

BEFORE PUBLIC LAW BOARD NO. 7007

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
and
MASSACHUSETTS BAY COMMUTER RAILROAD**

Case No. 18

STATEMENT OF CLAIM:

- (1) The Agreement was violated when the Carrier directed and assigned Supervisor J. Rodriguez to perform Maintenance of Way foreman duties (record and report time) for the tie installation crew on July 28 through August 25, 2006 and for the rail laying crew on August 28 through September 21, 2006 instead of Foreman J. Teague [Carrier's File MBCR-BMWE-01(a) and (b)/0107].
- (2) The Agreement was violated when the Carrier directed and assigned Supervisor J. Rodriguez to perform Maintenance of Way foreman duties (record and report time) for the tie installation crew on September 25 through October 2, 2006 instead of Foreman R. Bly (Carrier's File MBCR-BMWE-02/0107).
- (3) The Agreement was violated when the Carrier directed and assigned Supervisor J. Rodriguez to perform Maintenance of Way foreman duties (record and report time) for the rail laying crew on October 3 through October 26, 2006 instead of Foreman J. Teague (Carrier's File MBCR-BMWE-12/0107).
- (4) As a consequence of the violation referred to in Part (1) above, Claimant J. Teague shall now be compensated for a total of seventy-two (72) hours at his respective time and one-half rate of pay.
- (5) As a consequence of the violation referred to in Part (2) above, Claimant R. Bly shall now be compensated for a total of ten (10) hours at his respective time and one-half rate of pay.
- (6) As a consequence of the violation referred to in Part (3) above, Claimant J. Teague shall now be compensated for a total of thirty (30) hours at his respective time and one-half rate of pay.

FINDINGS:

The Organization filed the instant claims on behalf of Claimants J. Teague and R. Bly, alleging that the Carrier violated the parties' Agreement when it assigned Supervisor

J. Rodriguez to perform Maintenance of Way duties (record and report time) for a rail-laying crew during certain periods from July through October 2006. The Carrier denied the claims.

The Organization initially contends that this case involves the Carrier's improper assignment of a supervisor to perform common, ordinary foreman work for several gangs on a regular daily basis, instead of allowing the regularly assigned track foremen to perform this work. The Organization asserts that the Carrier cannot assign supervisory personnel to perform work rightly accruing to Maintenance of Way employees under the terms of the Agreement. The Organization argues that it is well established that supervisory personnel cannot validly be assigned to replace Agreement-covered forces in the performance of scope-covered work.

The Organization emphasizes that seniority is one of the most important cornerstones of collective bargaining agreements. Arbitral boards long have recognized that seniority is a valuable property right of an employee. The Organization maintains that when the parties listed the various classes within Rule 1, they explicitly included all classes of employees, including track foremen, intended to be covered by the Scope of the Agreement. The Organization asserts that the parties therefore excluded all those not listed therein. The Organization insists that Supervisor Rodriguez was excluded from the Agreement and had no contractual right to perform the work at issue. The Organization points out that the Carrier never disputed the fact that Supervisor Rodriguez was not governed by the parties' Agreement.

The Organization maintains that Supervisor Rodriguez performed foreman work,

and there can be little question but that such work historically has been performed by foreman forces coming within the Scope of the Agreement. The Organization contends that foremen always have been responsible for keeping time.

The Organization asserts that countless Board Awards have held that work of a class belongs to those for whose benefit the contract was made, and delegation of such work to others not covered thereby is a violation of the contract. Moreover, arbitral boards consistently have held that it is improper for supervisors to perform scope-covered work.

The Organization then addresses the defenses raised by the Carrier in this matter, contending that none of them have any merit. The Organization argues that the so-called exclusivity test has no application here because this test applies to cases involving the proper assignment of employees as between various classes of employees. The Organization points out that this case involves the improper assignment of scope-covered work to supervisory employees outside of the collective bargaining agreement. Accordingly the exclusivity test has no application here, as has been found in numerous Board Awards.

The Organization additionally emphasizes that the Carrier is in serious error when it claims that the number of hours claimed is completely arbitrary. The Organization insists that there is no evidence in the record indicating that the number of hours claimed is not entirely accurate. The Organization points out that the Board may direct the parties to conduct a joint review of the Carrier's records to dispel any discrepancies in the number of hours claimed.

