover be allowed the difference in pay between what he did receive at the Assist-

ant Extra Gang Foreman's rate and what he should have received at the Extra Gang Foreman's rate for the work performed during the period of October 5, 1964 to November 20, 1964, both dates inclusive.

4. (a) The Carrier further violated the Agreement when it did not allow Trackmen Lawrence Collins and Maxwell Boyle pay at the extra gang foreman's rate for work performed by Trackman Collins on September 29, 1964 and October 1, 1964 to October 30, 1964, both dates inclusive, and for Trackman Boyle on November 2, 1964 to November 13, 1964, both dates inclusive. (System Case 6.65 MW)

(b) Trackman Lawrence Collins and Maxwell Boyle be allowed the difference in pay between what they did receive at the Assistant Extra Gang Foreman's rate and what they should have received at the Extra Gang Foreman's rate for the work performed by Trackman Collins on September 29, 1964 and October 1, 1964 to October 30, 1964, both dates inclusive, and for Trackman Boyle on November 2, 1964 to November 13, 1964, both dates inclusive.

EMPLOYEES' STATEMENT OF FACTS: Claimants Pietro Sparano and Leland Collins are regularly assigned as Assistant Extra Gang Foremen. Claimants Lawrence Collins and Maxwell Boyle are regularly assigned Trackmen.

Each of the aforementioned Claimants was assigned the work of directing the activities of a track equipment operator, raising track at various locations for a spot tamper and making various reports, during the periods listed below:

Pietro Sparano from October 19, 1964 to November 20, 1964, both dates inclusive.

Leland Glover from August 27, 1964 to October 2, 1964, both dates inclusive, and from October 5, 1964 to November 20, 1964, both dates inclusive.

Lawrence Collins September 29, 1964, and from October 1, 1964 to October 30, 1964, both dates inclusive.

Maxwell Boyle from November 2, 1964 to November 13, 1964, both dates inclusive.

For the services they performed as Extra Gang Foremen, the Claimants were paid at the Assistant Extra Gang Foreman's rate.

Claim was timely and properly presented and handled by the Employees at all stages of appeal up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated November 15, 1943, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: The claimant named in Item 1 of this dispute, Assistant Extra Gang Foreman Pietro Sparano, was assigned on the dates involved in this portion of the claim as one of two Assistant Extra Gang Foremen in Extra Gang No. 227, Whitehall, New York. During all of the time involved in this portion of the claim, the normal complement of the gang in question consisted of Extra Gang Foreman John Pellegrino, two (2) Assistant Extra Gang Foremen, and seven (7) trackmen.

Assistant Extra Gang Foreman Leland Glover is the claimant named in Items 2 and 3 of this dispute as submitted to the Board by the Organization. Carrier records indicate that during the period covered by these portions of the claim, i.e., August 27, 1964 to October 2, 1964, inclusive, in Item 2 and October 5 through November 20, 1964, inclusive, in Item 3, the named claimant was assigned to work with Extra Gang No. 203 at Thompson, Pennsylvania. This extra gang was under the direct supervision of Extra Gang Foreman Peter Zenewicz, and the number of men assigned to the gang fluctuated based on the work which the gang was programmed to accomplish. Carrier records indicate that the normal complement of the gang consisted of an Extra Gang Foreman, one Assistant Extra Gang Foreman and five trackmen. However, during certain portions of the period covered by Items 2 and 3, two additional Assistant Extra Gang Foremen were added to the gang, and the number of trackmen assigned to the gang was increased to take care of the additional work load. At all times during the period covered by the claim as set forth in Items 2 and 3, all work performed by employees assigned to Extra Gang No. 203 was performed under the supervision and direction of Extra Gang Foreman Peter Zenewicz.

Item 4 of this dispute covers work performed under the supervision of Extra Gang Foreman Foster J. Alphonse, of Extra Gang No. 240 at Port Henry, New York. During the entire period of time covered by this portion of the claim, Mr. Alphonse was assigned as Extra Gang Foreman with a gang consisting of himself, one assistant extra gang foreman, the claimants named in this portion of the claim, and 8 trackmen. On September 29, 1964, and during the period October 1 through October 30, 1964, claimant Lawrence Collins was assigned to the gang as an Assistant Extra Gang Foreman, and claim has been made in his favor covering this period. During the period November 2 through November 13, 1964, Collins was relieved on vacation, and his duties as Assistant Extra Gang Foreman of Extra Gang No. 240 were assigned to claimant Maxwell Boyle, in whose behalf claim has been lodged for this latter period.

In each of the instances made subject of claim herein, the claimant was assigned by his foreman to work with certain members of the gang in utilizing maintenance machinery, a spot tamper, in maintaining the track structure within the assigned limits of responsibility of the gang involved.

The claims as contained in letter of the BMW organization filing this dispute with the Third Division, National Railroad Adjustment Board, were handled on the property by both parties as four separate and distinct claims, identified as Cases 3.65 MW (Item 1); 4.65 MW (Item 2); 5.65 MW (Item 3) and 6.65 MW (Item 4). Each of the individual claims was denied by the Carrier at all levels of appeal on the property.

