

PUBLIC LAW BOARD NUMBER 1837

Case Number 45
(MW-BRS-76-13)

PARTIES TO DISPUTE:

Norfolk and Western Railway Company

and

Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM:

1. The Carrier has violated the provisions of the Wheeling and Lake Erie District Scheduled Agreement dated April 1, 1951, and subsequent amendments when on April 28, 29, and 30, 1976, it assigned Bridge and Building Carpenter Pete Cieresewski to flag for a crane operated by a work equipment operator while ditching at the East and West end of Pittsburgh Junction Tunnel instead of Trackman John Whiteman.

2. Claimant John Whiteman, being qualified, available, and having seniority as a trackman, be paid twenty-four (24) hours at the appropriate rate of pay of the trackman.

FINDINGS:

This Board, upon the whole record and all evidence, finds that:

The carrier and the employee involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

OPINION:

Claimant was a Trackman with seniority in the Track Sub-department. The other employee directly relevant to this case, Cieresewski, was a carpenter (or Lead Mechanic per the Carrier) and assigned to the Bridge and Building, Sub-department. On April 28, 29 and 30, 1976 Cieresewski was assigned to flag a crane's operations which involved ditching and sloping banks at the east and west end of a tunnel. Per the Organization since such ditching operations were performed within the Track Sub-department, the job of flagging the crane was "work incidental" to the major work being performed -- that of ditching and sloping -- as contemplated by Rule 40 (b) of the Agreement. Per the Carrier, the assignment of such flagging work was proper in that (1), two crews -- track and B&B -- were working in and around the tunnel area and it was routine for only one flagman to serve both crews (2), no rule grants exclusivity to any craft for flagging duties and (3), the Claimant was fully employed and occupied at the time of events germane to this dispute.

The Organization objects to the Carrier's raising the contention set out in item (1) above in its Submission, pointing out that no such defense was raised on the property at any level of the handling of this claim. Its point is well-taken: assertions and contentions not disclosed during grievance

handling may not be brought out for the first time at the appellate level of dispute handling.

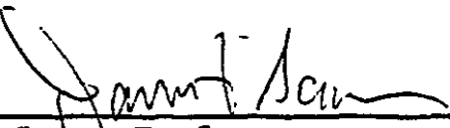
The Organization's assessment of Rule 40 (b) is well-taken: a literal reading of this Rule must lead to the conclusion that the duties of flagging for a crane's operation in conjunction with a Track crew's work would be performed by a member of that craft. The Carrier points out that the Claimant herein was fully occupied during this period and could not have performed such duties. The Organization does not dispute this but asks instead for punitive damages as a deterrent to future such abuses.


A great deal of history on punitive awards has been written by various Boards and Divisions empowered under the provisions of the Railway Labor Act; indeed, the Courts have added to the mosaic on this subject. On the one hand, the argument is made that collective agreements allow for "make whole" decisions and not for unjust enrichment or pay for time that could not be worked; on the other hand, unless a basis to do otherwise exists, an employer would continue to violate its obligations on the pain of mere admonishment. We adopt the position that punitive damages should be the order of business where the offense is flagrant and could not escape reasonable notice or where the Carrier repeatedly violates the Agreement, even if such offense is merely an irritant. We find neither of these contentions to exist, but alert the Carrier

to the potential for punitive damages if such offenses recur.

AWARD:

The Organization has demonstrated a violation of the Agreement; however, punitive damages shall not be awarded for the reasons set forth in the Opinion.


James F. Searce
Neutral Member


E. N. Jacobs
Carrier Member


William E. LaRue
Employee Member

Dated March 24, 1982 at Philadelphia, Pa.