

SPECIAL BOARD OF ADJUSTMENT

In the Matter of the)	
Arbitration Between:)	
)	
BROTHERHOOD OF MAINTENANCE OF)	
WAY EMPLOYES,)	
)	
Organization,)	
)	
and)	
)	
NORFOLK AND WESTERN RAILWAY)	OPINION AND AWARD
COMPANY,)	
)	
Carrier.)	
)	
)	

Hearing Date: January 9, 1991
Hearing Location: New Orleans, Louisiana

MEMBERS OF THE BOARD

Employees' Member: S. V. Powers
Carrier Member: W. L. Allman, Jr.
Neutral Member: John B. LaRocco

ORGANIZATION'S QUESTIONS AT ISSUE

1. Did the Carrier violate the collective bargaining agreement and established past practice when it assigned supervisory employees to perform routine track patrol work to detect routine track defects on a regular daily basis beginning on or about February 5, 1990?
2. Did the Carrier violate the collective bargaining agreement and established past practice when it assigned supervisory employees to perform routine track maintenance and repair work such as spiking ties, installing track bolts, raising low joints, installing rail anchors, etc. on a regular daily basis beginning on or about February 5, 1990?

CARRIER'S STATEMENT OF THE CLAIM

The claim initially presented by the Organization on the property, by letter dated April 4, 1990, set forth the following:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES AND THE
NORFOLK AND WESTERN RAILWAY COMPANY

Continuation of Carrier's Statement of the Claim:

The above employe has advised our office that the Carrier is permitting non-contract personnel to perform work covered under the scope of the M/W Agreement. On February 05, 1990 the Carrier placed supervisors with Foreman TP positions and allowed these individuals to perform work. These supervisors have been permitted to perform the work that was originally assigned to Trackman with the Foreman TP positions. These supervisors have been participating in the routine work activities each day. This work covers placement of bolts into joints and frogs, smoothing rough track, using rail drills and saws, cutting brush, installation of bars on broken rails and inspecting track for weather related conditions. This is contrary to the current M/W Agreement as well as the past practice that was established by these positions by their inception in 1984. An agreement provision was established by the parties after negotiations concerning the 1983 Memorandum Agreement with the Eastern Region and the 1986 Agreement with Eastern and Western Regions.

By the inceptions of the above Agreements the positions of Foreman TP and Trackman positions were established on every Roadmaster's seniority district. Each of said positions were advertised with both positions and now the Carrier has replaced the Trackman with non-contract personnel.

[That portion of the claim requesting payment was withdrawn by subsequent agreement leading to the establishment of this Special Board of Adjustment.]

In support of this request we are citing Rules 1, 2, 3, 4, 8, 13 and 31 of the current M/W Agreement as well as any other that may pertain to this claim. This claim is presented without prejudice to our position that the Carrier unilaterally changed our Agreement as outlined above and that this constitutes a major dispute under the Railway Labor Act.

[Carrier Files: MW-ROAN-90-57-LM-94; CW-MW-1-3-1]

OPINION OF THE BOARD

I. INTRODUCTION

This Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act as amended; that this Board has jurisdiction over the parties and the subject matter of the dispute herein; that this Board is duly constituted pursuant to an undated special arbitration Agreement executed during the month of August, 1990; and that all parties were given due notice of the hearing held on this matter.

Both parties filed lengthy submissions with an enormous number of exhibits before the Board's January 9, 1991 hearing. In addition, the Organization and the Carrier filed post-hearing briefs which the Neutral Member of the Board received on or before February 25, 1991.

II. STATEMENT OF PROCEDURE

On February 5, 1990, the Carrier assigned Assistant Track Supervisors, employees not covered by the scope of the July 1, 1986 BMWE-N&W Consolidated Schedule Agreement (1986 Agreement), to daily accompany Track Patrol (TP) Foremen, a class of employees covered by the 1986 Agreement, to inspect track and to repair or assist the TP Foremen in repairing defects detected during the inspection.¹ Prior to February 5, most TP Foremen performed their duties alone, although thirteen TP Foremen regularly worked with a

¹ The Carrier assigned Assistant Track Supervisors to patrol track with TP Foremen on both the Eastern and Western Regions of the combined Norfolk and Western Railway (NW). The Western Region is the territory consisting primarily of the former Wabash Railway (WAB) while the Eastern Region is the original Norfolk and Western Railway (N&W).

subordinate Trackman (Laborer). Coincident with the Carrier's assignment of Assistant Track Supervisors to accompany the TP Foremen on a daily basis, the number of TP Foreman positions rose slightly from 49 to 51. The Carrier abolished the thirteen Trackmen positions but the Carrier emphasized that no BMWE employee was furloughed as a result of the job abolishments. The Organization alleges that the Carrier established forty additional supervisory positions on or about February 5, 1990. The number of Assistant Track Supervisors increased to fifty which almost corresponded to the aggregate number of TP Foremen.

The Organization quickly and vigorously objected to the Carrier's decision to assign non-agreement employees to inspect track and repair track defects. It characterized the Carrier's action as a major dispute within Section 6 of the Railway Labor Act. In April, 1990, the Organization also filed numerous claims alleging that the Assistant Track Supervisors were performing work reserved to Maintenance of Way employees in violation of the scope clause and Rule 2(f) of the 1986 Agreement.

When the Organization threatened to strike, the Carrier filed an ex parte petition to enjoin any work stoppage in the United States District Court for the Western District of Virginia. Norfolk and Western Railway v. Brotherhood of Maintenance of Way Employees, No. 90-0189-R (USDC WD VA) After granting the Carrier's petition for a temporary restraining order, the District Court held an evidentiary

hearing on April 16, 1990 to consider the Carrier's motion for a preliminary injunction. In a Memorandum Opinion dated May 1, 1990, the District Judge granted not only plaintiff's petition for injunctive relief but also its motion for summary judgment. Thereafter, the court vacated its ruling on the Carrier's motion for summary judgment. The preliminary injunction remained in effect. Both parties conducted additional discovery and most, if not all, of the depositions as well as the court testimony and affidavits have been incorporated into the record before this Board.

Sometime in August, 1990, the parties settled the litigation. They entered into a consent decree and an undated Memorandum of Agreement providing for the parties to submit their dispute to final and binding arbitration. As a result of the settlement, the parties cooperatively brought the court action to a final conclusion. On September 17, 1990, the court adopted a consent decree which left the preliminary injunction intact. Specifically, the consent decree enjoined the Organization and its members from participating in or conducting a strike over the "...issue of the Company's right to assign track inspection and maintenance work to supervisory personnel and track patrol foremen, which issue the parties have committed to final and binding arbitration...." Paragraph 5 of the Memorandum of Agreement settling the Court action reads:

5. A Special Board of Adjustment will be established pursuant to the attached agreement and Exhibit A to the attached agreement will be as follows:

With respect to the claim identified by Carrier file number MW-ROAN-90-57-LM-194, the usual claim handling procedure on the property will be suspended. Instead, the Organization will on or before September 13, 1990, appeal the above claim directly to W. L. Allman, Jr. detailing its position and providing all its argument, evidence and citation of agreement support thereof. Following receipt of the Organization's appeal and on or before October 15, 1990 the Carrier will respond to the said appeal, including all its argument, evidence and citation of agreement support of its position. The contents of this exchange will constitute the complete record on the property.

Simultaneously, the parties entered into another Memorandum of Agreement (the Arbitration Agreement) establishing this Board under the auspices of Section 3 Second of the Railway Labor Act. Paragraph 1 of the Arbitration Agreement limits this Board's jurisdiction to the dispute described in Attachment A which is the same as Paragraph 5 (quoted above).

