

PUBLIC LAW BOARD NO. 2960

AWARD NO. 91
CASE NO. 117

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 assigned and used brakemen to perform trackmen duties of flagman, cleaning a crossing and inspecting track at Mile Post 226.9, Alton, Iowa, during May, June, July and August of 1983. (Organization File 7T-3907; Carrier File 81-83-173).
- (2) Because of the aforesaid violation, Trackmen W. E. Olson, R. Getzel, T. Olson and R. Meheim shall be allowed an equal proportionate share of five hundred twenty-eight (528) hours straight time and one hundred ninety-eight (198) hours time and one-half.

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.

The Organization claims that Rules 1(a)(b)(c), 2(2) and 3(a) were violated when brakemen were used to perform flagging, cleaning a crossing and inspecting track. The rules read as follows:

- 1(a) "The rules contained herein shall govern the hours of service working conditions and rates of pay of all employees in any and all subdepartments of the Maintenance of Way & Structures Department, (formerly covered by separate agreements with the C&NW, CStPM&O, CGW, FtDDM&S, DM&CI, and MI) represented by the Brotherhood of Maintenance of Way Employees.
- 1(b) "Employees included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the constructions, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common carrier service on the operating property. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission.
- 1(c) "This Agreement shall not apply to the following:
 - 1. General Foreman, Assistant B&B Supervisors, Assistant Roadmasters, or other comparable supervisory officers and those of higher rank."
 - 2,2. "The Following subdepartments are within the Maintenance Way and Structures Department.
 - (a) Track Supervisors (includes Track Inspectors on former CGW)
 - (b) Track Foremen
 - (c) Assistant Track Foremen
 - (d) Truck Drivers
 - (e) Welders
 - (f) Welder Helpers
 - (g) Trackmen and Crossing Watchmen
 - (h) Machine Operators
 - (i) Assistant Machine Operators"
- 3(d) "An employe assigned to perform the work of constructing, repairing, maintaining and/or dismantling of roadway and track and other similar type work shall be classified as a Trackman."

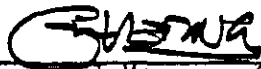
First, with respect to the portion of the claim related to cleaning the crossing and inspecting track, the Board cannot pass on the application of the rules because there is insufficient evidence to make a factual finding that a brakeman performed such work. The only evidence beyond mere assertion that they performed such work is that the brakeman borrowed a shovel. In addition, there is a dispute as to whether he borrowed it for a day or if he ever returned the shovel. The fact a shovel was borrowed might establish some basis to speculate that he was using it to clean tracks. However, in the opinion of the Board, it is insufficient to establish the facts necessary to determine if a scope rule violation occurred.

With respect to the portion of the rule related to flagging, there does not seem to be any factual dispute that the brakeman did provide flag protection for two construction companies engaged in bridge construction. When these facts are considered against the rules cited by the Organization, particularly Rule I, it cannot be concluded that the rules specifically reserve the work in question to the Claimants.

Moreover, in this case the Board can find no convincing evidence of a custom or past practice sufficient enough to sustain the organizational contention that the work in question has been traditionally performed by the Claimants.

AWARD:

In view of the foregoing, the claim is denied.



G. I. Vernon, Chairman



H. G. Harper, Employee Member



D. Crawford, Carrier Member

Dated: May 8, 1985