

B E F O R E

PUBLIC LAW BOARD NO. 478

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

VS.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

STATEMENT OF CLAIM: Did Carrier's action in increasing the force on Section Gang No. 421, Waxahachie, Texas, instead of creating an extra gang to perform certain track maintenance work beginning on or about June 2, 1969, violate any rule of the current agreement (Agreement No. DP-357, effective February 1, 1928, with revisions to September 15, 1961); or, any other rule in effect between the parties at the time this dispute arose?

During the course of the hearing BMW withdrew any claim for monetary damages even though violation of the Agreement be found. Arbitration of the dispute was and is consequently confined to resolution on the merits of the claim.

JURISDICTION:

Pursuant to Section 3, Second of the Railway Labor Act, herein called the Act, as amended; and, pursuant to the duly promulgated Rules of the National Mediation Board (NMB) (CFR TIT. 29, Ch. X, Part 1207, as published in F. R. Doc. 66-12451, filed November 16, 1966), the parties hereto, by agreement executed November 4, 1969, established this Board.

OPINION OF BOARD:

There is no prejudicial conflict in the facts.

At all times material herein Vicente Ramirez was Section Foreman, Section No. 421, headquarters Waxahachie, Texas. On May 27, 1969, General Chairman

C. L. Uptergrove received a communication from Ramirez that he had been advised by his superiors that: (1) a Tie Gang would be started on June 2, 1969, at Hillsboro, Texas; and (2) Ramirez would be in charge in addition to performing his duties on Section 421. Hillsboro, some 34 miles from Waxahachie, is in Section 425 (Note, not in Ramirez's Section 421). BMW and Ramirez complained about the assignment averring it was in violation of: (1) the Schedule Agreement; and (2) history, tradition and custom unilaterally established by Carrier in a letter to BMW's General Chairman Jones, dated November 9, 1955, from Carrier's then Vice President-Personnel, A. F. Winkel, which had been complied with from 1956 to the June 2, 1969 incident referred to above.

Ramirez, under threat of discipline for insubordination by his superior, complied. Ramirez reported at 8:00 A.M. each morning at his headquarters at Waxahachie from which point Carrier transported him to the site at Hillsboro where the Tie Gang was working and then transported him back to Waxahachie for termination of his day's employment at 5:00 P.M. On the other hand, although the Tie Gang was assigned by Carrier to Section No. 421, they did not report at its headquarters, Waxahachie, at starting and finishing time. Instead they reported directly to the job site where the machines were located and terminated their day's employment at such locations. On June 10, 1969, the Tie Gang moved from the work area of Section 425 into the territory of Section 421. Ramirez continued under specific orders to be the Foreman in charge. The Tie Gang was abolished July 7.

On or about July 14, about the same number of Track Laborers was assigned headquarters at Waxahachie, Section 421, where they reported each morning at 8:00 A.M. and normally terminated their day at the same location at 5:00 P.M. This Gang was employed laying rail. It was referred to as the Rail Gang. It was abolished on August 19, 1969.

It is Carrier's position that the two Extra Gangs -- Tie and Rail -- were only additional employees assigned to Section 421; and there being no contractual

or legal bar the assignments were an inherent right of Carrier, subject only to its will as to number of employees required. It cites, in support, Third Division Award No. 11467 (June 6, 1963) involving this property and the same parties, Schedule Agreement, and Vice President-Personnel Winkel's letter of November 9, 1955, which we quote, infra.

In Award No. 11467, the Third Division stated that "There must be a violation of an Agreement between the parties before this Board may sustain a claim." The principle enunciated by Carrier and the quoted finding from Award No. 11467 were for a long time the established case law of Railroad Adjustment Boards and sustained by the courts. The Supreme Court in the Günther v. San Diego & Arizona E. R. Co., 382 U. S. 257, did however, in effect, reverse Award No. 11467. Cf. the Supreme Court's Opinion in Detroit and Toledo Shore Line RR v. U.T.U., 396 U.S. 142 (12/9/69) which has given greater legal significance to history, tradition and custom on a property absent formal contractual provisions.