During the expedited appeal schedule set forth in Attachment A, a dispute developed regarding the parameters of not only the work in dispute but also the claim to be arbitrated. Before considering any aspect of the merits of this case, we must delineate the subject matter in dispute.

Claim MW-ROAN-NO-57-LM-194 referred to in the lawsuit settlement Memorandum Agreement and Attachment A to the Arbitration Agreement was initiated by the Organization on

behalf of Trackman L. E. Jennings.² The procedural controversy concerns whether or not the claim included the allegation that employees not covered by the 1986 Agreement were impermissibly performing track inspection work. From the Organization's perspective, there are two distinct types of track inspection. The first variety of track inspection work is routine, daily track patrols, including Federal Railroad Administration (FRA) mandated inspections, to look for track obstructions and to detect defects in the rails and roadbed. Also, the Organization asserts, the TP Foreman conducted inclement weather inspections, when necessary, outside of their regularly assigned hours.³ The second type of track inspection consists of sporadic track patrols conducted by supervisory employees to plan work assignments for section gangs, prepare long-term track rehabilitation programs, and verify that TP Foremen are adequately inspecting the track. According to the Organization, the former, but not the latter, type of inspection was an integral part of the work in dispute.⁴

² This claim, which the Organization filed on April 4, 1990, is reproduced under the "Carrier's Statement of the Claim" on the title pages of this Opinion.

³ Extreme heat or cold and other adverse weather conditions can quickly cause serious track defects posing hazards to the safe passage of trains.

⁴ For the sake of clarity, the Board will refer to the Organization's categorization of track inspections as regular and supervisory inspections with the understanding that the Board is not necessarily recognizing the Organization's distinction. [See infra.]

The Carrier interprets the April 4, 1990 claim brought on behalf of Claimant Jennings as restricting this dispute to whether or not Assistant Track Supervisors began performing Trackman's work on February 5, 1990. Stated differently, from the Carrier's view, the claim set forth in Attachment A is limited to track repair work exclusive of track inspections. Thus, the Carrier accuses the Organization of materially and improperly expanding the claim on appeal to include: (1) track inspections to detect routine defects; (2) continuous supervision of Agreement covered employees; and, (3) certain decision-making authority such as determining how to effectuate repairs. The Carrier asserts that throughout the court action, there was simply no dispute over how frequently Assistant Track Supervisors inspected track or how continuously they supervised covered employees. The claim itself, the Carrier declares, expressly refers to the Assistant Track Supervisor performing work "...that was originally assigned to Trackmen with the Foreman TP positions." The Carrier stresses that the April 4, 1990 claim letter describes the work in dispute as the placement of bolts into joints and frogs; smoothing rough track; using rail drills and saws; cutting brush; the installation of bars and broken rails; and, inspecting track for hazards emanating from adverse weather conditions. The Carrier contends that the Organization's claim concerns work which it alleged was reserved solely to Trackmen and the claim did not embrace any work, except for inclement weather

inspections, which purportedly belonged exclusively to TP Foremen. The Carrier avers that the understanding to suspend the usual on-the-property claim handling procedure was designed to expeditiously progress the claim to arbitration as opposed to allowing the Organization to substantially expand the ambit of the disputed work. Thus, the Carrier urges this Board to summarily dismiss the Organization's allegations regarding the Carrier's assignment of track inspections to Assistant Track Supervisors.

The Organization responds that the strike and subsequent court action dwelt extensively on whether or not the Carrier wrongfully appointed Assistant Track Supervisors to perform regular track inspection work reserved to TP Foremen. The Organization points out that the consent decree terminating the litigation referred to the controversy as the Carrier's right "...to assign track inspection..." to supervisors. The Organization also argues that the underlying intent of the Arbitration Agreement was to fully and finally resolve all disputes arising out of the action taken by the Carrier on February 5, 1990, including the right of Assistant Track Supervisors to inspect track on a regular, daily basis. Finally, the Organization characterizes the Carrier's procedural challenge as a bad faith attempt to prevail on an arcane and contrived technicality. The parties specifically agreed, in paragraph 5 of the Memorandum Agreement ending the lawsuit,

to suspend the usual claim handling procedure. The Organization concludes that the Carrier is trying to reinstate the strict procedural rules which it agreed to waive. Moreover, the Organization explained that the original claim was not expanded on appeal inasmuch as the General Chairmen on both the Eastern and Western regions referred to track patrol work in their initial letters, dated March 1, 1990, objecting to the Carrier's assignment of an Assistant Track Supervisors to accompany each TP Foreman on each and every work day.

This Board lacks the power to enlarge this case to encompass issues which did not precipitate either the threatened strike or the court action. In spite of this limitation on our authority, this Board is a product of the parties' obvious intent to resolve all the major issues surrounding the Carrier's establishment of Assistant Track Supervisor positions on February 5, 1990 and thus, we would be abdicating our mission if we left important matters undecided.⁵ The issues herein are so critical to the continuing relationship of the parties that leaving some issues unresolved would foment more acrimony and controversy in the future. Therefore, the express designation of a single claim in paragraph 5 of the Memorandum Agreement

⁵ Nevertheless, there are some issues clearly beyond our authority. For example, the Arbitration Agreement excludes any issue of lost wages should the Board determine that the Carrier's action violated any collective bargaining agreement.

settling the court action did not fix a rigid boundary of the issue in dispute. Rather, the purpose of identifying one claim was to avoid cluttering the record with numerous and repetitive claims. More importantly, the Arbitration Agreement cannot be interpreted in a vacuum. The affidavits, depositions and courtroom testimony are replete with references to the extent to which Assistant Track Supervisors may permissibly patrol the track. In addition, the consent decree, which the court would not have entered but for the Memorandum Agreements establishing a forum to adjudicate the outstanding issues, alludes to track inspections and the assignment of such inspections to Assistant Track Supervisors.⁶ As the Organization persuasively argues, the track patrol issue was promptly raised in the General Chairmen's March 1, 1990 letters challenging the addition of Assistant Track Supervisors to work daily with the TP Foremen. The Carrier failed to come forward with proof that the parties intended to strictly restrict this case to the routine and incidental repair of track defects detected by either a TP Foreman or an Assistant Track Supervisor. On the contrary, the circumstances surrounding the initiation of claim MW-ROAN-NO-57-LM-194 and the subsequent agreements ending the

⁶ The consent decree does not make the distinction between the types of track inspections advocated by the Organization. Nevertheless, the Organization never took the position that supervisors could not conduct any track inspections.

lawsuit demonstrate that the original claim was partly premised on the Organization's allegation that TP Foremen have the exclusive right to perform regular and/or FRA track inspections.

While the Board will decide if Assistant Track Supervisors may conduct regular, daily track inspections, the Organization's vague assertions about Assistant Track Supervisors assuming decision-making authority exclusively vested in TP Foremen and the methods Assistant Track Supervisors utilize to supervise TP Foremen are plainly outside the parameters of the original claim. Neither the March 1, 1990 objection letters nor the designated April 4, 1990 claim mention the extent of a TP Foreman's authority or how supervisors execute their duties. Throughout the court action, the Organization never contested the right of the Assistant Track Supervisor to direct subordinates, such as the TP Foreman. Instead, as discussed above, the Organization limited its claim to the efficacy of Assistant Track Supervisors performing regular track inspections and their repair of routine track defects.

In sum, the disputed work consists of what the Organization has characterized as regular track patrol and the repair of track defects discovered during these inspections plus inclement weather inspections.

