

SPECIAL BOARD OF ADJUSTMENT NO. 1110

Award No. 43

Case No. 43

PARTIES TO THE DISPUTE:

BROTHERHOOD OF MAINTENANCE WAY EMPLOYEES

and

CSX TRANSPORTATION, INC. (Former Louisville
and Nashville Railroad Company).

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it used Welder R. K. Orr and his helper to perform Track Subdepartment maintenance work of removing rail anchors, pulling spikes, spacing ties, tamping ties and related trackman's work between Mile Posts 49.0 and 112.0 on the Bruceton/Memphis Subdivision on April 10, 11, 12, 17, 18, 20, 24, 28, May 1, 2, 3, 9, 15, 16 and 18, 1995 [System File 14(34)(95)/12(95-0861) LNR].
2. As a consequence of the aforesaid violation, Track Repairman L. J. Flake shall be allowed one hundred twenty (120) hours' pay at his respective straight time rate.

FINDINGS:

This Board, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and Employees involved are, respectively, Carrier and Employees within the meaning of the Railway Labor Act, as amended, and;
2. That the Board has jurisdiction over this dispute.
3. The Carrier denied the Organization's claim stating: "There is nothing in the Agreement to prevent these employees from performing the work for which they were assigned, which is making

field welds and performing the incidentals associated with this task". The Carrier asserts that the Organization's claim that the work performed, removing rail anchors, pulling spikes, spacing ties, tamping ties, and related trackman's work in connection with making field welds, was something other than work performed by those employees as a part of their regular assignments. The Carrier argues that the Organization has not put forth any proof that the work in question was part of the trackman's assignment to the exclusion of the welder's assignments.

4. The Carrier contends that the Organization failed to provide the details of exactly how the work in dispute belonged only to a trackman's position and that Claimant was contractually entitled to the work rather than the employees used. The Carrier claims that lacking such evidence, the claim must fail. Citing authority, the Carrier further maintains that since the Organization abandoned a dispute involving an identical subject, it is precluded from pursuing the instant claim.

5. The Carrier argues that the clear and unambiguous ambitions of Article XI - Intra-Craft Work Jurisdiction, supercedes the Schedule Agreement and supplants the Rules relied upon by the Organization. The Carrier points out that Article XI states in pertinent part:

"Employees will be allowed to perform incidental tasks which are directly related to the service being performed and which they are capable of performing, provided the tasks are within the jurisdiction of the BMW. Compensation shall be at the applicable rate for the employee performing the service and shall not constitute a basis for any time claims by other employees. This provision is not intended to alter the establishment and manning of work forces accomplished in accordance with existing assignment, seniority, scope and classification rules".

6. The Carrier argues that the work performed was directly related to the work of the welders in making field welds and in conformity with the Agreement. Citing authority, the Carrier contends that strict classification among BMW employees is not supported by the Agreement and the Board has consistently denied such claims.

7. The Organization argues that the work involved in this dispute has historically, traditionally and customarily been assigned and performed by the Carrier's Track Sub-department Forces. The Organization points out that Appendix No. 34 of the Agreement specifically states:

"[O]n all seniority districts of this company when field welds are being made, a track repairman will be assigned to work with the welding gang to perform the track work unless the ties have already been spread to permit the field weld and that we will not be presented time claims that the welding gang is performing track sub-department work and also time claims that the track repairman is performing welding sub-department".

8. The Organization points out that the subject work was recognized by the parties as being reserved to track repairmen in a Letter of Understanding dated August 23, 1969 and a December 9, 1974 Letter of Instructions. The Organization contends that the trackman's work actually performed by the welders in this dispute consumed more time than other duties performed by Welder Orr and his helper on the claim dates. The Organization points out that the Carrier never questioned the number of hours claimed, the remedy requested or Claimant's ability to perform the subject trackman's work.

9. The Organization argues that Rules 3 and 5 clearly establish that the welding and track sub-departments are separate groups that are maintained with a distinct demarcation of the work accruing to each group of employees; and that the issue in this dispute was previously addressed by NRAB Third Division Awards 29913 and 29914. The Organization contends that since the circumstances of this dispute are nearly identical in nature to those decisions, the Third Division's Awards are controlling precedent.

10. The Organization asserts that the Carrier's reliance on Article XI of the Imposed Agreement lacks merit. The Organization claims that the trackwork performed has no relationship to the making of field welds. The Organization claims that the historical background of Article XI proves that it was never intended to alter the establishment and manning of work forces accomplished in

accordance with existing assignment, seniority, scope and classification rules.

11. The Organization points out that following the expiration of various moratoria contained in collective agreements between BMWE and CSX Railroad in 1988, both parties served notices under the Railway Labor Act seeking changes to the Agreements. When national negotiations proved unsuccessful, the parties agreed to a process that led to the appointment of Presidential Emergency Board No. 219 (the "PEB"). The Organization points out that under the PEB, the Carriers requested of the Contract Interpretation Committee that they be granted authority to assign any employee to perform any work of any craft or any classification, without regard to established class and craft lines or pay or seniority classifications.