On November 9, 1955, Vice President-Personnel, Winkel wrote to the BMW's
General Chairman:

"Dallas 2, Texas
November 9, 1955
2 5 7 0

"Mr. E. Jones
General Chairman
Brotherhood of Maintenance of Way Employes
Post Office Box 433
Denison, Texas

Dear Sir:

Maintenance of Way methods in effect on our property have become obsolete and will be modernized within the near future. The length of sections vary and few, if any, machines are used to maintain the track except by the occasional extra gangs. Our section forces use the same type of hand tools for maintaining the track as was used in its original construction.

The plan which we have adopted is similar to those in effect on some of the other railroads, and the following is a general outline of the program:

One hundred eight of the 328 existing sections will be abolished, and the remaining 220 sections will be

lengthened to take care of patrolling, spotting and miscellaneous work, including yard and branch line gangs, which will continue to function along present lines.

Tie insertions, out-of-face surfacing of main track and heavy maintenance will be done by 17 mechanized gangs as follows:

Two tieing-Surfacing Gangs, each consisting of

1 Foreman
1 Assistant Foreman
1 Timekeeper
7 Machine Operators
19 Laborers.

These two gangs will be used on programmed out-of-face tieing and surfacing on the following main lines:

Paola to Parsons
Parsons to Denison
Denison to Whitesboro
Denison to Hillsboro via Dallas
Ft. Worth to Granger
San Marcos to San Antonio

Two Tie Gangs, each consisting of

1 Foreman
1 Timekeeper
6 Machine Operators
20 Laborers

will be used on programmed cross tie insertion work on the following lines:

Machens to Parsons
Parsons to Oklahoma City
Chase to Osage
Whitesboro to Wichita Falls
Waco to Stamford
Granger to Austin
Granger to Smithville
Smithville to San Marcos
Smithville to Houston

Eleven Maintenance Gangs, each consisting of

1 Foreman
7 Laborers

equipped with one 4-man pneumatic tamper and equipment, will be assigned to the following territories:

1 Machens to Franklin

- 2 Franklin to Parsons
- 3 Parsons to Oklahoma City
- 4 Paola to Parsons and Parsons to Joplin
- 5 Parsons to Muskogee
- 6 Muskogee to Staley
- 7 Staley to Dallas
- 8 Dallas to Hillsboro and Fort Worth
to Bellmead
- 9 Bellmead to Austin
- 10 Granger to Houston
- 11 Smithville to San Antonio

Two Maintenance Gangs assigned to the Northwestern Division will have the same setup as the above Maintenance Gangs, except that they will not be equipped with the tamper.

J. F. Wink
gkc

These Maintenance Gangs will take care of heavy maintenance work, and will be equipped with trucks for transportation purposes and trailer houses for lodging accommodations.

It should be understood that the forces shown as comprising the above gangs may fluctuate from time to time.

As the seniority question and other matters are involved by these changes, I shall be glad to go over the matter with you in conference at 10:00 A.M., November 21. Will you please advise if this date is satisfactory.

Yours very truly,
/s/ A. F. Winkel."

In a letter from Winkel to the General Chairman dated November 29, 1955,

Winkel stated:

"You were advised in conference that it will be our purpose to operate these gangs on a system basis as extra gangs in the manner in which extra gangs are now operated. You were further advised that the section gangs would continue to operate and work in the same manner as they are now doing and have done in the past; that the extra gang foreman will have responsibility for work performed under his supervision as now, and that section foreman will have responsibility for his section as now. * * *" (Emphasis supplied)


Relative to seniority rights and duties of Section Foremen, we quote from p. 12 of Third Division Award No. 3627 (July 1947) this property:

"OPINION OF BOARD: By Rule 2 of Section 3 foremen hold seniority rights to new positions or vacancies within a Superintendent's district. Such rights are exercised by bidding for positions as foreman of a designated section, identified by number, and the assignment bulletin assigns him to that specific section. When so assigned, his work is confined to his assigned section, except in case of emergency, when he and his gang may be used on another section where the foreman, and his gang, assigned to the section where the emergency exists, are employed and on duty.