III. BACKGROUND AND SUMMARY OF THE FACTS

To fully understand the parties' arguments on the merits, this Board must separately relate the evolution of the disputed work on the former WAB and N&W. The historical overview is also essential to pinpointing the source of applicable rules appearing in the currently effective 1986 NW Agreement.

On the former WAB, a Section Foreman, sometimes assisted by a Laborer from his gang, was responsible for inspecting track on the section's territory. Although the Carrier concurs with the Organization that Section Foremen often patrolled the WAB track, it asserted that supervisory personnel sometimes inspected the track. Again, reiterating its dual track inspection distinction, the Organization submitted that supervisors only periodically patrolled track for the purposes of planning long-term rehabilitation programs and "ascertaining maintenance work priorities for section gangs.

In 1971, the Organization filed numerous claims when the WAB purportedly abandoned the longstanding practice of assigning track inspection work to Section Foremen. The WAB established a new Assistant Supervisor position outside the scope of the December 1, 1963 WAB Schedule Agreement and simultaneously directed Section Foremen to cease inspecting track. The Organization represented to this Board that the WAB paid the claims. On the other hand, the Carrier intimated that the WAB allowed only those claims involving

its failure to call BMWE employees for overtime while the claims pertaining to the inspection of track by supervisors were withdrawn.⁷

Regardless of whether the WAB ultimately paid the claims, track patrol work was contractually assigned to BMWE employees with the advent of the February 1, 1973 Agreement adding the position of Foreman-Track Inspector to Rule 1(a) of the 1963 WAB Schedule Agreement. Paragraph 1 of the February 1, 1973 Memorandum of Agreement on the WAB states:

1. The classification of Foremen-Track Inspectors will be added to Rule 1(a) Track Sub-Department. Foremen-Track Inspectors will be shown on separate seniority rosters.

Rule 1(a) follows the introductory paragraph of Rule 1 of the December 1, 1963 BMWE-WAB Schedule Agreement which reads:

These rules govern the rates of pay, hours of service and working conditions of all employees in the track sub-department and bridge and building sub-department of the Maintenance of Way and Structures Department listed in this rule, and other employees performing similar work recognized as belonging to and coming under the jurisdiction of the track and bridge and building sub-departments of the Maintenance of Way and Structures Department, but do not apply to supervisory forces above the rank of foreman.

⁷ At the arbitration hearing, the Carrier presented a claim summary sheet showing the withdrawal of a substantial number of grievances claiming that supervisory personnel allegedly performed track inspections. The Organization objected to this evidence since it was not supplied to the Organization during the appeal on the property. (The Carrier's response is set forth in the section of this Opinion summarizing the Carrier's position.) Nonetheless, pursuant to Paragraph 6 of the Memorandum of Agreement establishing this Board, we must exclude the Carrier's belatedly proffered evidence.

At about the same time as the track inspection dispute arose on the WAB, the FRA began compelling railroads to inspect tracks on a regular basis according to traffic volume and it instituted ancillary record-keeping requirements regarding track defects and the railroad's remedial action. Thereafter, on the WAB, occupants of the Foreman-Track Inspector positions established under the February 1, 1973 Memorandum Agreement accomplished FRA inspections. However, the Carrier asserts that supervisors occasionally inspected track, noted defects and made incidental repairs. Also, the Carrier refutes the Organization's allegation that Foreman-Track Inspectors engaged in inclement weather track inspections.

Unlike the WAB, where the parties essentially concur that Foremen-Track Inspectors performed almost all FRA track inspections and repaired detected defects (at least subsequent to the February 1, 1973 Memorandum Agreement), there is a substantial dispute over what group of employees regularly patrolled track on the former N&W. According to the Carrier, the track inspection work was performed almost exclusively by supervisors (Roadmasters and Assistant Roadmasters). Contrarily, the Organization alleged that Section Foremen and some other covered employees customarily inspected tracks and repaired routine defects.⁸

⁸ The evidence supporting these conflicting assertions will be discussed more thoroughly when the Board summarizes the positions of the parties.

Rule 1, entitled "Scope," of the January 1, 1975 BMWE-N&W Schedule Agreement provides:

These rules shall govern the hours of service and working conditions of all employees designated in Rule 2 who are employed in the Maintenance of Way Department, and in the Roadway Material Yard at Roanoke, Virginia.

The scope of this Agreement will also apply to employees used in the operation of power driven machines hereafter introduced in the Maintenance of Way Department, and in the Roadway Material Yard at Roanoke.

The Rules of this Agreement shall not apply to supervisory officers above the rank of Foremen.

Rule 2, which listed Seniority Groups, Classes and Grades, does not refer to track inspectors or any other position comparable to the Foreman-Track Inspector position added to Rule 1(a) of the WAB Schedule Agreement pursuant to the February 1, 1973 Memorandum Agreement.

Although the parties disagree over the impetus leading to it, they reached an accord, dated December 1, 1983, which included the following paragraph (j):

Qualified foremen will be employed to perform track inspection work at a commensurate foreman's rate of pay. Prior right section forces will be given preference for such work. The positions shall be bulletined and assigned to work on a division basis and will be capable of performing any work within the foreman class as well as track inspection. Payment of expenses will be governed by the provisions of the applicable Agreement.

The Carrier submits that the establishment of TP Foreman positions pursuant to paragraph (j) was a benefit the Organization received in exchange for providing the Carrier with some relief from outmoded seniority district

boundaries, a subject covered by other paragraphs in the December 1, 1983 agreement. According to the Organization, the December 1, 1983 agreement was precipitated when the Organization learned, early in 1983, that the Carrier planned to hire 31 supervisors to do track inspection work previously performed by N&W Section Foremen or other covered employees.

The Carrier gradually put paragraph (j) of the December 1, 1983 agreement into effect during 1984. Thereafter, a TP Foreman performed FRA inspections on each division.⁹ Initially, the new TP Foreman, who had to be a qualified track inspector, patrolled track on the various inspection territories with the assistance of a Trackman, who helped repair some of the track defects noted during the inspection. Sometime in the mid-1980s, the N&W cut off most of the Trackman positions and so, TP Foremen solitarily inspected the track as well as effectuated routine repairs on most territories. Shortly before February 1990, the Carrier added several Trackman positions to accompany some TP Foremen, bringing the total number of Trackman positions to 13 at the time of the February 5, 1990 job abolishments.

⁹ However, the Carrier submitted that Track Supervisors (Roadmasters) and Assistant Track Supervisors (Assistant Roadmasters) continued to periodically inspect track and they performed FRA inspections when the TP Foreman was unavailable. The Organization again countered that any track inspections conducted by supervisors were the supervisory track inspections distinct from regular inspections.

Effective July 1, 1986, the parties consolidated the previously separate schedule agreements on the former WAB and the former N&W. The parties adopted the WAB Scope Rule (the introductory paragraph of Rule 1 of the December 1, 1963 Agreement) supplemented by the second paragraph of the Scope Rule in the January 1, 1975 N&W Agreement as the scope clause in the consolidated schedule agreement. Rule 1 of the July 1, 1986 BMWE-NW Agreement provides:

These rules govern the rates of pay, hours of service and working conditions of all employees in the track sub-department and bridge and building sub-department of the Maintenance of Way and Structures Department listed in this rule, and other employees performing similar work recognized as belonging to and coming under the jurisdiction of the track and bridge and building sub-departments of the Maintenance of Way and Structures Department, but do not apply to supervisory forces above the rank of foreman.

