Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33602
Docket No. SG-34635
99-3-98-3-291

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

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Consolidated Rail Corporation (Conrail):

Claim on behalf of T. L. Campbell for payment of the difference between his regular rate and the Inspector's rate for 48 hours, and on behalf of S. M. Potter for payment of the difference between his regular rate and the Inspector's rate for 8 hours, account Carrier violated the current Signalmen's Agreement, particularly Rule 4-G-2 and Appendix 'E', when the Claimants were used to perform Inspector's work but were not compensated at the Inspector's rate on November 11, 13, 15, 19, 20 and 21, 1996. Carrier's File Nos. SG-938, SG-939, SG-940, SG-941, SG-942, SG-943, SG-944. General Chairman's File Nos. RM2953-28-0497, RM2954-28-0497, RM2955-28-0497, RM2956-28-0497, RM2957-28-0497, RM2958-28-0497, RM2959-28-0497. BRS File Case No. 10568-CR."

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 Claimants are Signal Department employees of the Carrier, who were assigned to Maintainer positions at the time this dispute arose. On various dates in November, 1996, they were involved in assisting Signal Inspectors performing 22c tests on the property.

The Organization contends that the Carrier violated Rule 4-G-2 when it used the Claimants to perform Inspector's duties. The claim is for the difference between the Maintainer rate and the Inspector rate for each of the days on which they performed Inspector's duties.

The Agreement between the parties provides (in part):

"Rule 4-G-2 . (a) An employee, who during a tour of duty performs work for which more than one rate of pay is applicable, shall be paid for the entire tour of duty at the highest rate of pay applicable to any of the work performed. An employee who performs service temporarily in a lower rated position shall not have his rate reduced."

CLASSIFICATIONS

INSPECTOR
An employee assigned to direct the work of employees and to inspect the facilities, equipment or apparatus installed, maintained or repaired by employees under this agreement, and to perform the C & S 27 Tests (See Appendix "F") Ensures that all work and testing of signal circuits and equipment are done in accordance with Federal, State and Conrail standards and regulations currently in use.

MAINTAINER TEST
An employee assigned to perform the inspection, testing and repair of relays, locking and meggering of insulated wires and cables as required by Federal and Company rules.

MAINTAINER C&S
An employee assigned to perform signal and/or communication inspection, testing, maintenance, installation, adjustment and repair work covered by this agreement within an assigned territory; or signal and/or communication construction work which involves the installation or major revision of signal and/or communication equipment and control systems."

Specifically, the Organization argument for the increased pay rate is founded on the following two step analysis and interpretation of the parties' Agreement:

"1. According to the table in Appendix E of the Agreement specifying which employee classifications are permitted to perform different tests of the signal apparatus, the 22c tests which the claimants were performing are permitted to be performed both by Maintainers and by Inspectors.

2. As the Claimants in this case performed work for which more than one pay rate was applicable - that is the Inspector and the Maintainer pay scales - then the Claimants are entitled to be paid at the higher, Inspector, rate under the provisions of Rule 4-G-2 (a), which provides that "an employee, who during a tour of duty performs work for which more than one rate of pay is applicable, shall be paid for the entire tour of duty at the highest rate of pay applicable to any of the work performed."

The Carrier initially raises as a procedural objection, the argument that the claim before the Board is defective because the Organization failed to progress the claim according to the dictates of the parties' Agreement and the Railway Labor Act. Accordingly, it is asserted that the Board has no jurisdiction in this matter.

The Carrier specifically objects to a letter from the Organization to the Carrier, which it alleges submitted new claims and expanded previous arguments after the appeal was handled by the final appeal officer on the property. The Senior Director had denied the appeal on August 7, 1997, and the letter complained of was sent on January 23, 1998.

On the merits of the matter, the Carrier argues that the Claimants are not entitled to the Inspector pay rate and that the Collective Bargaining Agreement contains no provisions which would support their claim. Specifically, the work or functions the

Claimants performed is permitted under the Agreement to be performed by either Maintainers or by Inspectors.

