

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30514  
Docket No. MW-30136  
94-3-91-3-575

The Third Division consisted of the regular members and in addition Referee Hugh G. Duffy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(CSX Transportation, Inc. (former Louisville  
( and Nashville Railroad Company)

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

(1) The Carrier violated the Agreement when it assigned Welder R.K. Orr and Welder Helper K.D. Gilliland to perform track work (removed joint bars, pulled and drove spikes, tamped ties and applied anchors) at:

MP 342.0 and 342.1	May 14, 1990
MP 344.3 and 344.4	May 22, 1990
MP 347.8 and 347.9	May 25, 1990
MP 348.2	June 4, 1990
MP 348.1	June 12, 1990
MP 348.2	June 18, 1990
MP 347.9, 347.8 and 347.2	June 19, 1990
MP 347.5 and 347.2	June 20, 1990
MP 346.2 and 344.7	July 2, 1990

[System File 11(21)(90)/12(90-869) LNR]

(2) The Carrier further violated the Agreement when it assigned Welder R.K. Orr and Welder Helper K.D. Gilliland to perform track work (removed joint bars, pulled and drove spikes, tamped ties and applied anchors) at:

MP 340.3 - 340.6	July 10, 1990
MP 340.6 - 339.7	July 11, 1990
MP 337.7 - 336.6	July 12, 1990
MP 336.6	July 13, 1990
MP 348.9 - 349.2	July 16, 1990
MP 351.2	July 17, 1990
MP 340.9	July 18, 1990
MP 343.3 - 342.1	July 19, 1990
MP 326.7 - 330.7	July 20, 1990
MP 351.1 - 351.2	July 23, 1990
MP 350.9 - 349.8	July 24, 1990
MP 349.5 - 349.8	July 25, 1990
MP 356.1 - 355.9	July 26, 1990

MP 355.9	July 27, 1990
MP 355.7 - 355.6	July 30, 1990
MP 355.1 - 354.9	July 31, 1990

[System File 11(30)(90)/12(90-969)].

(3) As a consequence of the violation referred to in Part (1) above, Track Repairmen J. Smith, Jr. and J. Ware shall each be paid thirty-eight (38) hours' pay at their respective straight time rates.

(4) As a consequence of the violation referred to in Part (2) above, Track Repairmen H.D. Williams and R.D. Davidson shall each be paid fifty-two (52) hours pay at their respective straight time rates."

#### FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

By letter dated July 19, 1990, the Organization filed a time claim seeking 38 hours at the pro rata rate on behalf of two Track Repairmen on the grounds that the Carrier violated Rules 1, 3(a), 5(a), 5(c), 6(a), 6(b), 6(c), 6(f), 9(a), 22(e), 38(b), Appendix No. 34 and letters of understanding dated August 23, 1969, December 9, 1974, and July 16, 1980, on nine dates during the period of May 14 to July 2, 1990, inclusive, when a Welder and Welder Helper allegedly performed Track Subdepartment work when they removed joint bars, pulled and drove spikes, tamped ties and applied rail anchors.

By letter dated August 23, 1990, the Organization filed an essentially identical claim seeking 52 hours at the pro rata rate on behalf of two different Track Repairmen for Track Subdepartment work allegedly performed by the same Welder and Welder Helper during the period of July 10 to 31, 1990, inclusive. The claim further contends that the Welder requested that a Track Repairman be assigned to work with him, but that the request was denied by Roadmaster J.R. Rich.

The first claim was denied by the Carrier's highest designated official on January 17, 1991 on the grounds that the Organization had failed to prove a violation of the Agreement. The second claim was denied on January 31, 1991 on the same grounds, and the claims were then consolidated for consideration by the Board.

As part of its denial of January 31, 1991, the Carrier attached a written statement from Roadmaster Rich, which reads as follows:

"Mr. Orr and Mr. Gilliland only performed work which is associated with their welding. I give the welders a track repairman and sometimes the whole section when there is rail to be cut in or ties to be moved. I do not give them a Laborer to install anchor, spike, or remove joint bars at the weld."