The scope of this Agreement will also apply to employees used in the operation of power driven machines hereafter introduced in the Maintenance of Way Department and in the Roadway Material Yard at Roanoke.

Paragraph (j) of the December 1, 1983 BMWE-N&W Memorandum of Agreement was incorporated into the 1986 Agreement as Rule 2(f) with the addition of a note specifying the minimum qualifications an employee must possess to be awarded a TP Foreman position. Rule 2(f) of the July 1, 1986 Agreement reads in its entirety:

Qualified foremen will be employed to perform track inspection work at a commensurate foreman's rate of pay. Prior rights section forces will be given preference for such work. The positions shall be bulletined and assigned to work on a division basis and will be capable of performing any work within the foreman class as well as track

inspection. Payment of expenses will be governed by the provisions of the applicable Agreement.

NOTE:

(1) At least -

(i) 1 year of experience in railroad track inspection; or

(ii) A combination of experience in track inspection and training from a course in track inspection or from a college level educational program related to track inspection;

(2) Demonstrated that he -

(i) Knows and understands the requirements of this part;

(ii) Can detect deviations from those requirements; and

(iii) Can prescribe appropriate remedial action to correct or safely compensate for those deviations.

Rule 2(f) extended paragraph (j) of the December 1, 1983 N&W Agreement to the former WAB territory because the February 1, 1973 BMWE-WAB Memorandum of Agreement was not carried forward into the 1986 Agreement and the class of Foreman-Track Inspector, listed in Rule 1(a) of the 1963 WAB Agreement (as amended), does not appear among the classes enumerated in Rule 2 of the 1986 Agreement.

The controversy over who inspected tracks on the former component lines of the N&W spills over to the other items of work in dispute. With regard to the inclement track inspections, the Organization avers that Section Foremen and then Foreman-Track Inspectors on the WAB and Section Foremen and later TP Foremen on the N&W inspected tracks during inclement weather without a supervisor expressly instructing

these employees to conduct such inspections. The Carrier contends that inasmuch as covered employees did not perform hardly any track inspection work on the N&W prior to 1984, only Roadmasters and Assistant Roadmasters conducted inclement weather track patrols. Furthermore, the Carrier asserts that, even after 1973 on the WAB and 1984 on the N&W, the Foremen-Track Inspectors and the TP Foremen engaged in inclement weather inspections only when specifically authorized by their superiors. Only rarely, the Carrier alleged, was a TP Foreman subject to a continuing order to decide on his own whether or not an inclement weather track inspection was necessary.

The routine track maintenance and repair work in dispute includes spiking ties; installing or tightening track bolts; raising low joints; installing rail anchors; smoothing rough track; using rail drills and saws; cutting brush; the installation of a bar on a broken rail; placing bolts in joints, frogs and guardrails; tightening loose braces; repairing a wide or narrow gauge; replacing cotter pins and other similar tasks. The parties agree that the track maintenance and repair items in dispute were accomplished by whoever performed the track inspection. Of course, they disagree, for the most part, on who performed the inspection.

The Carrier contends that even after Foreman-Track Inspector and TP Foremen positions were put on the former WAB and N&W territories, supervisors routinely repaired

incidental defects during the course of their inspections. The Organization retorted that, except in cases of an emergency, supervisors never performed routine track maintenance and repairs. Instead, the Organization asserted, Section Foremen and later, the Foreman-Track Inspectors and TP Foremen either repaired the defect, often with the assistance of a Trackman, or notified a section gang.

As stated earlier in this Opinion, on February 5, 1990, the Carrier abolished the remaining Trackmen positions which were attached to TP Foremen jobs and instituted new Assistant Track Supervisor positions to regularly and daily inspect track with the TP Foremen. Both the supervisor and the TP Foremen patrol track and perform routine maintenance and repairs and apparently the Assistant Track Supervisors also perform inclement weather track inspections. The issue is whether or not the Assistant Track Supervisors are performing work reserved solely to Agreement-covered employees by Rule 1, Rule 2(f) or past practice.

IV. THE POSITIONS OF THE PARTIES

A. The Organization's Position

The Carrier's assignment of Assistant Track Supervisors to accomplish work traditionally and historically performed by BMWE employees since 1916 cut the heart out of the bargaining unit. If the Carrier can assign the disputed work to Assistant Track Supervisors, then there is no

maintenance of way work which is reserved to Agreement-covered employees. If the Carrier prevails herein, it will have successfully achieved its objective of abrogating the labor union.

After dropping the Track Patrol Foreman off at the end of his regular shift, the Assistant Track Supervisor often resumes inspection duties. The Supervisor also repairs routine defects even in the absence of the TP Foreman. When this occurs, the Assistant Track Supervisor usurps not only the TP Foreman but also the Trackman. In essence, under the new supervisory track inspection program, the TP Foreman, when he is on duty, is reduced to the status of a laborer.

The history of the disputed work and the Agreement rules definitively demonstrates that track patrol and related repairs and maintenance tasks are reserved exclusively to BMWE represented employees.

Rules 1 and 2 of the 1986 Agreement expressly reserve the disputed work to the class and craft of maintenance of way employees. Since the parties adopted Rule 1 of the former WAB Agreement as the Scope Rule for the 1986 consolidated Schedule Agreement, the assignment of work on the former WAB determines the work reserved to covered employees by Rule 1. Rule 1 in the 1963 WAB Agreement, with its practices, negotiating history and recognized interpretations, was carried forward into the 1986 Agreement. Rule 1 specifically excludes supervisors from the scope of the Agreement and thus, they cannot perform

work reserved to the maintenance of way craft. On the WAB, supervisors never conducted regular or daily track inspections. Roadmasters travelled over the track under their jurisdiction once a week or once a month but the purpose of their inspections was to plan maintenance work rather than to detect and repair track defects. Thus, the supervisory inspections were for purposes quantitatively and qualitatively different from the ordinary, regular inspections which eventually became FRA mandated inspections. The WAB recognized that Rule 1 relegated track patrol work to maintenance of way employees since, in 1973, it retreated from its nefarious plan to transfer track inspections to supervisory personnel. In his August 4, 1972 letter to the Chief Engineer, the WAB Vice President of Labor Relations wrote that the Carrier had "...no objection to restoring the work of making regular track inspections..." to maintenance of way employees.¹⁰ [Emphasis added.]

Besides Rule 1, the Board need look no farther than the clear and unambiguous language of Rule 2(f) of the 1986

¹⁰ The Carrier first proffered the August 4, 1972 letter at the arbitration hearing. Believing that the correspondence supports its position, the Organization withdrew its objection to the evidence. The Carrier relies on the portion of the letter relating that the Carrier's action was "without prejudice" to the Carrier's discretion to assign supervisors to perform inspection work "...in connection with the discharge of their responsibilities." The Organization argues that this is a reference to the supervisory inspections distinct from the regular inspections which were the subject of the 1971 claims.

Agreement to conclude that the disputed work belongs only to covered employees. Using the mandatory term "will," Rule 2(f) emphasizes that qualified foremen perform track inspection work. Moreover, the Note following Rule 2(f) was lifted verbatim from the FRA standards raising the inescapable inference that TP Foremen, as opposed to supervisors, patrol track to detect and repair defects. Rule 2(f) must reserve work to BMWE employees, as opposed to merely positions, because the parties did not simply add the TP Foreman position to Rule 2(a). If Rule 2(f) does not reserve track inspection work to Track Patrol Foremen, then the contract provision is meaningless. The parties do not negotiate solemn labor agreements with the intent that their language will be deemed null and void.

