

BEFORE PUBLIC LAW BOARD NO. 1837

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NORFOLK & WESTERN RAILWAY COMPANY

Case No. 118

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier failed to bulletin the extra gang foreman vacancy on Smoothing Gang SM-17 and when it failed to recall and assign furloughed Extra Gang Foreman V. Kreamer thereto and instead assigned Track Patrolman B. Scorp to supervise Smoothing Gang SM-17 on November 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, and 21, 1997. (File MW-FTW-97-144)
2. The Agreement was further violated when the Carrier failed to bulletin the extra gang foreman vacancy on Smoothing Gang SM-17 and when it failed to recall and assign furloughed Extra Gang Foreman V. Kreamer thereto and instead assigned Track Patrolmen V. Berry and B. Scorp to supervise Smoothing Gang SM-17 on September 29, 30, October 1, 2, 3, 6, 7, 8, 9, and 10, 1997. (File MW-FTW-97-146)
3. The Agreement was further violated when the Carrier failed to bulletin the extra gang foreman vacancy on Smoothing Gang SM-17 and when it failed to recall and assign furloughed Extra Gang Foreman V. Kreamer thereto and instead assigned Welder E. Shephard, Truck Driver M. Minix and Track Patrolman B. Scorp to supervise Smoothing Gang SM-17 on November 24, 25, 26, December 1, 2, 3, 5, 8, 9, 11, 12, 15, 16, 17, 18, and 19, 1997. (File MW-FTW-97-149)
4. The Agreement was violated when the Carrier failed to bulletin the extra gang foreman vacancy on Smoothing Gang SM-17 and when it failed to recall and assign furloughed Extra Gang Foreman V. Kreamer thereto and instead assigned Track Patrolman Bill Scorp to supervise Smoothing Gang SM-17 on January 12, 13, 14, 15, and 16, 1998. (File MW-FTW-98-014)
5. As a result of the violation in Part 1 above, Extra Gang Foreman V. Kreamer shall be compensated one hundred thirteen (113) hours at the applicable extra gang foreman's straight time rate of pay and the referenced extra gang foreman's position shall be advertised in accordance

with the Agreement.

6. As a result of the violation of Part 2 above, Extra Gang Foreman V. Kreamer shall be compensated eighty (80) hours at the applicable extra gang foreman's straight time rate of pay and the referenced extra gang foreman's position shall be advertised in accordance with the Agreement.
7. As a result of the violation in Part 3 above, Extra Gang Foreman V. Kreamer shall be compensated one hundred twenty-eight (128) hours at the applicable extra gang foreman's straight time rate of pay and the referenced extra gang foreman's position shall be advertised in accordance with the Agreement.
8. As a result of the violation in Part 4 above, Extra Gang Foreman V. Kreamer shall be compensated forty (40) hours at the applicable extra gang foreman's straight time rate of pay and the referenced extra gang foreman's position shall be advertised in accordance with the Agreement.

FINDINGS:

At the time of this claim, Claimant V. Kreamer was on furlough as an extra gang foreman and held seniority as an extra gang foreman.

Initially, four separate claims were filed by the Organization on behalf of the Claimant; but, because of the claims' similarities, the claims have been combined.

The Organization filed claims on behalf of Claimant V. Kreamer, contending that the Carrier violated the parties' agreement dated February 1, 1951, specifically Rules 1-(a), 1-(b), 11, 14-(a), 14-(b), 14-(c), and 14-(d), when it assigned employees Shephard, Minix, Berry, and Scorp, who were not extra gang foremen, to Smoothing Gang SM-17 to perform supervisory duties normally accruing to an employee with seniority as an extra gang foreman, that is, the Claimant. The Organization contends that the Claimant was denied the opportunity to perform extra gang foreman work on Smoothing Gang SM-17, which was reserved to him by the

agreement, on the following four groups of dates:

1. September 29, 30, October 1, 2, 3, 6, 7, 8, 9, and 10, 1997; and
2. November 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, and 21, 1997; and
3. November 24, 25, 26, December 1, 2, 3, 5, 8, 9, 11, 12, 15, 16, 17, 18, and 19, 1997;
and
4. January 12, 13, 14, 15, and 16, 1998.

The Organization contends that, for each group of dates, the Carrier failed to advertise the vacancy and recall and assign the Claimant, who was qualified and available, to the supervisory duties in question in recognition of his seniority. The Organization argues that, during each period, the work in question was of sufficient duration so as to justify bulletining the vacancy and making it available to the Claimant. The Organization also argues that even though the Claimant was working in another rank, at the direction of the Carrier, each time the extra gang foreman work became available, the Carrier was contractually obligated to advertise the extra gang foreman vacancy, and not merely assign the work to a welder, a truck driver, and track patrolmen.

The Carrier argues that the work in question during each period involved obtaining track warrants and piloting track equipment for Smoothing Gang SM-17 which, the Carrier contends, is work that is and has been performed by a variety of employees in both the BMW crafts, in other crafts, and by employees in a supervisory capacity, not exclusively by extra gang foremen. The Carrier contends that the scope and classification rules of the agreement between the parties in regards to this matter are general in nature and do not expressly reserve the work of obtaining track warrants and piloting equipment for a smoothing gang, or any other extra gang, to extra

gang foremen or, for that matter, to any classification or even to the BMW craft. The Carrier states that the Organization has the burden of proving that the disputed work has by custom and practice been performed by one classification to the exclusion of all other employees; and, in each of these cases, it has not. The Carrier also maintains that there is nothing in the agreement which requires the assignment of an extra gang foreman to work with or supervise an extra gang, such as SM-17, and that it did not need to advertise the position, but retains the sole prerogative to determine whether a foreman is needed on a particular gang. In addition, the Carrier contends that since the Claimant was fully employed in another capacity at the time of each assignment and was not furloughed, he could not have possibly been available to perform the work on any of the dates in question.

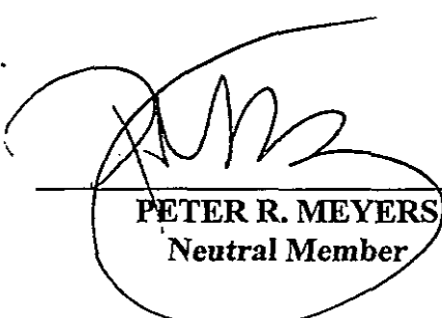
The parties being unable to resolve the issues, this matter came before this Board.

This Board has reviewed the record in this case, and we find that the Carrier acted in violation of the Agreement in making these temporary assignments. The Claimant was qualified and available and was entitled by his established seniority to perform the disputed extra gang foreman's work. The Carrier was contractually obligated to make the assignments based upon extra gang foreman seniority when using an employee that was not a member of SM-17 and was not a section foreman or assistant section foreman. It failed to do so and, therefore, this claim must be sustained at least in part.

The record also reveals that the Claimant was working during this entire period. Consequently, the Claimant is not entitled to the full pay, but only the difference between the amount of money that he would have earned in the extra gang position, minus any earnings that he made in the position that he worked during the days in question.

AWARD:

The claim is sustained in part. The Carrier violated the agreement and, therefore, the Claimant was entitled to the pay of the extra gang foreman vacancy position. However, since the Claimant worked during the period in question, he is only entitled to the difference in pay between what the extra gang foreman position paid and what he actually received in payment for the work that he performed.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: 2-15-00



CARRIER MEMBER

DATED: 2/15/00