NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 31531
Docket No. MW-31147
96-3-93-3-182

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

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

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

1. The Agreement was violated when the Carrier assigned either Roadmaster L. D. Smith or Assistant Roadmaster T. W. Long to perform Maintenance of Way track work on September 15, October 12, 13, 20 and 27, 1991, and September 8, 22 and 29, 1991, respectively, instead of assigning Truck Driver D. W. England [System File 11 (51) (91)/12 (92-246) (LNR)]

2. As a consequence of the violation referred to in Part (1) above, Truck Driver D. W. England shall be allowed eight (8) hours of pay at the truck driver's overtime rate of pay for September 8, 15, 22, 29 and October 12, 13, 20 and 27, 1991."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all of 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.

The instant claim involves compensation for Claimant for the following work performed on eight days in September and October 1991 by Supervisors not covered by the Agreement. All of the days were Claimant's rest days.

September 8, 1991 - the Assistant Roadmaster changed out bolts and wedges between M. P. 63 and 116.7 on the Bruceton/Memphis Subdivision.

September 15, 1991 - the Roadmaster replaced several bolts between M. P. 2.4 and 194.5 on the Bruceton/Memphis Subdivision.

September 22, 1991 - the Assistant Roadmaster replaced bolts and repaired a heel block between M. P. 116.7 and 132.0 on the Bruceton/Memphis Subdivision.

September 29, 1991 - the Assistant Roadmaster replaced bolts between M. P. 66.5 and 116.7 on the Bruceton/Memphis Subdivision.

October 12, 1991 - the Roadmaster repaired switch stands, replaced locks, cotter pins, targets, adjusted switch points, replaced wedges, spiked switch points down, and replaced bolts at New Johnsonville Yard and Colesbury Yard on the Bruceton/Memphis Subdivision.

October 13, 1991 - the Roadmaster spiked several switches out of service, adjusted switch points, replaced braces, bolts and locks and graphited switches on the Dresden Branch between M. P. 41.5 and 132.0 on the Bruceton/Memphis Subdivision.

October 20, 1991 - the Roadmaster replaced bolts between M. P. 41.5 and 116.7 on the Bruceton/Memphis Subdivision.

October 27, 1991 - the Roadmaster replaced bolts between M. P. 18.0 and 80.5 on the Bruceton/Memphis Subdivision.

The Organization contends that the work was clearly work that the Agreement required be given to the Claimant. The Organization maintains that no emergency was presented; rather, it regards all work performed as routine track maintenance. Furthermore, the Organization contends that the amount claimed is in keeping with what the Claimant would have received had he been called to perform the work as the Agreement required.

Carrier contends that the Supervisors were confronted with FRA defects and other unsafe conditions which presented emergencies justifying performance of the work by supervisory personnel outside the coverage of the Agreement. Carrier further contends that the claim should be denied because the amount of work at issue was so small as to be de minimus. Finally, Carrier contends that the claim is excessive.

We consider first Carrier's contention that its actions were justified responses to emergency situations. A long line of precedential authority holds that mere assertions of emergency are insufficient. Carrier bears the burden of proof of an emergency. See, e.g., Third Division Awards 31704, 30978, 29742, 22821, 21904, 20310, 20223. In Third Division Award 20310, the Board stated:

> "An examination of the record of the handling on the property reveals that Carrier never established that an emergency existed. The only statements made by Carrier were that there were emergency repairs which should be made with the least possible delay. We have no information whatever beyond the fact of a broken rail - nothing with respect to location or significance."

Similarly, in the instant case, the record contains only Carrier's assertion that the Supervisors happened upon FRA defects and safety hazards and took "corrective action to prevent train delay and ensure the safety of the railroad." Carrier provided no details such as the nature of the defects and hazards, their locations, and the significance of their impact on operations. Carrier's bare assertions cannot establish an emergency or otherwise excuse it from complying with the Agreement.

We next consider Carrier's contention that the work performed by the Roadmaster and Assistant Roadmaster was de minimus in nature. Such arguments have been rejected consistently by this Board. See, e.g., Third Division Awards 25918, 25469. Assuming arguendo that a de minimus violation of the Agreement could be excused, we find that the record in the instant case shows a continuing violation over two months which cannot possibly be construed to be de minimus. Accordingly, we conclude that Carrier violated the Agreement and that a remedy is in order.