The recorded discussion of the October 15, 1983 meeting, where the Carrier and Organization representatives jointly explained the December 1, 1973 agreement to union members, confirms that Rule 2(f) reserves the disputed work to TP Foremen. The transcription shows that track patrol work formerly belonged to section gangs on the N&W and now the work was being assumed by the new class of TP Foreman. While the Carrier representatives alluded to supervisors inspecting tracks, these statements, when placed in their proper context, are references to the supervisory inspections qualitatively and quantitatively different from regular inspections. Also, supervisors probably did a substantial number of track inspections during the short

time between the Engineering Department's decision, in early 1983, to reassign track patrol work to supervisors and the consummation of the December 1, 1983 Agreement.¹¹ In any event, the Carrier's Director of Labor Relations represented at the meeting that the TP Foremen were full-time jobs to perform track inspection duties.

Even if this Board decides that Rules 1 and 2(f) do not place the disputed work within the exclusive province of the maintenance of way craft, the past practice from 1916 to February 1990 proves that only maintenance of way employees regularly inspected track. When examining the past practice evidence, the Board should refrain from applying the system-wide exclusivity test although, as will be discussed later, the Organization's evidence of past practice is so overwhelming that it satisfied even the onerous system-wide exclusivity principle. While Rule 1 is a general scope rule, the Organization need not prove that covered employees, to the exclusion of all others, historically performed the disputed work because this is not a work jurisdiction controversy between two (competing) labor unions. The system-wide exclusivity concept does not serve a reasonable purpose when the dispute involves supervisors

¹¹ The July 25, 1983 memorandum from the Chief Engineer, the catalyst resulting in the December 1, 1983 Memorandum Agreement, shows that section gangs primarily inspected track. In his memo, the Chief Engineer proposed the creation of 31 supervisory jobs to do track inspection with the concurrent elimination of 44% of the fixed section gangs.

impermissibly intruding into bargaining unit work. NRAB Third Division Award No. 28349 (Marx). Instead of exclusivity, the appropriate standard of proof is whether, in the past, maintenance of way employees customarily performed the work in dispute. Public Law Board No. 4768, Award No. 1 (Marx). See also, NRAB Second Division Award No. 11902 (Fletcher). Maintenance of way employees usually, normally and customarily performed the disputed work on both the former WAB and the N&W. Each road, at one time, improvidently but unsuccessfully tried to reassign the work to supervisors. Each time (1971-73 on the WAB and 1983 on the N&W), the Organization immediately objected to the transfer of bargaining unit work to supervisors and entered into agreements (the February 1, 1973 Memorandum of Agreement on the WAB and the December 1, 1983 Agreement on the N&W) clarifying and verifying the maintenance of way craft's right to perform regular track patrol work and repair routine track defects. Rather than relying on the uncertain and lengthy claims processing and arbitration procedures, the Organization procured agreements definitively and permanently providing for Foremen-Track Inspectors and TP Foremen to inspect tracks and repair routine defects.

However, even if the Board applies the exclusivity concept in this case, the Organization has demonstrated system-wide exclusivity on both the WAB and the N&W. There have been a few instances when a supervisor conducted a

routine track inspection especially if the agreement covered track inspector was absent. On a huge railroad system, the Organization cannot surveil the actions of each and every supervisor, and so Roadmasters may have conducted a de minimus number of inspections without the Organization's knowledge. These isolated instances do not pierce the veil of exclusivity. The Carrier's establishment of specialized positions, on both former railroads, to perform track inspection work conclusively proves that Foremen-Track Inspectors and TP Foremen performed the disputed work across the system.

The Organization's evidence of past practice is far more credible than the self-serving statements composed by Carrier supervisors. The Organization incorporated into the record statements from retired maintenance of way employees, persons who lack any motive for misrepresenting the facts. The statements of Carrier supervisors are of limited probative value since they are vague. They do not discuss the frequency of track inspections and they address only short time frames. One declarant, who is now a labor relations officer, stated that Roadmasters always inspected track on the former N&W but if examined closely, his knowledge of track inspections was limited to the short time in 1983 and 1984 when supervisors may have performed track inspections during the transition between the Carrier's improper reassignment of the work to supervisors and the effective date of the December 1, 1983 Memorandum of

Agreement. Most notably, the Carrier's statements contain no reference to supervisors performing track maintenance and repair work buttressing the Organization's position that covered employees repaired routine defects detected during their track patrols. The few statements which mention track repairs describe defects of an emergency nature. If the supervisor sees a hazard while conducting a supervisory inspection, he may make an emergency repair. Supervisors may also have occasionally completed FRA track inspection reports. Filling out a form does not mean that the supervisor actually conducted the inspection and performed the remedial work. Moreover, some of the statements and the track inspection reports offered by the Carrier refer to repairs that one person could not possibly accomplish. To reiterate, the credibility of these statements is obviously suspect. Current supervisors can be easily pressured into writing statements endorsing the Carrier's view of the facts.

In addition to its credible statements, the Organization presented daily inspection reports on the N&W prior to 1983 effectively dispelling the Carrier's faulty notion that N&W track supervisors regularly inspected track. As retired Foreman A. W. Bevins attested in his statement, the Assistant Roadmasters inspected the track in their territory only once every three or four weeks. The Organization's statements also show that the Foremen-Track Inspectors and the TP Foremen exercised their discretion to

conduct track inspections during adverse weather conditions. Indeed, they would be derelict in their duties if they did not inspect the track since extreme heat and cold can cause track defects serious enough to derail a train.

Contrary to the Carrier contention, the Organization did not admit during the lawsuit that supervisors historically inspected track on the N&W. The Carrier mischaracterized the N&W General Chairman's courtroom testimony. He was attesting to supervisory inspections. The Organization has never disputed that supervisors are free to ride over the track at various times, but again, the purpose of these inspections was qualitatively and quantitatively different from daily inspections and repairs. The sheer increase in the number of supervisory positions in February, 1990 shows that supervisors had not historically or customarily performed the disputed work.

The Carrier misplaces its reliance on the June 11, 1987 Award of the Special Board of Adjustment (Zumas) adjudicating a dispute on the former Virginian territory. The issue in dispute was the extent of the seniority rights of the former Virginian employees as opposed to the division of work between covered employees and supervisors.

Finally, the Carrier's own operating rules and directives manifest the Carrier's recognition that it is contractually bound to assign the disputed work to the maintenance of way craft. Various operating rules, in effect since 1951, placed the responsibility for regular

track patrols and inclement weather inspections with Section Foremen. After the TP Foreman position was established specifically to perform the track inspection work formerly performed by the section foremen, the N&W Maintenance of Way Engineer wrote, in an August 13, 1984 memorandum, that the duties of the TP Foreman and the Laborers are to patrol the track.

To reiterate, the Carrier's violation threatens the very existence of the bargaining unit. Undoubtedly, the Carrier is surreptitiously scheming to abolish all TP Foremen jobs therefore, the Organization respectfully petitions the Board to affirmatively answer the Organization's questions at issue.

