

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32413
Docket No. MW-32125
98-3-94-3-541**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Soo Line Railroad Company (former Chicago, Milwaukee,
(St. Paul and Pacific Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated as a result of the Carrier's failure to increase the monthly rate of pay for the position of section foreman of Crew #39D at Glendale, Wisconsin from \$2,397.00 per month to \$2,499.00 per month effective June 1, 1993 (System File C-69-93-R280-01/8-00137 CMP).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants D. Hendricks, K. Samplaski and R. Cichantek shall be allowed:**
 - (a) The difference between the monthly rate of pay as section foreman to which entitled, to that which is currently established for the position of section foreman on Crew #39D,**
 - (b) The difference between the overtime factor to which entitled and the overtime factor that is currently established,**
 - (c) All subsequent and future wage increases to which entitled.”**

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 were given due notice of hearing thereon.

The January 25, 1990 Memorandum of Agreement establishes a formula for the calculation of Section Foremen wage rates which "builds from a \$2,000 base rate taking into consideration the amount of mileage maintained, traffic density, as well as yard engine starts." With respect to "traffic density (tons, millions)", the Memorandum of Agreement specifically provides that "Fifteen to twenty-five million tons" requires a payment of "\$300" as part of the formula.

On June 1, 1993, the Carrier revised the section limits of certain territories which resulted in the allocation of an additional 2.72 miles of main line trackage to the jurisdiction of the Foremen of Crew #39D at Glendale, Wisconsin. The Organization's claim asserts that as a result of that realignment of territories, the additional trackage assigned to Crew #39D had increased the total traffic density which entitled the Foremen to increased pay under the formula from the Memorandum of Agreement.

The record, as developed on the property, shows that in support of its position the Organization relied upon a 1992 CP Rail System Traffic Density Map which has an inset showing that between Milwaukee and Grand Avenue Junction the traffic density was 20.18 million tons. Using that figure and asserting that area came under the jurisdiction of the crew in dispute, the Organization calculated the wages in accord with the formula in the Memorandum of Agreement. Specifically, the Organization seeks to attach the \$300 entitlement under the Memorandum of Agreement due to a traffic density of 15 to

25 million tons. as well as two \$50 supplements for main line miles less than 40 and less than 50 yard engine starts per month. The Organization further asserts that when a 2% wage increase effective October 15, 1992 is factored in, the result required an increase in pay for the Foreman from \$2,397.00 per month to \$2,499.00 per month.

In its October 25, 1994 denial, the Carrier's response (without the production of data or other specific information) was that "I have been advised by the Engineering Department that the density on the section you are referring to has actually decreased." The Carrier further stated "[p]lease for the record, provide probative evidence which shows an increase in density, increase in mileage, an increase in engine starts, or any combination thereof, which would entitle these employees to a higher foreman rate." The Carrier then took the position that the Organization failed to meet its burden.

These cases are decided on burdens. Ultimately, in a contract dispute, the burden is on the Organization to prove all the elements of its claim. That burden is not met through reliance upon unsupported allegations. However, when the Organization makes a sufficient threshold showing on the property of a violation, the burden is then shifted to the Carrier to refute the Organization's demonstration through evidence similarly developed on the property.

The first question here is whether the Organization has made its threshold showing. We find that it has. The Organization produced a 1992 CP Rail System Traffic Density Map which has an inset showing that the traffic density between Milwaukee and Grand Avenue Junction was 20.18 million tons. That was a prima facie demonstration that, under the Memorandum of Agreement, a payment of \$300 was required for traffic density in the 15 to 25 million ton range. That showing shifted the burden to the Carrier to refute the Organization's demonstration.

The second question here is whether the Carrier has refuted the Organization's showing. We find it has not. The Carrier did not refute the Organization's demonstration through facts developed on the property. The Carrier could have easily done so. Traffic density data are certainly in the Carrier's control. Those figures could have been produced, but were not. Instead, the Carrier's responding official—without factual support—took the position that "I have been advised by the Engineering Department that the density on the section you are referring to has actually decreased";

demanded that the Organization produce data that was within the control of the Carrier; and then took the position that the Organization failed to meet its burden. When the Organization produced the 1992 CP Rail System Traffic Density Map showing that the traffic density between Milwaukee and Grand Avenue Junction was 20.18 million tons, the Carrier was obligated to produce data or other evidence showing that the Organization's data was incorrect or otherwise inapplicable to the calculation of the wage rate under the Memorandum of Agreement. However, the Carrier did not do so.

Given the Carrier's failure to sufficiently refute the Organization's showing, this Board could sustain the claim as presented and impose the wage increase as sought with full make whole relief for all employees who served in the Foreman position. However, this Board has discretion with respect to the formulation of remedies. Under the circumstances of this case, we choose to exercise that discretion.

In light of the formula set forth in the Memorandum of Agreement and as a result of factual data, the employees are or are not entitled to the wage increase sought by the Organization. The data required to compute the factors in the formula set forth in the Memorandum of Agreement (traffic density, mainline miles, yard engines per month, etc.) are operative facts within the control of the Carrier. We shall therefore remand this matter to the parties to conduct a joint check of the Carrier's records to determine the data necessary for making the wage rate computation under the Memorandum of Agreement. That rate computation shall then be applied to all affected employees who occupied the Foreman's position. If increases were warranted, for example, due to increased traffic density resulting from the realignment of territories, those employees shall be made whole for all lost wages and benefits at the applicable Agreement rate taking into account wage increases.

This Board shall retain jurisdiction for disputes arising under the remedy, if any.

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 21st day of January 1998.