"The section laborers of the section to which a foreman is assigned comprise the gang for that foreman.

"Rule 3 of Article 3 of the Agreement, reading:

'Seniority rights of laborers as such, will be restricted to their respective gangs
* * *

 "Since the work of the foreman and the gang is confined to the section, except in emergencies, and since the seniority of the laborers is confined to the gang, the terms 'sections' and 'gangs' become synonymous when used with respect to seniority.

"When, therefore, a gang is, by Carrier direction, assigned work on a section other than that bulletined to its foreman, it is invading the seniority district of the gang of the foreman to whom was assigned the section so invaded. And the foreman not only goes outside his working district, fixed by his assignment, and by seniority rights of his gang, but he also violates the terms of the assignment of the foreman upon whose section he encroaches." (Emphasis supplied)

Introduced in evidence in this case for our consideration are: (1) Mediation Agreement Case A-5987; (2) Decision in Arbitration Board No. 298; and (3) The National Agreement of February 7, 1965.

Article I - PRIOR CONSULTATION of Mediation Agreement Case No. A-5987 provides that in the event a carrier decides to effect a material change in work methods involving employees covered by the rules of the collective agreement of the organization

there will be notification to and consultation between Carrier and the General Chairman within prescribed time limits; "This Article does not contain penalty provisions and it does not require that agreements must be reached as the right of the carrier to make changes in work methods"

Arbitration Board Award No. 298 in Paragraph I thereof concerns employees who are employed in a type of service, the nature of which regularly requires them throughout their work week to live away from home in camp cars, camps, highway trailers, hotels or motels. Paragraph II concerns employees who are required in the course of their employment to be away from their headquarters point as designated by carrier.

The February 7, 1965 Agreement is not applicable in the case before us.



The issue in this case narrows as to whether Carrier violated the Scope Rule. The Rule is general in nature. For Organization to prevail it has the burden of proving that: (1) Carrier's assignment of the work involved to a Section Gang violated the Agreement; and (2) requiring Section Foreman Ramirez to supervise work on other than his assigned Section, in the absence of an emergency, violated the Agreement.

Issue (2) was found in the affirmative in Award No. 3627, supra. We concur in that finding.

Evidence of the duties historically and customarily performed by a Section Gang, including the Foreman, are evidenced in the first indented paragraph of Winkel's November 9, 1955 letter and the excerpt quoted from his letter of November 29, 1955; supra; and Award No. 3627. Carrier's unilateral enlargement of the respective duties violates the Scope Rule.

We find no need to make findings as to rates of pay, other emoluments and

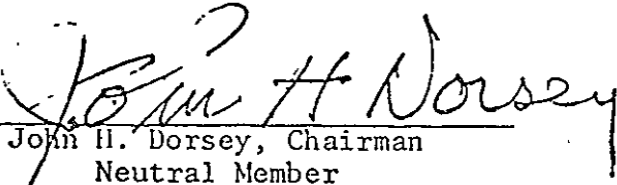
conditions of work attaching to employees assigned to the work here involved. These flow from the assignment as prescribed in Schedule Agreement, Mediation Agreement Case A-5987 and Decision in Arbitration Award No. 298.

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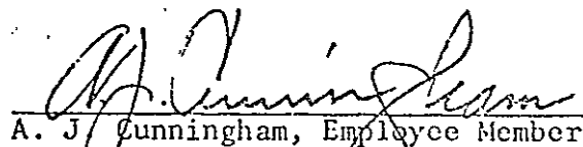
As per Opinion of the Board, supra.

O R D E R

Carrier is hereby ordered to make effective Award No. 1, supra, made by Public Law Board No. 478 as of the date of its execution shown below.


John H. Dorsey, Chairman
Neutral Member


Fred R. Carroll, Carrier Member


A. J. Cunningham, Employee Member

Dated at Dallas, Texas, the 2nd day of September, 1970.