

PUBLIC LAW BOARD NO. 2960

AWARD NO. 168  
CASE NO. 265

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago & North Western Transportation Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it used a regularly assigned track foreman and assistant foreman to operate a ballast regulator and tamper instead of recalling and using furloughed Machine Operators M. P. She and R. K. Huntley (Organization File 4LF-2249T; Carrier File 81-88-140).

(2) As a consequence of the aforesaid violation, furloughed Machine Operators She and Huntley shall be compensated for 80 hours straight time each at the respective applicable rates of pay for 901 and 902 Machine Operators."

OPINION OF THE BOARD:

This Board, upon the whole record and all of the evidence, finds and holds that the Employee and Carrier involved in this dispute are respectively Employee and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

There is no dispute in the facts. D. P. Dunn and M. J. Driggins were assigned as Track Foreman and Assistant Foreman, respectively, on the section crew headquartered at

Dunlap, Iowa, during April 1988. On ten separate days they operated a Class A tamper and a Class B ballast regulator in connection with surfacing track at various locations on the West Iowa Subdivision. Foreman Dunn, who operated the Class B ballast regulator, has a Class "B" seniority date of October 8, 1975. Assistant Foreman Driggins, who operated the Class "A" tamper, holds no seniority as a Machine Operator.

The Organization contends that the issue presented by this case has already been decided in Award 88 of this Board. They also argue that under Rule 3, Foreman, Assistant Foreman, and Machine Operators are separate and distinct classes with a distinct line of demarcation. They stress that the assistant foreman did not have seniority as a Machine Operator and that although Mr. Dunn did possess Machine Operator's seniority, his regular assignment was that of a Foreman, so he was not exercising his rights as a Machine Operator. They also reject the Carrier's reliance on Rule 14(d) and Rule 16(b). In their opinion, Rule 14(d) is clear in that it refers to "the regular employe" stating that he can be used rather than recalling a furloughed employe. The regular employe, as it is used here, refers to the Carrier using a Trackman that possesses Machine Operator's seniority to fill the Machine Operator vacancy. Likewise, the Carrier's application of Rule 16(b) is in error because it would allow him to hold two positions at the same time. Mr. Dunn was not working as a Machine Operator, but he had exercised his seniority to a higher-rated position and had been assigned to a permanent position as a Track Foreman.

The Carrier relies on Rule 16(b) which states that Machine Operator vacancies of less than 30 days will be filled by employes holding seniority as Machine Operators but not

working as such. Since Foreman Dunn has not only seniority as a Class "B" Machine Operator, but is more senior than the Claimant, he can be used under rule 16(b). Further in this connection, the Carrier notes that there are no rules in the collective bargaining agreement between the C&NW and the BMWE which restrict an employee who is working as a Track Supervisor or Track Foreman from filling temporary Machine Operator positions when needed by the Carrier.

As for Award 88, the Carrier contends that it is distinguished since the Foreman in that case held no seniority as a Machine Operator. They also believe the Award is not controlling with respect to the facts relating to Assistant Foreman Driggins since Rule 14(d), an issue and position which was not presented for the handling of Docket No. 122 before this Board, permits the Carrier to use an employee in service before recalling an employee from furlough. Rule 14(d), in their opinion, gives the Carrier the right to use Dunn as a regular employee, prior to recalling furloughed employees even if he was junior to Shea and Huntley.

The relevant rules are as follows:

Rule 3(b):

"(b) An employee directing the work of men and reporting to officials of the Company shall be classified as a Foreman."

Rule 3(c):

"(c)" An employee assigned to assist a Foreman or Track Supervisor in the performance of his duties shall be classified as an Assistant Foreman."

Rule 3(k):

"(k) An employee qualified and assigned to the operation and servicing of machines used in the performance of Maintenance of Way and Structures Department work shall be classified as a Machine Operator."

Rule 4(d):

"(d)" Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the Company."