We next consider the issue of appropriate remedy. The claim seeks eight hours pay at the overtime rate for each day in question. Carrier asserts that the amount claimed is excessive. The remedy issue raises two questions: what rate is appropriate and how many hours compensation are due.

There is no dispute that the days in question were Claimant's rest days. Had Claimant been called in to perform the work as required by the Agreement, he would have been compensated at the overtime rate. Therefore, the monetary remedy should be calculated at the overtime rate. See, e.g., Third Division Awards 30715, 28724, 25918 (each compensating the claimants at the rate they would have received under the Agreement had they been called in as required).

Calculation of the number of hours for which Claimant should be compensated is problematic. The record is devoid of any evidence concerning the amount of time the Roadmaster or Assistant Roadmaster spent performing work which should have been performed by the Claimant. The description of the work contained in the record developed on the property does not enable us to estimate the amount of time with a reasonable degree of certainty. In similar situations, the Board has ordered the parties to conduct a joint check of the Carrier's records to ascertain the amount of time spent on work that should have been performed by employees covered under the Agreement. See, e.g., Third Division Awards 28611, 24280, 14004, 330. Claimant is entitled to a minimum of the number of hours guaranteed for a call under the Agreement for each day. However, if the records reflect that the jobs took more than that amount of time on any particular days, Claimant is entitled to the actual amount of time spent on the work for those days. If Carrier does not provide the records necessary for the joint check, the claim is to be sustained as presented. See Third Division Awards 29622, 26072.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of July 1996.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 31531, DOCKET MW-31147
(Referee Malin)

The Board erred in two major aspects in rendering Award 31531. Initially, contrary to the Board's opinion, when Roadmasters discover FRA defects requiring immediate repairs on heavily travelled main line track, an emergency does indeed exist. CSXT, like every carrier, has at the very least a legal obligation under FRA regulations to repair defects immediately; it is not required that a train derail before an emergency situation exists. Trains constantly travel on the track involved in this claim requiring frequent inspections and occasional minor repairs to prevent the possibility of a derailment.

Secondly, de minimis work is that which requires minimal time and/or effort and is incidental to other duties. Work does not lose the character of being de minimis because it is done on more than one occasion, or even routinely. In fact, over 50 years ago the Board reach the following conclusion in Third Division Award 2932:

> *"The Board recognizes the necessity of protecting the work of signalmen as it does any other group under a collective agreement. But this does not mean that the simple and ordinary work that is somewhat incidental to any position or job and requiring little time to perform, cannot be performed as a routine matter without violating the current Agreement." (Emphasis added)*

In the instant case, the mere fact that similar minor repairs were performed on eight occasions over a 60 day period does not constitute a "continuing violation over two months" as erroneously characterized by the Board in Award 31531.

Further, the decision that an employee should have been called on his rest day to make minor repairs erroneously presumes that the Roadmaster should have known he would discover defects which would require immediate correction on the dates claimed.

However, the Carrier is not contractually required to send a Track Repairman/Truck Driver with a Roadmaster every day just in case a minor defect may be discovered, no matter how little time it takes to correct. Any suggestion to the contrary is ludicrous.

Additionally, while the Board recognized the fact that the claims for eight hours at the overtime rate were excessive, it nevertheless awarded payment at the time and one-half rate. This is contrary to the Board's longstanding practice of awarding straight time for time not actually worked.

For the foregoing reasons we dissent. Award 31531 has no precedential value and does not resolve the issue between these parties.

Michael C. Lesnik

Martin W. Fingerhut

Paul V. Varga

11/5/96

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 31531, DOCKET MW-31147
(Referee Malin)

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by a board and rejected. Without endorsing this school of thought in general, it is foursquare on point with respect to the dissent in this case. This is true because the Board held in this case that the prior findings of this Division concerning the exact same issue had been decided decades ago. The problem with the Carrier Members' Dissent is that it is simply decades late. In any event, the Organization must respond to the Carrier Members' dilatory comments for the following reasons.

The Carrier Members' Dissent gives the reader the impression that the referee decided this dispute in a vacuum and that the award carries no precedential value. Nothing could be further from the truth. The referee in this case was presented with copies of Third Division Awards **13073, 13738, 17423 and 19334** which interpreted the Scope Rule and Rule 2 of *this Agreement* and held that supervisors were prohibited from performing bargaining unit work, specifically including track work of the character involved here.

