

PUBLIC LAW BOARD NO. 7566

BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION)
IBT RAIL CONFERENCE)
and)
CANADIAN NATIONAL/WISCONSIN)
CENTRAL LTD.)

REC'D JUN 12 2013
Docket No. 1

Claimant: D. Poquette

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it assigned non-agreement Assistant Track Supervisor M. Yankee to perform scope covered track inspection work beginning on August 14, 2009 and continuing instead of Claimant D. Poquette (Carrier's File WC-BMWED-2009-00059).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Poquette shall be allowed pay at the applicable track inspector's rate for all straight time and overtime hours worked by non-agreement Assistant Track Supervisor M. Yankee in the performance of scope covered track inspection work beginning on August 14, 2009 and continuing until the violation ceases."

Findings:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7566 has jurisdiction over the parties and the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The instant dispute involves the use of non-bargaining unit track inspectors. The parties have previously executed a Letter of Agreement, identified as Side Letter # 3, which reads:

Mr. Fred Peters
General Chairman
Wisconsin Central Division
Brotherhood of Maintenance of Way Employees'
205 Elm Road South
Stevens Point, WI 54481

July 20, 2004

Dear Mr. Peters:

This is to confirm our understanding, reached during negotiations leading to the agreement of this date, regarding current performance of Track Inspection work. The parties agree that the incumbents of the non-agreement unit Assistant Track Supervisor positions, on the Wisconsin Central Division may continue to perform the track inspector duties now performed in the same manner and to the same extent as currently being until such time as they permanently vacate the position now held.

As the incumbents vacate their positions, for any reason, the track inspection work performed by them will come under the provision of the agreement.

Yours truly,

/s/ JS Gibbins

J.S. Gibbins

Director - Labor Relations

I concur:

/s/ Fred A Peters

Fred Peters - General Chairman

The Organization contends that when incumbents assigned to non-agreement assistant track supervisor positions vacate the position held as of July 20, 2004, for any reason, the track inspection work performed by the vacating incumbent will come under the provisions of the Agreement and the track inspection work will then be assigned to the appropriate bargaining unit member. Simply, if the position is vacated for any reason, then the work will be assigned to bargaining unit employees. Here, it was vacated when the incumbent assistant track supervisor left the position and moved to another location. He vacated the position to move to another location and the work should now going to a bargaining unit member.

In support, the Organization argues:

Beginning on approximately August 14, 2009, incumbent D. Pinto vacated his Fond du Lac assistant track supervisor position and assumed the new assistant track supervisor position created and headquartered in Burlington, working under Track Supervisor C. Lewzader. . . Moreover, Mr. Yankee vacated his assistant track supervisor position headquartered at Neenah and thereafter assumed the Fond du Lac assistant track supervisor position vacated by Mr. Pinto.

The Carrier responds that the parties entered into their first collective bargaining agreement in July 2004. The letter of understanding addressed non-bargaining unit track inspectors. Two of those track inspectors, Newberry and Yankee did not vacate their positions within the meaning of the letter of understanding. To vacate the position would mean that they retired, resigned or were promoted. This did not happen in the instant matter. Rather, the two track inspectors were reassigned to different territories. The Carrier also reminds that there have been new bargaining unit track inspector positions added. The Organization cannot show a violation where the track inspectors were relocated or reassigned. The Agreement was not violated.

In a contract interpretation claim, the burden is on the party asserting a violation of the Agreement. The burden is therefore on the Organization. In support, the Organization argues that the side letter illustrates the intent of the parties to preserve the incumbent positions – and not to agree to allow the incumbents to be moved between territories. Further, the Organization maintains that vacating a position “for any reason” includes vacating, as here, due to reassignment. The work then becomes scope covered work.

The Organization argues in its Submission that:

the phrase “for *any* reason” as incorporated within the parties’ July 20, 2004 Side Letter #3, clearly means that the parties’ intent and agreement beginning on July 1, 2004 and continuing, was for track inspection work to continue to be performed by the incumbents assigned to assistant track inspectors at the particular locations within the Wisconsin Central Division until they vacated the positions, *for any reason.* (*emphasis in original*)

The Organization argues that the incumbent positions mean that they are tied to “the particular locations within the Wisconsin Central Division.” However, a reading of the Side Letter does not support that conclusion. A plain reading of the Side Letter indicates that the terms apply to the Wisconsin Central Division but does not limit the incumbents to particular locations within that Division. The inquiry then turns to the meaning of the “until such time as they permanently vacate.”

A document should be read as a whole when considering the meaning of certain provisions. In the instant matter, the first paragraph of the Side Letter discusses the “non-agreement unit Assistant Track Supervisor positions, on the Wisconsin Central Division.” This language indicates to whom the Side Letter applies. A plain reading indicates that it applies to all non-bargaining unit employees performing track inspector work on the Wisconsin Central Division at the time the letter was executed.