We consider first the Carrier's procedural objection, related to the Organization's letter of January 23, 1998. That letter provided, in pertinent part:

> "Initially, we must correct your stated assumptions concerning our position. The Organization is not claiming a violation of Appendix "E", as stated in your denial. Rather, as stated by Local Chairman Downing, per Appendix "E" and Rule 4-G-2, the claimant should have been compensated at the Inspector C&S rate. As pointed out in your denial, Appendix "E" establishes that both Maintainers and Inspectors can perform the test in question. This is not in dispute.
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> However, Rule 4-G-2 stipulates that where more than one rate of pay applies, the higher rate shall be applicable. Appendix "E" in the instant case involving the work of performing tests, supplies criteria for the determining the applicability of 4-G-2, that is, whether more than one rate of pay applies, regardless of who performs the work. Rule 4-G-2 was violated by the Carrier when it failed to provide the Claimants with the highest rate applicable.
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> In addition to the above, as stated by Mr. Alexander, ADE, in his denials, the claimants obviously also performed the required work of inspecting or "monitoring" the work of others who assisted him with the tests and assured that they were performed timely and in accordance with Corporate and Federal guidelines.
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> The Carrier makes no attempt to deny that the Inspector of the territory was not present at the time the work was performed and goes so far as to state that he need not be present. Yet, clearly points out the requirement for Inspectors's Classification of work to be performed with each and every test. This further establishes that the work performed by the Claimants was that of Inspector C&S Classification, thereby guaranteeing the rate of pay and establishing a violation of Rule 4-G-2."

The first two paragraphs of this letter do not appear to be attempting to introduce any new arguments at that stage. Rather, on its face, these paragraphs attempted to convey the idea that perhaps the Carrier had misunderstood and failed to grasp the essence of the Organization's contractual claim. In so doing, the Organization was arguably simply alerting the Carrier to this possible misapprehension, in case the Carrier might want to reconsider its position prior to having the case proceed to arbitration before the Board.

While the Carrier may have interpreted these two paragraphs as a new legal theory, it cannot be said that they make any legal claim that was not present in the Organization's initial letters.

In the second two paragraphs, the Organization refers to the Carrier's initial letters of denial, attempting to infer factual admissions by the Carrier from these letters. This appears to be an attempt to comment on evidence already in the record, and perhaps interpret this evidence in a new light. As such, it come closer to the Carrier's procedural objections.

However, taken as a whole, it cannot be said that the comments in this letter clearly violate the prohibition against introducing new issues or the expansion of previous legal theories. Accordingly, the Board must deny the Carrier's procedural objections.

The Organization's claim, in its essence, is that the performance of the 22c signal tests could have been done either by employees in the Maintainer Classification or in the Inspector Classification. Accordingly, Rule 4-G-2 requires that the work be paid for at the highest rate, no matter who performs that work.

This is not a correct reading of the meaning of Rule 4-G-2. That rule is designed to apply to cases where an employee may perform work which must be performed by a higher rated classification. It further provides that if part of a tour of duty spent performing lower rated work and part is spent performing higher rated work, then the pay rate for that entire tour shall be at the higher rate.

As we read Rule 4-G-2, it does NOT provide that an employee who performs work that is clearly within his classification is entitled to be paid at the rate of another

classification simply because the work could also have been done by employees from that other classification.

To attempt to read Rule 4-G-2 in the way proposed by the Organization would change completely the meaning of Schedule E, which indicates which classifications of employees the Carrier may elect to use for the performance of the various kinds of testing specified. The Organization's proposed reading would mean that for every test, only employees in the highest paid classification could perform those tests, and if the tests were performed by lower paid employees, they would have to be paid at the highest rate.

That is not the plain meaning of the rule as we interpret it. If the Organization wishes to prevail on such an interpretation, it must show by reference to the past practice of the parties that such an interpretation has been applied to Rule 4-G-2. But no such evidence of past practice was offered by the Organization to support its position.

The only other argument on behalf of the Claimants in this case is that they were not directly supervised by the Carrier's supervisory personnel. But in Third Division Award 31297, involving the same parties, the Board said:

> "This Board has repeatedly held that, absent some agreement provision to the contrary, Carrier has the sole prerogative of determining under what circumstances and to what extent supervision is required. For example, in Third Division Award 7059, we read:
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> > 'The need of supervision in the absence of agreement provisions to the contrary, is a matter within the prerogative of management'
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> And again in Third Division Award 13031, we find:
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> > 'The question of how much supervision is required over various operations is obviously one of managerial discretion, to by decided by the Carrier.'"

The conclusion from Third Division Award 31297 "The Organization has not met the burden of proving by convincing agreement that the action taken by Carrier in this

instance required the assignment of an Inspector or Foreman . . . " is just as applicable in this matter.

AWARD

Claim denied.

ORDER

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 16th day of November 1999.