In fact, the fact pattern in this docket was nearly identical to the fact pattern in Awards **13073** and **13738**. With that said, the balance of the Carrier Members' Dissent is nothing more than a re-hashing of the arguments found within the Carrier's submission to this Board and as presented by the Carrier Member during the panel discussion which simply did not carry the day.

Within the Carrier Members' Dissent, it also revisited the misguided de minimis argument and cited Award 2932 in support of its position. It must be pointed out that Award 2932 involved an ancient dispute between the Signalmen and Telegraphers concerning the replacement of a burned out light bulb in a train order signal. The Board held in that case that the work took no special skill and it was simply a routine function which anyone could perform. Moreover, the portion of that award which the Carrier Members conveniently neglected to quote was:

> "*** It is not disputed that prior to the negotiation of Signalmen's agreements, the attending of train order signal lights was the work of the Telegraphers and many Telegraphers' agreements still require it as a Telegrapher's duty. Clearly, the quoted Scope Rule of the Signalmen is not definite enough to remove this routine work from the Telegraphers, nor specific enough to place it exclusively with the Signalmen. The contentions of the Organization attempt to draw too fine a line and tend to inject too much rigidity into railroad operation when a reasonable amount of flexibility is essential to the welfare of both the employes and the carrier. We do not think that a proper basis for an affirmative award exists."

A review of the aforementioned award reveals that it is a dispute between two competing crafts, not the assignment of scope covered work to a supervisor who has no right to perform any work. The dispute which resulted in Award 31531 involved the Carrier assigning a supervisor to perform work which this Board has already determined to be reserved to Maintenance of Way employes. Hence, the Carrier Members' reliance on Award 2932 is misplaced.

Finally, insofar as the misplaced de minimis argument is concerned, we are impelled to point out that Award 13073, involving these parties, addressed that issue and held:

> "But the question of whether the Agreement was breached by the Supervisor's activity does not turn on the amount of work required to make the repair, but on whether he was inspecting to determine whether any repair was needed at all, in which case he was performing an inspection proper for an official excluded from the Scope, or whether he was inspecting to determine the extent of the repairs to be made and the manner of their making, in which case he was performing work which belonged to the section foreman. This question is answered by the Carrier's presentation quoted above.
>
> The fact that the amount of work to be done, both in the inspection and in the repair, was small, does not alter the requirement of Rule 30 (f). Award 12844, cited by both parties, says: 'Although the Scope Rule for Foremen does not describe work, it is well established that work content for employes covered by the Agreement is determined by the work such employes customarily do.' Repair of the track in this section is the regular work assignment of the section foreman and the laborers. The motor car operator was not the regular employe assigned

> "to the section crew; what repair work he may have done during his travels on the motor car was incidental to his basic duties and not usually performed under the circumstances described here, where a call came in indicating that repairs might be needed at a particular place.
>
> For the reasons set forth, we will find that the Carrier did violate the Agreement."

A review of the above-cited quotation reveals that this Board has already considered the de minimis argument relative to a supervisor performing scope covered work and determined that such a position has no application in such a dispute.

The Carrier Members' contention that the Roadmaster would not have known the defects found would require immediate attention is equally misplaced. It was pointed out that the supervisors involved in this dispute anticipated finding defects because they stocked their hi-rail truck with bolts, angle bars, frog bolts and other track materials which were used to repair "defects" when found. Hence, the supervisor's actions were premeditated and designed to deprive the Claimant of his contractual right to perform the work. It must be pointed out that in the event the Carrier came across an FRA defect that was so onerous that it required immediate attention, the supervisor should have notified the dispatcher that no trains could pass over the defect until it was properly repaired or protected the area with a slow order until

such time that the Maintenance of Way employes could be called to effectuate the repairs.

Finally, this Board has considered the Carrier's allegations concerning the proper rate of pay for employes who were not called to perform scope covered work and determined that such rate should be the rate they would have received absent the violation of the Agreement.

The findings of Award 31531 are well reasoned, supported by ample **on-property** precedent and clearly reflect the industry-wide position of this Board concerning supervisors performing scope covered work. Award 31531 reconfirms this Board's prior findings involving these issues between these parties and merely bolsters the already overwhelming precedent concerning this subject that has existed for more than three decades.

Respectfully submitted,

Roy C. Robinson
Labor Member