The Organization contends that Rules 3 and 5 of the Agreement clearly establish that the Welding Subdepartment and Track Subdepartment are separate groups that are maintained with a distinct demarcation of the work accruing to each group of employees. Rules 3 and 5 read in pertinent part as follows:

"RULE 3. SUBDEPARTMENTS

The employes covered herein shall be grouped in subdepartments, namely:

- 3(a) Track Subdepartment.
- 3(b) Bridge and Building Subdepartment.
- 3(c) Pump Repairmen and their Helpers.
- 3(d) Welding Subdepartment.
- 3(e) Maintenance of Way -- General.

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RULE 5. SENIORITY RANK

The grade or rank sequence of employes in the track and bridge and building subdepartments shall be as shown below, the lowest number designating the highest rank and the highest number the lowest rank in the respective subdepartments:

5(a) Track Subdepartment:

Rank No. 1 -- Foremen.

Rank No. 2 -- Assistant Foremen.

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Rank No. 6 -- Track Repairmen.

.....

5(c) Welding Subdepartment

Rank No. 1 -- Welder Foremen.

Rank No. 2 -- Welder (including welding instructor).

Rank No. 3 -- Welder Helper.

Rank No. 4 -- Welder Laborer."

The Organization further contends that, under date of December 6, 1974, the parties entered into an agreement which settled a dispute similar to that involved in the instant case. That agreement reads as follows:

"APPENDIX NO. 34

December 6, 1974

Mr. J. D. Sowders, General Chairman  
Brotherhood of Maintenance of Way Employees  
Room 210, 109 Third Avenue, North  
Nashville, TN 37203

Dear Sir:

A conference was held with you in this office on December 5, 1974 at which time we discussed claim 1-17(17) in favor of T.L. Gandy and J.G. Watkins at the respective rates of pay claimed for four-hours straight time each date of may 6, 7, 8, 9, 10, 13, 14, and 15, 1974 and continue to be paid so long as welding subdepartment employees are permitted to perform track subdepartment work.

In full settlement of the claim it was agreed to allow Mr. Watkins 30 hours straight time, with the understanding that in the future on all Seniority Districts of this Company when field welds are being made a track repairman will be assigned to work with the welding gang to perform the track work unless the ties have already been spread to permit the field weld and that we will not be presented time claims that the welding gang is performing track sub-department work and also time claims that the tract (sic) repairman is performing welding sub-department work.

We are arranging the necessary payroll adjustment and are having the above instructions issued by our Engineering Department to their Supervisory Personnel charged with the responsibility of implementing our obligation to this Agreement.

Please indicate your concurrence in this matter by signing and returning one copy of this letter for my file.

Yours Truly,

W. T. WALLACE  
Assistant Vice President

AGREED:

J. D. SOWDERS  
General Chairman, B.M.W.E."

The Organization thus concludes that Appendix No. 34 and Rules 3 and 5 make it clear that the Welders in the instant case performed Track Subdepartment work and that the claims should be sustained. It also contends that the Carrier failed to offer affirmative proof that the Welders did not perform such work.

The Carrier, on the other hand, contends that only work normally associated with and incidental to welding duties was performed by the Welders, and contends that the Organization is attempting to shift its burden of proof in this matter to the Carrier.

The Carrier also notes an exception in Appendix No. 34, which reads in pertinent part as follows:

"...a track repairman will be assigned to work with the welding gang to perform the track work unless the ties have already been spread to permit the field weld and that we will not be presented with time claims that the welding gang is performing track sub-department work..."

The Carrier contends that since there has been no allegation that the Welders were required to "spread" the ties to make the welds, it must be presumed that the ties were spread in advance. That being the case, the Carrier contends, the exception in Appendix No. 34 permitted the Welders to perform their duties without the assistance of a Trackman.

The Carrier thus concludes that the Organization has failed to prove that the Welders performed any work that was exclusively assigned to the Track Subdepartment and not directly related to their duties, and that there was nothing improper about the Welders performing these minor duties to complete their assignments.

This same issue was the subject of a previous arbitral proceeding between the parties. In Award No. 3 of Public Law Board No. 4138, Referee Zumas concluded as follows:

"The Organization has failed, as is its burden, to establish that welders performed track subdepartment work in violation of the Agreement. The Organization's mere assertion that Osborne and Levan performed track subdepartment work is not sufficient to support the claim."

Under the circumstances present in this case, we are constrained to reach a similar conclusion, and accordingly find that the Organization has failed to carry its burden of proof in this matter.

AWARD

Claim denied.

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O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 9th day of November 1994.