The Organization ultimately contends that the instant claims should be sustained in their entirety.

The Carrier initially contends that the Organization has fallen woefully short of satisfying its burden of proof in this matter. This is particularly true where, as here, the Agreement's Scope Rule is general in nature.

The Carrier then points to the Organization's statement that supervisors started doing time cards around July 2005. The Carrier asserts that no formalized dispute was raised at that time, so the Organization accepted the process. The Carrier argues that under the Doctrine of Estoppel, the employees "slept on their rights" under the grievance procedure and the Organization cannot now claim a violation of the Agreement.

Turning to the Organization's assertion that foreman have been keeping time for twenty-nine years, the Carrier maintains that whatever the time period, the Organization must prove its case with grounded evidence. The Carrier emphasizes that none exists in this case. The Carrier points out that the Organization did not proffer any historic demonstration of any employee routinely receiving two hours pay at the overtime rate when assigned as a production crew foreman.

The Carrier then challenges the Organization's allegation that Supervisor Rodriguez handled time on the dates claimed, arguing that the Organization's mere assertion cannot be accepted as fact. The Carrier emphasizes that aside from failing to show historical system-wide ownership of the work in dispute, the Organization failed to submit contemporary proof, such as witness statements, to support its assertions. The Carrier argues that Supervisor Rodriguez has both managerial prerogative and an

obligation to ensure that the production gangs work as efficiently and safely as possible.

The Carrier insists that the fact that the job bulletin states that the foreman will “record time” does not meet the burden of exclusivity. The Carrier asserts that the bulletin does not say that “no one other than a foreman will record time.” The Carrier contends that the Claimant’s position was not bulletined for ten hours (two hours of overtime) to complete employee payroll records. The Carrier argues that the Organization’s position that the claim is driven by a manpower shortage, and that this is what prohibited the Claimant from “doing time cards” during straight-time hours, clearly is a hollow argument. Moreover, this assertion is in contravention to the motive – that Claimant obviously came to enjoy “anticipated” overtime.

The Carrier argues that the Board is not to adjudicate whether the Carrier made a wise adjustment in “practice.” The Carrier maintains that there is no evidence of an attempt to dilute the primary duties of a production crew foreman. The Claimant did not suffer a loss in work opportunity as a result of a violation of the Scope Rule. The Carrier asserts that the instant claim is excessive, lacking in merit, and devoid of requisite proof necessary to sustain the claim.

The Carrier ultimately contends that the instant claims should be denied in their entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the record in this case, and we find that the Organization has met its burden of proof that the Carrier’s assignment of supervisory personnel to

perform the foreman work was improper. Therefore, the claim must be sustained.

The record reveals that the Organization-represented foremen have been recording and reporting time for the tie installation crew for several decades. The Carrier representative stated in her response to the claims that she did not challenge the fact that the job bulletin denotes the foreman's general responsibility includes recording time. Consequently, it is clear that that work has been bargaining unit work covered by the parties' collective bargaining agreement for many years.

Although the Carrier argues that “. . . a roadmaster certainly bears responsibility to ensure the employee time is recorded and transmitted in a timely fashion,” that does not mean that the basic work of recording and reporting time for the tie installation crews at issue in this case was work that could be expropriated by supervisory in personnel. The supervisor was not governed by the terms of the parties' collective bargaining agreement, and it was the foremen who were supposed to be performing the work at issue in this case. Since the Carrier improperly took that work away from the bargaining unit employees, this claim must be sustained.


With respect to the remedy, there is some dispute as to the number of hours that were actually spent by the supervisors improperly performing the work at issue. The Claimants are seeking seventy-two hours, ten hours, and thirty hours, respectively, at the time and one-half rate to fully compensate them for the violations. This record does not contain sufficient information for this Board to award those hours to the respective Claimants and, consequently, this Board must direct the parties to conduct a joint review of the Carrier's records to dispel any discrepancies in the numbers of hours claimed.

Consequently, the claim is sustained in part, but the parties are directed to conduct a joint review to determine the correct number of hours to be paid to the Claimants.

The claim is sustained in part in accordance with the above decision.

AWARD:

The claim is sustained in part. The parties are directed to conduct a joint review to determine the correct number of hours to be paid to the Claimants.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER



CARRIER MEMBER

DATED: 4/9/09

DATED: 4/9/09