

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5905

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)	
)	Case No. 4
and)	
)	Award No. 4
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY)	

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
J. F. Ingham, Carrier Member

Hearing Date: May 26, 1998

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned foremen to work in place of senior available trackmen, i.e., to perform spiking, removing and replacing bolts, installing ties, clips, anchors and insulated joint bars, shovelling stone, tamping, etc., in connection with the replacement of the diamonds at Chicago Heights, Illinois on October 24, 1993 and the diamonds at Rondout, Illinois on November 13 and 14, 1993 (System File SAC-19&20-93/UM-24&25-93).
2. As a consequence of the violation referred to in Part (1) above, Trackmen A. V. Almanza, S. Cardonz, E. A. Izaguirre and A. L. Reed shall each be allowed an equal proportionate share of the total number of man-hours expended by the track foremen in the performance of trackman's work on October 24, 1993 at their respective time and one-half rates of pay and Trackmen S. Cordoza, E. A. Izaguirre, A. L. Reed and A. Aguirre shall each be allowed an equal proportionate share of the total number of man-hours expended by the track foremen in the performance of trackman's work on November 13 and 14, 1993 at their respective time and one-half rates of pay.

FINDINGS:

Public Law Board No. 5905, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On October 24, 1993, Carrier replaced the diamonds at Chicago Heights, Illinois, and on November 13 and 14, 1993, Carrier replaced the diamonds at Rondout, Illinois. On both jobs, Carrier used five track foremen. The foremen performed work that is also performed by trackmen. The Organization filed claims maintaining that the Claimants should have performed the work. Carrier denied these claims which subsequently were consolidated for on property handling and presentation to this Board.

The Organization contends that foremen are restricted to foremen's duties and that Carrier violated the Agreement by assigning the foremen in question to perform trackmen's duties. Furthermore, the Organization contends that the work did not require five foremen and that Carrier has impermissibly favored giving work to foremen over trackmen. The Organization attacks the status of two of the foremen in particular, as one purported to direct the work of only one employee and the other did not direct the work of any employees.

Carrier maintains that, on this property, foremen are working foremen and that the Agreement does not restrict the duties that it may assign to foremen. Carrier further argues that four of the foremen directed the work of subordinate employees and that the fifth made reports to Carrier which also is among a foreman's duties. Carrier observes that there is no incentive for it to favor foremen in the assignment of work because foremen are paid at a higher rate than trackmen. Carrier urges that it has the sole authority to determine how many foreman a particular project requires.

The Board has reviewed the record carefully. It is clear that on this property foremen are working foremen. Carrier does not violate the Agreement merely by assigning some trackmen's duties to foremen. The critical question is whether the five foremen were working as foremen, i.e. whether they were performing foremen's duties. If they only performed trackmen's duties, then they were working as trackmen and the claim must be sustained.

Rule 3(b) of the Agreement provides: "An employee directing the work of men, reporting to officials of the railroad and the work of patrolling and inspecting track and roadway shall be

classified as a foreman." The record reflects that four of the five foremen directed the work of other employees. The Organization objects that no more than three foremen were needed and points out that one of the foremen directed the work of only one employee. However, it is not the function of this Board to tell Carrier how many foremen to use on a particular project. As long as the employees that Carrier labelled as foremen actually worked as foremen, there is no violation of the Agreement.

The Organization further relies on signed statements from eleven employees that attested to the foremen working as trackmen in violation of the Agreement. We do not find these statements persuasive. Many of them attest only to seeing the foremen perform trackmen's duties. However, as discussed above, foremen could perform trackmen's duties without violating the Agreement as long as they were working as foremen. Some of the statements attested that the younger foremen did not direct the work of any other employees. These statements failed to identify the specific foremen to whom they referred. It is possible that they referred to the one foreman who did not direct the work of other employees. Furthermore, the statements merely asserted a conclusion with no additional detail. They are less probative than the specific Carrier records which show, as conceded by the Organization during handling on the property, that four of the foremen directed the work of other employees.

Carrier concedes that the fifth foreman did not direct the work of any employees. Nevertheless, Carrier maintains that he worked as a foreman because he completed reports, a duty specifically mentioned in Rule 3(b). However, the only reports the record shows the fifth foreman completed were Foreman's Field Labor Reports. The record also contains unrefuted evidence that employees other than foremen completed these reports, which took an average of five to ten minutes to complete. Accordingly, we find that the fifth foreman did not work as a foreman and that, although the claim must be denied concerning the work of the four foremen who directed the work of other employees, it must be sustained as to the trackman's work performed by the fifth foreman who did not direct the work of any other employees.


AWARD

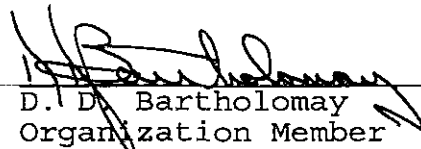
Claim sustained in accordance with the findings.

ORDER

The Board, having determined that an award favorable to Claimants be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto.


Martin H. Malin, Chairman


J. F. Ingham,
Carrier Member


D. D. Bartholomay
Organization Member

Dated at Chicago, Illinois, October 22, 1998.