OPINION OF BOARD: The named Claimants herein directed the activities of the operators of a spot tamper and track liner while performing

the work of raising and lining track during the specified periods set forth in the Statement of Claim. Claimants seek additional compensation for such work at the extra gang foreman's rate of pay under the provisions of Rule 18 of the Agreement between the parties which provides as follows:

"Employees assigned to higher rated positions shall receive the higher rate while so engaged; if assigned to a lower rated position their rate will not be changed."

In each instance, Claimants were assigned to extra gangs as Assistant Extra Gang Foremen under the general supervision of Extra Gang Foremen, who admittedly kept time records as well as written reports concerning all work assigned to members of the extra gang under their supervision.

In the first instance, Carrier contends that the consolidated claims should be dismissed because they were not handled on the property in the usual manner as required under Section 3, First (i) of the Railway Labor Act, and Circular No. 1 of the National Railroad Adjustment Board. Carrier asserts that the claims are not sufficiently specific as to either alleged rule violations or the specific work in issue, and that such deficiencies were not rectified until the consolidated claim was appealed to Carrier's Director of Labor Relations and Personnel Planning on June 17, 1965.

The record reflects that the issues involved in this case have previously been the subject of prior disputes between the same parties under the present Agreement, culminating in similar submissions to this Board for adjudication. Although the instant claims may lack the specificity found in such earlier claims and generally imposed to meet the requirements of this Board, it is evident that the Carrier was provided with such detailed information while the claims were still being considered on the property. Furthermore, the Claimants were named and the specific periods of time involved set forth as to each claim in the initial submission on the property. In view of the foregoing, we cannot find that the initial claims were so broad and indefinite as to justify dismissal, and will consider them on the merits. Award 12633.

Petitioner contends that Claimants should be compensated as Foremen because (1) prior Awards of this Board have recognized that one of the principal duties of an Extra Gang Foreman is to direct the activities of the operator of a spot tamper in performing the work of raising track, and (2) it is immaterial whether or not the Claimants were under the general supervision of Extra Gang Foremen who actually prepared all necessary reports in connection with the work performed under their direction.

Carrier contends that the primary issue to be decided in this dispute concerns supervision and specifically whether an assistant, acting at the direction and under the supervision of a foreman, is actually performing the work of such foreman when he directs the work of other members of the gang while they operate a spot tamper to raise and line track.

Petitioner has included as part of the record in this case the complete records in cases resulting in our Awards Nos. 12971, 13264, 15804 and 15805. Petitioner avers that the dispositive questions confronting the Board in the instant case have already been decided in these earlier Awards, and that the doctrine of stare decisis is applicable.

Careful examination of all these prior Awards, as well as Awards 13305 and 14422, relied on by Carrier in support of its position, confirms Petitioner's basic contention that the fundamental issues before us have already been adjudicated. Award 15804 arose out of an identical fact situation and the Opinion of Board in that case contains a comprehensive analysis and comparison of the issues and facts found in each of the cases resulting in Awards 12971, 13264, 13305 and 14422. Further discussion of these four Awards would be redundant in view of the objective review found in the Opinion of Board in Award 15804.

The Carrier suggests that Award 15804 is palpably in error because the Referee in part relied upon evidence offered by Petitioner concerning an oral Agreement between the parties as to the performance of work with spot tamperers. Although Carrier protests the admissibility of the evidence in question, which apparently was introduced as an exhibit with Petitioner's rebuttal in Docket No. MW-12663 (Award No. 12971), it does not now refute in the instant case the statements contained therein made by Petitioner's General Chairman concerning the oral Agreement with Carrier that spot tamper work would be performed by Extra Gang Foremen. Furthermore, we cannot agree with Carrier that Award 15804 was decided solely on the basis of the disputed evidence as the Referee was mindful of Award 12971, which categorically held that the disputed work of raising track for spot tamping work was customarily considered that of an Extra Gang Foreman.

Unlike the situation found in Awards 13305 and Award 14422, where different machines were involved, the instant dispute involves a spot tamping machine and a track liner. Previous awards have specifically considered similar situations in which other Claimants were under the supervision of foremen at the times involved in such claims, which factor was not considered decisive as the specific work (the direction of the operation of spot tamping machinery) customarily is performed by foremen. Awards 15804 and 15805.

Although there may be minor distinctions between the facts involved in the instant dispute and those found in Awards 15804 and 15805, such distinctions are insignificant. Consequently, such Awards constitute controlling precedent on this same property in the absence of sufficient evidence to support a finding that Awards 15804 and 15805 are palpably wrong.

In view of the foregoing, the consolidated claim must 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 Agreement was violated.

AWARD

Claim sustained.

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

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 12th day of January 1968.

**CARRIER MEMBERS' DISSENT TO AWARDS 16039,
16040, 16041, 16042, 16043, 16044, 16045, 16046, 16047,
16048, 16049, 16050 and 16051, DOCKETS MW-16541,
MW-16594, MW-16595, MW-16596, MW-16597, MW-16598,
MW-16599, MW-16600, MW-16601, MW-16602, MW-16730,
MW-16731 and MW-16732.**

For the same reasons that are fully and specifically enunciated in Carrier Members' dissent to Awards 15804 and 15805, Dockets MW-16108 and MW-16109, which are, by reference, incorporated herein, we dissent to these Awards.

**R. E. Black
P. C. Carter
W. B. Jones
G. L. Naylor
G. C. White**