The Carrier maintains that the positions were reassigned, but not vacated. That reading is persuasive when the language of the Side Letter is considered. The employees are still assistant track inspectors albeit at a different location on the Wisconsin Central Division. They have not been promoted, fired, demoted or retired – and thereby creating a vacancy that must be filled with a bargaining unit member. Given that there is nothing in the Side Letter limiting it to the specific assistant track inspector locations, the Carrier’s position should prevail. Had the parties wished to tie the positions to specific locations, they could have stated that in the Side Letter. They did not.

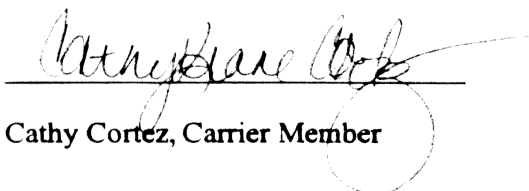
The non-bargaining unit assistant track inspectors in the instant matter are still performing assistant track inspector work on the Division. They have not vacated the assistant track inspector position. The burden is on the Organization to establish a violation. The Organization has not met that burden.

Award:

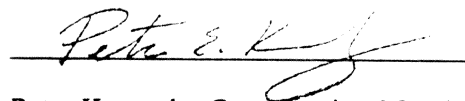
Claim denied.



Brian Clauss, Chairman



Cathy Cortez, Carrier Member



Peter Kennedy, Organization Member

Signed on June 10, 2013

LABOR MEMBER'S DISSENT
TO
AWARD 1 OF PUBLIC LAW BOARD NO. 7566
(Referee Clauss)

It is a timeworn belief by many advocates within the railroad arbitration industry that dissents are an exercise of futility because they are simply a regurgitation of arguments already denied by the Referee. This Organization Member does not subscribe to such school of thought. The precedential value of an award is directly proportionate to the reasoning contained therein. In this instance, the Board erred when it subscribed to the Carrier's specious arguments and used such as its basis for denying the claim. Accordingly, Award 1 (Case 1) of PLB No. 7566 is based on faulty reasoning and, thus, has no precedential value.

In this regard, the Board ultimately denies the instant claim on the following basis:

"The Carrier maintains that the positions were reassigned, but not vacated. That reading is persuasive when the language of the Side Letter is considered. The employees are still assistant track inspectors albeit at a different location on the Wisconsin Central Division. They have not been promoted, fired, demoted or retired – and thereby creating a vacancy that must be filled with a bargaining unit member. Given that there is nothing in the Side Letter limiting it to the specific assistant track inspector locations, the Carrier's position should prevail. Had the parties wished to tie the positions to specific locations, they could have stated that in the Side Letter. They did not."

The Board's ruling that non-bargaining unit track inspector positions are not vacated unless they are promoted, fired, demoted or retired is entirely specious and the Board's statement that the parties did not limit the non-bargaining unit track inspector positions to specific track inspector locations is entirely erroneous. The parties did not limit what constitutes a reason for vacating the non-bargaining unit track inspector positions and parties did tie the non-bargaining unit track inspector positions to specific track inspector locations. In this connection, Side Letter #3, as referred to by the Board, clearly states:

"The parties agree that the incumbents of the non-agreement unit Assistant Track Supervisor positions, on the Wisconsin Central Division may continue to perform the track inspector duties now performed in the same manner and to the same extent as currently being until such time as they permanently vacate the position now held.

As the incumbents vacate their positions, for any reason, the track inspection work performed by them will come under the provision of the agreement."


As noted throughout the on-property handling of the instant dispute, the subject incumbent, D. Pinto, was regularly assigned to a non-bargaining unit assistant track supervisor position at

Fond du Lac and the incumbent performed track inspection at the assigned territory coming under this assignment at this location. No non-bargaining unit assistant track supervisor position existed at Burlington. The Carrier created a non-bargaining unit assistant track supervisor position at Burlington and assigned D. Pinto to said newly created Burlington position. Thus, the Fond du Lac incumbent (i.e., D. Pinto) vacated his position when he took a new position at an entirely different location. Said in another way, D. Pinto held the Fond du Lac position until he vacated it and held the new Burlington position.

Notwithstanding, the Organization further notes that the word **any** literally means an indefinite selection. Accordingly, the provision "**As incumbents vacate their positions, for any reason....**", as contained in Side Letter #3, would therefore mean that as incumbents can vacate their position for an unrestricted or indefinite selected amount of reasons. Thus, said provision is clear and would undoubtedly encompass the reason of creating a new non-bargaining unit assistant track supervisor position at a new location and removing an existing non-bargaining unit assistant track supervisor incumbent from their position at their existing location and assigning them to said new position as **any reason** as contemplated by Side Letter #3.

The parties did not limit vacating as promoting, firing, demoting or retiring as the Board has inaccurately concluded here. The Board's conclusion is not founded upon the clear and unambiguous language of the Agreement, as incorporated through Side Letter #3. Accordingly, the Award 1 (Case 1) of PLB No. 7566 has no founded reasoning to support its conclusions. Therefore, I vigorously dissent and assert that award has no precedential value, whatsoever.

Respectfully submitted,


Peter E. Kennedy
Organization Member
PLB No. 7566