B. The Carrier's Position

The Carrier uses the adjectives spurious and frivolous to describe the Organization's allegation that BMWE employees performed track inspection duties on the former N&W territory prior to the implementation of the December 1, 1983 Memorandum Agreement. In exchange for attaining greater flexibility in handling section gangs and for achieving needed reforms in seniority district boundaries, the Carrier gave the Organization new positions to be staffed by maintenance of way employees. The incumbents of the positions could perform, among other foreman duties, track inspections, work which covered employees had never before performed on the former N&W. The record contains numerous admissions by the Organization that Assistant Track

Supervisors performed the disputed work on the N&W prior to 1983. In his court affidavit, the N&W General Chairman conceded that supervisors accomplished all pre-1984 track inspections. During the April 16, 1990 court hearing, the N&W General Chairman candidly conceded that he did not have any objection to supervisors patrolling with the TP Foreman to insure that the latter properly executed his duties. In an arbitration case involving the rights of Virginian employees to bid on TP Foreman positions, the N&W General Chairman wrote, in the Organization's third party submission, that Assistant Track Supervisors performed jobs analogous to the TP Foreman before the advent of the December 1, 1983 Memorandum Agreement. Referee Zumas incorporated the General Chairman's factual statement into the Special Board of Adjustment's decision dated June 11, 1987. Almost all of the Organization's statements on the N&W come from former workers on the Scioto Division, a small territory where supervisors may have routinely delegated a modicum of track patrols to Section Foremen. On the other hand, the Carrier submitted statements from its Engineering and Labor Relations Departments showing that, on the former N&W, supervisors performed track inspection work and associated maintenance and repair tasks. Former Roadmaster Kirby specifically attested that the FRA track inspections plus weather-related inspections were performed frequently by N&W supervisory personnel. The Organization's statements, composed in the same handwriting, lack

credibility. The patent appearance of the Organization's statements suggests that someone coached the declarants. Each of the Organization's statements contain the same vague phraseology such as patrolling track on a routine basis which conveniently concurs with the Organization's devised distinction between supervisory and regular track patrols. However, a track inspection is a track inspection. While the supervisor may have been inspecting the track primarily to plan long-term maintenance, he was also looking for track defects.

While the Organization deliberately and materially misrepresents the past practice on the N&W, its portrayal of the historical practice on the WAB is more truthful, although not totally accurate.

On the former WAB, BMW employees performed a substantial amount of track inspection work but not to the complete exclusion of supervisors. The Carrier's statements are replete with examples where WAB supervisors patrolled track. Any claims settled on the former WAB were non-precedential. The Carrier claims sheet indicated that only claims for overtime were paid. The Carrier did not proffer the sheet on the property because it was unaware that the Organization was asserting that supervisors never performed the disputed work on the WAB. When they did inspect, albeit periodically, supervisors carefully checked the track and performed incidental maintenance work such as replacing and tightening bolts, driving in loose spikes, replacing broken

joint bars, gauging track and removing, if possible, obstructions to tracks and signals. Thus, supervisors and covered employees shared in performing the disputed work on the WAB. The latter performed more than a preponderance of the work but less than all the work.

The statements of Carrier officers show that supervisors did some inspection work on the former WAB and N&W territories after the adoption of the July 1, 1986 Agreement. The Carrier presented many track inspection reports filled out by supervisors during the year preceding February, 1990, proving that supervisors performed a significant amount of track inspection work even before they began to regularly ride with the TP Foremen.

To prove the disputed work is reserved to BMWE employees under the general scope rule found in the 1986 Agreement, the Organization must prove system-wide exclusivity. NRAB Third Division Award No. 28323 (Roukis); Public Law Board No. 4219, Award No. 8 (Stallworth). The Organization is attempting to obtain a specific scope rule by arbitral fiat, a benefit other labor organizations have properly procured through collective bargaining. This Board should reject the aberrant awards requiring rail unions with general scope rules to merely show that their members have "customarily" performed the work to obtain an arbitration ruling preserving the work to the craft since the predominant line of arbitral authority adheres to the system-wide exclusivity principle. Those minority awards

inconsistently hold that a craft can obtain exclusive jurisdiction over work which members of the craft only normally or customarily performed. Finally, most of the awards cited by the Organization interpreted scope rules containing the word "customarily" which is not found in Rule 1 of the 1986 Agreement. Nevertheless, the Organization has failed to prove that covered employees even customarily performed the work on the N&W prior to 1984.

Moreover, if the Organization is complaining that the Assistant Track Supervisors replaced Trackmen, then the Organization should have grieved when the Carrier abolished the Trackmen positions assigned in tandem with the TP Foremen, back in the mid-1980s. The Organization cannot prove that any Laborer was furloughed as a result of supervisors riding with TP Foremen. Quite to the contrary, the total number of TP Foremen actually increased in 1990. The only change wrought by Assistant Track Supervisors patrolling track with TP Foremen was the degree of supervision. The more intense supervision raised the quality of the track inspections. The Organization obviously did not file a claim when the Trackman positions were abolished since it recognized that paragraph (j) of the December 1, 1983 Agreement created positions rather than exclusively reserving track inspections to those positions.

Paragraph (j) [Rule 2(f)] is hardly a work preservation rule. In December, 1983, the N&W agreed only to put on N&W Foremen positions to be filled by persons qualified to

conduct FRA track inspections. The N&W did not tender the BMWE the exclusive right to perform track inspections and incidental maintenance work. At the October 15, 1983 meeting held to explain the meaning and intent of the December 1, 1983 Memorandum Agreement, the N&W Director of Labor Relations clearly articulated that paragraph (j) would still allow Assistant Track Supervisors to conduct track inspections and they might even accompany the new TP Foremen. The Director spoke about positions as opposed to work. Rule 2(f) is a qualifications, pay and assignment rule. Nowhere does Rule 2(f) state that track inspections may only be performed by TP Foremen. It simply says that designated positions, so long as they exist, will inspect track and may perform other duties within the foreman classification. Moreover, the Carrier promises to maintain the present TP Foremen positions except if there is a legitimate reduction in the number of inspection territories.

Since Rule 2(f) does not reserve any work to the maintenance of way craft, the Organization must fall back on the general Scope Rule. But, as discussed earlier, the Organization has not demonstrated a system-wide exclusivity over the work even if covered employees customarily performed the work on the former WAB. Nonetheless, pre-1986 practices on the WAB are irrelevant to interpreting Rule 1 of the 1986 Agreement. Rule 1 in the 1986 Agreement is a hybrid of the scope rules found in the former WAB and N&W

schedule agreements and thus, the present scope rule is not necessarily instilled with the interpretations and practices developed under the WAB scope rule. More notably, the parties elected not to adopt the WAB February 1, 1973 Foreman-Track Inspector Agreement but instead incorporated paragraph (j) of the N&W December 1, 1983 Agreement. By adopting the N&W TP Foreman rule, a specific term, in lieu of the WAB Foreman-Track Inspector Rule, a general rule, the parties evinced their intent to jettison the WAB past practices.

The Organization cannot reasonably rely on the Carrier's operating rules to prove its case since those rules are unilaterally promulgated and amended by the Carrier. Nonetheless, they do not preclude qualified employees, other than TP Foremen, from patrolling track and performing incidental repairs. Many of the operating rules cited by the Organization were in effect on the former N&W before implementation of the December 1, 1983 Agreement when supervisors did virtually all FRA track inspections.

The Carrier acknowledges that supervisory personnel may only perform maintenance and repair tasks incidental to their track inspections. It is difficult to formulate an apt definition of incidental track maintenance and repairs. What tasks are incidental should be decided on a case-by-case basis according to two criteria. First, the task must be truly associated with the Assistant Track Supervisor's track inspection. It cannot be planned maintenance. The

defect being corrected must have been discovered by the TP Foreman or the Assistant Track Supervisor while they were making their inspection. Second, the task must be capable of being performed within a reasonable time so as not to interfere with the main task at hand, that is, inspecting track.

