SPECIAL BOARD OF ADJUSTMENT NO. 1110

Award No. 52
Case No. 52

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 Agreement was violated when the Carrier assigned Assistant Roadmaster T. W. Long to perform Maintenance of Way track work on February 17 (pulled and tamped track at Mile Post N-100.8 on the Nashville Division); on February 20 (repaired the No. 8 Switch on the "Front Ladder" at Bruceton Yard near Mile Post 94.5); and on February 22, 1995 (stripped old ballast from a joint, refilled it with ballast, tamped and leveled track at Mile Post 79.0 in the New Johnsonville Yard), instead of assigning Foreman D. S. Devault and Trackman C. R. Parker [System File 14(15)(95)/-12(95-0683) LNR].

2. As a consequence of the aforesaid violation, Foreman D. S. Devault and Trackman C. R. Parker shall each be allowed four (4) hours and forty (40) minutes pay at their respective overtime rates and two (2) hours' pay at their respective straight time rates.

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 Organization argues that Rule 1 reserves "all work in the maintenance of way and structures department" to employees represented by BWME. The Organization points out that the NRAB has issued five awards which, in interpreting the Scope of Work provision, have prohibited supervisors from performing such work.

4. The Organization further argues that Rules 2 and 8 specifically prohibit supervisors from performing the work in question. The Organization asserts that such work has been performed by BMWE-represented employees since the May 1, 1960 Agreement. Citing authority, the Organization contends that the NRAB sustained the Organization's claim in various awards where the Carrier assigned other than track repairmen to perform track repair work. The Organization further points out that when the parties executed a new collective bargaining agreement on October 1, 1973, Rules 1 and 2 were adopted virtually unchanged, and supervisors continued to be prohibited from performing work within the scope of the Agreement.

5. The Organization argues that in the 1990's, supervisors began to perform track repair work during inspections; a practice challenged by the Organization Citing authority, the Organization contends that, notwithstanding the Carrier's assertion that such work was *de minimus*, the Third Division sustained the Organization's claim. The Organization asserts that the decisions by the NRAB are on point and are of precedential value.

6. The Organization further contends that the appropriate remedy under circumstances where a supervisor performs Scope covered work is to pay the appropriate members of the bargaining unit their straight time rate for the number of hours worked by the supervisors.

7. The Carrier does not dispute that the subject work falls

within the Scope of the Agreement. However, the Carrier maintains that the work performed by Assistant Roadmaster Long was *de minimus*. The Carrier argues that the evidence shows that Assistant Roadmaster Long was not "assigned" by the Carrier to perform the work in question; he merely took it upon himself to assist the trackmen and spike a switch out of service. Citing authority, the Carrier asserts that the performance of such *de minimus* or incidental work has repeatedly been held not to violate the Agreement.

8. The Carrier contends that supervisors have the right to perform minor repairs/tasks to ensure the safety of the track and prevent delays to train operations.

9. The Carrier further argues that the Organization has failed to proffer any evidence that the work performed by Assistant Roadmaster Long was anything but incidental and *de minimus*. The carrier points out that Claimants suffered no lost work opportunities, as they were working at their regular assignments on the dates in question.

10. Citing authority, the Carrier asserts that even where the Board has found a violation of the Agreement, it has limited claimants' remedy to actual monetary loss.

OPINION:

The Board is not persuaded that the Organization has met its burden of proof in this dispute. The evidence relied upon by the Organization - a statement by D.W. England - is, at best, ambiguous. At one point, Mr. England states in respect to the Organization's claim of February 17, 1995, that Mr. Long "performed all of the work by himself on February 17, 1995". As to the claim arising from Assistant Roadmaster Long's alleged activity on February 20, 1995, Mr. England states: "[A]fter a switch has been run through, work has to be performed to make the point fit the stock rail before it can be spiked out of service. Switch shims have to be removed and points jacked against the stock rail". This

evidence is in the form of an opinion as to type of work which might have been performed under the circumstances by the Assistant Roadmaster. It does not state unequivocally that such work was actually performed by him. In addition, because of the ambiguity of the statement, there is no way to determine the *bona fides* of the Organization's claim of remedy - four hours and forty minutes of overtime and two hours of straight time.

AWARD:

The Claim is denied in accordance with the Opinion of the Board.

E. William Hockenberry
Chairman and Neutral Member

Donald D. Bartholomay
Employee Member

Patricia A. Madden
Carrier Member

Dated: OCT 25 1999