Rule 14(d):

"(d) The Company shall have the right to use furloughed employees to perform extra work, and relief work on regular positions during the absence of regular occupants, provided such employees have signified in the manner provided in paragraph (e) hereof their desire to be so used. This provision is not intended to supersede rules or practices which permit employees to place themselves on vacancies or preferred positions in their seniority districts, it being understood, under these circumstances, that the furloughed employee will be used, if the vacancy is filled, on the last position that is to be filled.

This does not supersede rules that require the filling of temporary vacancies. It is also understood the Company retains the right to use the regular employee, under pertinent rules of the Agreement rather than call a furloughed employee."

Rule 16(b):

"(b) Vacancies of less than thirty (30) calendar days duration may be filled without bulletining by the senior qualified employees in the district and group making request in writing, consistent with operational requirements.

Vacancies of less than thirty (30) calendar days in machine operator positions will first be filled by employees holding seniority as Machine Operators but not working as such. If there are no such employees holding seniority as Machine Operators, consideration will then be given to Track Department employees who have on file written request with Assistant Division Manager-Engineering for such consideration, prior to assignment of others. No seniority will be established for employees filling these positions on this basis.

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Rules 3 and 4 operate together to give employees seniority within a classification and entitle them to positions based on their relative seniority. In this case, the Assistant Foreman had absolutely no seniority as a machine Operator and had absolutely no entitlement to the work in question to the exclusion of those who did have seniority. In this regard, the use of the Assistant Foreman is clearly contrary to the dictates of Award 88. Additionally, it must be stated that the Carrier cannot justify the use of an employee with no seniority to the exclusion of those with seniority based on Rule 14(d). Rule 14 presumes that the employee has proper seniority and, therefore, some base entitlement to the position. In this regard, an employee with no seniority cannot be viewed as the "regular employee" as the term is used in Rule 14(d).

The use of the Foreman presents a different set of issues since he did have seniority standing to operate the machine in question. While the Carrier argues there is no rule prohibiting the use of the Foreman, the Organization contends that an employee cannot hold two positions/classifications simultaneously. The Board has difficulty with both arguments.

First, the problem with the Organization's argument is that it is contrary to the fact that Section Foreman do perform Trackman work and the work of a Foreman within the same shift. This is done for obvious practical reasons. A Section Foreman often isn't purely a supervisor but a lead worker performing both supervisory and work functions.

The problem with the Carrier's position is that if the Foreman performed the Machine Operation function for a significant period of time, he truly would be occupying two positions and would be denying the opportunity for someone with Machine Operator seniority

from the work, or in the alternative, he would be denying someone the opportunity to fill the Foreman position.

It is the conclusion of the Board that it is permissible for a Foreman with Machine Operator seniority to operate that class machine on an incidental and intermittent basis when dictated by the practicalities of the individual circumstances.

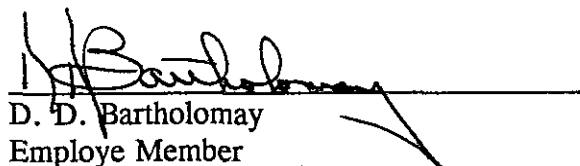
The only indication in this record as to the amount of time spent by the Foreman on the machine is the implied assertion in the claim that 80 hours were worked in a two-week period of time. This was never challenged. Since this exceeds what, under these circumstances, could be considered a reasonable amount of intermittent and incidental machine work for a Foreman without infringing on the work opportunities of other Machine Operators, and since there were no circumstances apparent which made it impractical to use a machine operator and since the Assistant Foreman had no standing to do machine work, the claim will be sustained.

**AWARD:**

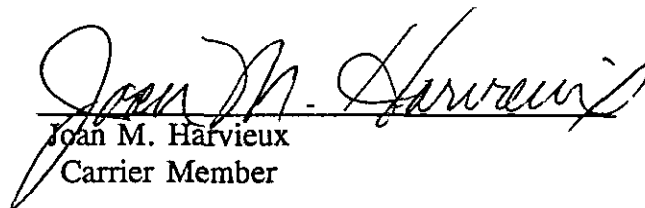
The claim is sustained.



Gil Vernon, Chairman



D. D. Bartholomay  
Employee Member



Joan M. Harvieux  
Carrier Member

Dated: 9/9/81