In an attempt to generate this Board's sympathy, the Organization has painted a gloomy picture of the future of the maintenance of way craft. However, supervisors performed the disputed work almost exclusively on the N&W before 1983 and the maintenance of way craft did not vanish. Also, as discussed earlier, Rule 2(f) effectively precludes the Carrier from creating floating gangs consisting entirely of supervisory track inspectors. Finally, both the past practice and applicable rules limit supervisors to performing tasks incidental to and associated with their track inspections. The Maintenance of Way craft is well insulated from extinction.

In summary, the Carrier submits that track inspection and incidental work is shared work on this property.

V. DISCUSSION

To avoid confusion, this Board will separate the performance of routine track repairs detected during a track inspection from the track inspection work itself even though the Board realizes that these two items of work are inextricably intertwined. Our threshold analysis is

whether supervisors may perform track inspection work because if the answer is negative then it logically follows they cannot accomplish what the Carrier calls incidental track repair work.

A. Track Inspections

The first sentence of Rule 2(f) announces: "Qualified Foremen will be employed to perform track inspection work at a commensurate Foreman's rate of pay." On its face, this language does not preserve any work to maintenance of way Foreman although the rule identifies track inspection as the type of work to be performed by TP Foreman.¹² Beyond the first sentence, the remaining language of Rule 2(f) addresses how the positions will be bulletined, prior rights, expense reimbursements and the minimum qualifications necessary for an employee to obtain a TP Foreman position. If the drafters of paragraph (j) of the December 1, 1983 Memorandum Agreement, the genesis of Rule 2(f), had intended to reserve all track inspection work to TP Foreman covered by the Agreement, the first sentence of Rule 2(f) would have emphasized track inspection work instead of describing TP Foremen and the rate of pay of the positions. Rule 2(f) does not state that qualified Foremen, to the exclusion of all others, shall perform track

¹² Rule 2(f) allows TP Foremen to perform "...any work within the Foreman class as well as track inspection." Nevertheless, the first sentence of Rule 2(f) clearly contemplates that these Foremen shall spend a substantial amount of their time inspecting track.

inspection work. Therefore, the patent language of Rule 2(f) does not exclusively reserve track patrol work to qualified Foreman covered by the Agreement.

Since the express language of Rule 2(f) does not exclusively reserve work to maintenance of way Foremen, the question is whether either a past practice or the past application of Rule 2(f) operated to accrue track inspection exclusively to covered employees.

At the onset, the Board concludes that the relevant past practice is the application of Rule 2(f), formerly paragraph (j) of the December 1, 1983 Memorandum Agreement, on the former N&W territory as well as the assignment of track inspection work on the same territory prior to the consummation of paragraph (j). The practices developed on the former WAB, both before and after the execution of the February 1, 1973 Memorandum Agreement, are irrelevant to interpreting and applying the present Rule 2(f) inasmuch as the parties, when they combined the schedule agreements, adopted the N&W TP Foreman rule as opposed to the WAB Foreman-Track Inspector provision. Stated differently, Rule 1(a), as amended on February 1, 1973, of the 1963 WAB Agreement containing the Foreman-Track Patrol track inspector class did not survive the combination of the two schedule agreements. Instead, the parties extended paragraph (j) to the WAB territory. While they also carried forward, virtually intact, the scope rule from the December 1, 1963 WAB Schedule Agreement, Rule 2(f) is a specific

contract provision which controls over the broad, general terms of Rule 1. If Rule 1 perpetuated the history of track inspections on the former WAB (despite the parties adoption of the N&W track patrol rule), the practices on the former component lines (which were different) would cause numerous conflicts undermining the uniformity which the parties achieved by entering into a single schedule agreement covering the N&W and the WAB. When they selected paragraph (j) for incorporation into the 1986 Agreement, they consciously rejected the WAB Foreman-Track Inspector rule. By adopting paragraph (j), the parties manifested their intent to be bound by the past practices on the former N&W and the precedents decided under the TP Foreman rule subsequent to December 1, 1983.

The Organization failed to meet its burden of proving that covered employees customarily performed track inspection work on the former N&W prior to the implementation of paragraph (j) of the December 1, 1983 Memorandum Agreement.¹³ The only probative evidence mustered by the Organization consists of several statements of retired maintenance of way employees and track inspection reports. The latter, while numerous, lend little support to the Organization's position since the reports emanate from

¹³ Inasmuch as the Board finds, as a matter of fact, that covered employees did not customarily inspect track on the former N&W property, the Board need not determine if the principle of system-wide exclusivity is the standard for determining if work is reserved to union employees to the exclusion of their non-contract supervisors.

one small segment of the former N&W property. The Board cannot extrapolate from a local practice on a single division to find that a custom exists across the entire N&W system. The statements prove that a few N&W Section Foremen performed some track inspections but, in view of the Carrier's rebuttal statements, the Organization has fallen short of demonstrating that maintenance of way employees customarily performed the work across the former N&W territory. Since the statements presented by the Carrier blatantly contradict the employees' statements, the gross factual disparity dilutes the credibility of the statements submitted by both parties. Therefore, the Board must reconcile the conflict by examining evidence corroborating the statements and direct evidence which is more reliable than the self-serving declarations of supervisors and employees.

The dialogue at the October 15, 1983 meeting, the June 11, 1987 Award of the Special Board of Adjustment (sitting with Referee Zumas) and the Organization's submissions filed with Zumas Board confirm that Roadmasters and Assistant Roadmasters performed a preponderance of track inspection work on the former N&W. Indeed, except for one small division, supervisors performed almost all this work. At the October 15, 1983 meeting, Carrier officers informed union representatives that the craft was obtaining positions they did not previously possess, plainly implying that covered employees had not performed the work which would be

performed by the occupants of the new positions. On page 28 of the meeting transcription, an officer of the Organization enunciates that Assistant Roadmasters are currently patrolling the track. The Organization ingenuously but incongruently argues that the officer's pronouncement referred only to supervisors patrolling track during the few months before the meeting, that is, after the Carrier had improperly transferred the work from Section Foremen to Assistant Roadmasters. The context in which the statement was uttered involved a discussion about the new benefits union members would receive as a result of the tentative December 1, 1983 Agreement. It is illogical to believe that an adept union officer would refer to the TP Foreman positions as a superlative benefit if the work had been performed by covered employees from 1916 until early 1983. Moreover, the Carrier also told the Organization's representatives that Assistant Roadmasters might continue to inspect track either alone or by riding with the new TP Foreman. The TP Foremen were additions to, not substitutes for, supervisory personnel.¹⁴ Thus, even under the December 1, 1983 Memorandum Agreement, the Carrier did not completely relinquish its prerogative assign track inspection work to supervisors but, as we will discuss later, there was an

¹⁴ At page 30 of the transcript, the Carrier's representative said, without any refutation, that an Assistant Roadmaster could accompany the TP Foremen. This further buttresses our finding that Rule 2(f) did not expressly reserve track inspection work exclusively to TP Foremen.

understanding that TP Foremen would begin performing a substantial quantum of track inspection work. Suffice it to state, a reading of the transcription of the October 15, 1983 meeting leaves little doubt that supervisors had previously performed most track inspection work on the former N&W. Next, in its third party submission to the Special Board of Adjustment (Zumas), the Organization's N&W committee wrote that "...the Track Patrolman jobs were being performed by the Assistant Roadmasters." The Committee elaborated that the December 1, 1983 Memorandum Agreement gave N&W BMWE employees jobs "...that they did not previously have." The Special Board validated the factual representations set forth in the Organization's third party submission. In its Opinion [footnote no. 1], the Board related the uncontested fact that prior to December 1, 1983, track patrolling on the Eastern Region (the former N&W) was performed by non-contract, supervisory personnel. Since its factual assertion was formally legitimized by the Special Board of Adjustment, the Organization is now estopped from taking a position inconsistent with the position it advanced in its third party submission to the Special Board. The Organization's third party submission corroborates the Carrier's contention that supervisors performed a majority of FRA track inspection on the former N&W prior to the implementation of paragraph (j).