12. The Organization further points out that Earl J. Curry, CSX vice-president of Engineering, testified before the PEB of specific areas in which the Carriers needed "relief" from strict intra-craft work jurisdiction rules:

"The first example involves some federations which contend that the drilling of road-crossing timbers is work exclusive to the B&B, therefore requiring the presence of B&B employees when road-crossing work is done, even though about 99% of the actual work to be done is track-type work. The trackmen have the skills to do this minimal amount of drilling that now has to go to the B&B. Compliance with this requirement simply takes the work away from other scheduled work that we feel that they should be on, and it adds to the cost of the crossing work. At times, a single B&B employee might have to be brought in from a considerable distance to do this relatively small amount of work".

* * *

"The third example involves welding. A welder on the former L&N is restricted from pulling and replacing spikes, rail anchors, etc., in conjunction with the primary responsibility he has, which of course is making the field weld. This condition exists despite the fact that most welders are promoted out of the trackman's ranks, and hence have the skills to deal with track

material. A track gang must be available, even though they cannot participate in the overwhelming majority of the work, which is the welding of the joint. This naturally has an adverse effect on the total cost of the weld".

13. The Organization argues that in the testimony, the Carriers stressed the "minimal amount of work allegedly entailed". The Organization argues that instead of granting the Carrier blanket authority to ignore established classifications, the PEB did not grant the Carriers' request for the authority to assign work across craft lines, as it recommended that "employees should be allowed to perform incidental tasks which are directly related to the service being performed which they are capable of performing".

14. The Organization maintains that while the recommendations of the PEB became binding on the parties on July 29, 1991, Article XI of the Imposed Agreement specifically states that it "is not intended to alter the establishment and manning of work forces accomplished in accordance with existing assignment, seniority, scope and classification rules". The Organization asserts that the PEB thus specifically limited the work that could be assigned across class lines to "incidental work directly related to the service being performed".

15. The Organization claims that in this dispute, the welder and the welder helper involved performed a considerable amount of track repairman's work of removing track ballast, jacking ties away from the welding area, removing splices and tamping ties at the location where the ties were moved. The Organization argues that the work performed by Welder Orr and Welder Helper Pinkley was not "incidental" or casual work; it entailed the performance of eight (8) hours of track sub-department work over a period of seventeen (17) days.

16. The Organization points out that the record contains a signed statement from Welder Orr attesting to the fact that he and his helper were required to perform the subject track work because the Carrier assigned no track repairman to perform such work. According to the Organization, Welder Orr's statement also detailed

the track work that he and his helper performed during the claim period which included spreading ties for the field welds they made.

17. The Organization further argues that the Carriers contention that there is precedent which holds that the Organization abandoned this claim, lacks merit. The Organization contends that the NRAB has long held that claims which the parties chose not to progress have no precedential value.

18. As to its burden of proof, the Organization argues that the Carrier never challenged the number of hours claimed. Citing authority, the Organization contends that the claim thus presented must be considered as factual. In respect to the Carrier's contention that Claimant is not entitled to recover since he suffered no loss as a result of its assignment, the Organization argues that the Carrier's failure to assign Claimant resulted in a definite loss of work opportunity and related monetary benefits to him. Citing authority, the Organization argues that Claimant is entitled to receive reparations in the amount he would have received had he been assigned to perform the work in question.

OPINION:

The Board is persuaded that the Carrier violated the Agreement by assigning the Welder and a helper to perform track work in connection with their performance of field welds on the claim dates. The Carrier's reliance upon Article XI of the Imposed Agreement is misplaced. The evidence in the record is that Article XI was intended to grant authority to assign work across classification only where the work is *incidental*. Indeed, the Carrier stressed before PEB No. 219 that it sought relief only in situations where the "incidental" work was minimal and amounted to a small percentage of the total work to be performed.

The record contains a statement by Welder Orr that the track work he performed in connection with the field welds on the claim dates accounted for "75% of [his] time". The statement by Welder Orr was not rebutted by the Carrier. Without question, the track work involved in this dispute was not "incidental". It was substantial and, under the Agreement, ought to have been assigned to Trackmen.

The Board finds that the Carrier's liability is not protected by Article XI. Article XI states, in pertinent part:

This provision is not intended to alter the establishment and manning of work forces accomplished in accordance with existing assignment, seniority, scope and classification rules.


By its plain terms, Article XI prohibits the Carrier from assigning significant trackmen's work to welders or others outside the Track Subdepartment classification. The Carrier violated the Agreement when it assigned a welder and a welder's helper to perform such trackman's work on the claim dates.

AWARD:


The Claim is sustained in accordance with the Opinion of the Board. Claimant Track Repairman L. J. Flake is awarded one hundred twenty (120) hours' pay at his respective straight time rate.



E. William Hockenberry
Chairman and Neutral Member



Donald D. Bartholomay
Employee Member



Patricia A. Madden
Carrier Member

Dated: OCT 25 1999