After the effective date of paragraph (j), N&W supervisors continued to perform track inspections

consistent with the representations the Carrier made at the October 15, 1983 meeting although they did not perform the work on a daily basis with TP Foremen. While the supervisors inspected track for purposes of planning future section gang repairs and long-term maintenance, the supervisor was not blind to routine defects easily detectable during the inspection. This Board reviewed the testimony at the April 16, 1990 court hearing and concludes that supervisors inspected track for a variety of reasons. Thus, the Organization's distinction between supervisory and regular inspections becomes blurred. The physical act of inspection is the same regardless of the purpose. The differences are not sufficiently significant especially in view of our finding that Rule 2(f) does not expressly reserve track inspections exclusively to TP Foremen.

Although the past practice fails to support the Organization's position that N&W maintenance of way employees, to the exclusion of all others, performed track inspection work, the Rule 2(f) language pertaining to track inspections is meaningful. The parties do not carefully draft and negotiate rules only to have them rendered superfluous. The language of Rule 2(f), while not reservation of work terminology, places two restrictions on the Carrier's previously unfettered discretion to assign track inspections to persons not covered by the scope of the Agreement. The transcript of the October 15, 1983 meeting shows that the N&W struck a bargain with the Organization.

It gave the Union positions in exchange for flexibility in handling section gangs. The December 1, 1983 Agreement obligated the N&W to create positions which were to be filled by high caliber employees (the rigorous qualifications were later added to the rule) "...to perform track inspection work...." The Carrier's promise to establish specialized jobs to perform specific work is tantamount to the Carrier guaranteeing the existence of the TP Foremen positions until the status quo is changed pursuant to Section 6 of the Railway Labor Act.¹⁵ Besides guaranteeing TP Foremen positions, the first sentence of Rule 2(f), in conjunction with the Rule 2(f) Note, raises the reasonable inference that the employee occupying a TP Foreman position will predominantly perform track inspection work. Equating a TP Foreman to a Laborer would defeat the spirit and purpose of the elaborate qualification provisions in Rule 2(f). It is unnecessary to mandate strict qualifications for a position performing ordinary laborer's duties. Put differently, Rule 2(f) prevents the Carrier from relegating the TP Foremen to the status of the trackmen who frequently worked in tandem with the TP Foreman in the past. Of course, a TP Foreman can, during the course of his

¹⁵ The Carrier contends that Rule 2(f) allows for future changes in inspection territories which could result in an increase or a diminution in the number of TP Foreman positions. This Board cautions the Carrier that any amendments to territories or divisions which cause a decrease in the number of TP Foremen could be construed as an improper attempt to evade our interpretation of Rule 2(f).

inspections, perform track repairs just as he did prior to February 1990. However, once the Carrier assigns an Assistant Track Supervisor to inspect the track with the TP Foreman each day, track inspection work must continue to be the Foreman's primary duty. The Assistant Track Supervisor may not completely assume the inspection work and effectively reduce the TP Foreman to a laborer. If the TP Foremen continue to predominantly perform inspection duties, the Carrier does not violate Rule 2(f) merely because it directs supervisors to accompany the TP Foremen on a daily basis. There was a great surge in the quantity of inspection work (two persons were devoting their time to inspecting track) after February 5, 1990. Nothing in Rule 2(f) prohibits supervisors from closely scrutinizing their subordinates. Subsequent to February 5, 1990, the degree and intensity of the supervision of TP Foremen increased but so long as the Carrier maintains the TP Foreman position and the main duty of the covered employees occupying those positions is the inspecting of track, the Carrier has not breached Rule 2(f).¹⁶

¹⁶ It is beyond this Board's authority to determine if any individual TP Foreman has been usurped of his track inspection duties in violation of Rule 2(f). The Board reserves the right to the Organization to file claims that a specific TP Foreman has been improperly relegated to the status of a trackman in contravention of Rule 2(f). However, the Organization cannot substantiate its claim by simply showing that a supervisor rode with the TP Foreman or inspected track. The Organization must marshal evidence proving that the Carrier violated the TP Foreman positions' guarantee enunciated in this Opinion or the Carrier took away a TP Foreman's track inspection duties.

B. Track Repairs Associated with Track Inspections

Since this Board has ruled that Assistant Track Supervisors may inspect track, the supervisory personnel may continue to perform the incidental maintenance work to the same extent that they performed these tasks during the course of their pre-February 1990 inspections. The record, however, contains a substantial dispute as to exactly what incidental tasks supervisors accomplished prior to February 1990. The employee statements, the supervisors' statements and the court affidavits do not reveal any substantive commonalty regarding the types of incidental track repair work supervisors performed since the adoption of paragraph (j). The only universal thread running through the statements and testimony is the recognition that supervisors may effect emergency repairs. In addition, the record contains examples of so many different tasks that if the Board were to list those that supervisors either can or cannot perform we would risk neglecting important tasks. Moreover, even in this very extensive and complete record, the parties may have inadvertently overlooked some items. Our finding that the Carrier may assign supervisors to perform track inspections without running afoul of Rules 1 and 2(f) does not give supervisors carte blanche to perform track repairs. Even the Carrier's statements manifest that, aside from emergency repairs, supervisory personnel only performed repairs directly attendant to and integrated with the track inspections. More notably, the Organization's

statements are dispositive that a supervisor was limited to correcting minor defects capable of being quickly repaired by a single person. The Organization's evidence plausibly and reasonably prove that a supervisor, inspecting track on his own, could not have accomplished major, complex, time-consuming or physically demanding track repairs.

Therefore, the Board will provide the parties with some guidelines, to be applied on a case-by-case basis, for determining the scope of track repair work which supervisors may perform during the course of their track inspections. First, the supervisor must perform the track repair work in conjunction with the track inspection. The defect must be discovered while inspecting track. The work cannot constitute planned maintenance. If a defect is detected during an inspection and the repair is deferred, the Assistant Track Supervisor may not return to the location and repair the defect after the TP Foreman's shift ends. Second, the repair task must be capable of being performed within a reasonable time so the activity does not unduly interrupt the track inspection. The Board cannot fix a precise time frame since the range of reasonableness will vary according to the type of repair and the breadth of the inspection territory. Generally, the longer the task takes to complete, the more likely the repair will interfere with the inspection. Third, the repair must be routine. Complex tasks or tasks necessitating the transportation of equipment not normally carried by Assistant Track Supervisors are not

an integral part of the track patrol. Fourth, supervisors may only accomplish a repair which they could have effectuated during a solitary supervisor inspection, that is, the task must be one which an Assistant Supervisor could have remedied (without assistance) when working by himself.

The Board is confident that these four guidelines will greatly assist the parties in fixing the boundary between work reserved to the craft and work which Assistant Track Supervisors may permissibly perform.

AWARD AND ORDER

1. The Answer to the Organization's First Question at Issue is No, so long as the Carrier complies with the provisos in this Opinion.

2. The Answer to the Organization's Second Question at Issue is No, so long as the Carrier complies with the provisos in this Opinion.

3. Claim MW-ROAN-90-57-IM-94 is denied but only to the extent consistent with this Opinion.

DATED: July 29, 1991

Steven V. Powers
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