Award No. 2169
Docket No. MW-2179

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Bruce Blake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Track Laborers G. Estopellan and Juan Federico, under the provisions of Rule 49 of current Maintenance of Way Agreement, be paid the difference between their rate as Track Laborer, 42 cents per hour, and the daily rate of $4.51 applicable to position of Groundman, Telegraph Department, for eight (8) hours on each of the days, June 24, 26, 27, 28, 29, and 30, 1939 and July 1, 3, 5, 6, 7, 8, 10, 11, 12, 13 and 14, 1939.

EMPLOYES' STATEMENT OF FACTS: Messrs. Estopellan and Federico held assigned positions as Track Laborers, Maintenance of Way Department, Section 142, Churchill, Nevada, working under the supervision of Track Foreman Mike Agriesti and were paid an hourly rate of 42 cents.

On the dates outlined in the Statement of Claim these Track Laborers were taken from their regular assigned work and instructed by the Track Foreman to work with and assist Mr. H. L. Rouse, Lineman, Telegraph Department. They performed work incidental to the maintenance of telegraph and telephone lines such as digging pole holes, cutting brush, digging trenches and other work in assisting the Lineman.

Work performed in the Telegraph Department comes within the scope of an Agreement between the Southern Pacific Company (Pacific Lines) and System Federation No. 114, Railway Employes' Department, American Federation of Labor, Mechanical Section thereof, effective August 1st, 1936.

Under Rule 28 of the Telegraph Department Agreement effective August 1st, 1936, the basic monthly rate for Groundman is shown as $125.00; however, to this rate has been added an increase of 5 cents per hour, or $12.17 per month, as a result of Mediation Wage Agreement effective August 1, 1937.

Claim was submitted to the Carrier requesting payment of the Groundman rate to Track Laborers Estopellan and Federico for work performed in the Telegraph Department, which claim was denied.

POSITION OF EMPLOYES: Rule 49 of the Maintenance of Way Department Agreement effective September 1st, 1926, covering Track Laborers reads as follows:

> "When an assigned employe is required to fill the place of another employe receiving a higher rate of pay, he shall receive the higher rate, but if required to fill temporarily, the place of an employe receiving a lower rate, his rate will not be changed."

49 of the current agreement involved in this docket; furthermore, there is no analogy or parity between the factual situation involved in Award 674 and the factual situation in the instant case.

The carrier asserts that it has conclusively established that the alleged claim in the instant case is entirely without merit and should be denied.

CONCLUSION

The carrier respectfully submits that it is incumbent upon the Board to dismiss the claim in this docket for want of jurisdiction but in the event the Board does assume jurisdiction then the carrier respectfully submits that the claim being entirely without merit it is incumbent upon the Board to deny it.

OPINION OF BOARD: At the threshold of this controversy we are met with a motion by the carrier to dismiss the claim on the ground of laches. It appears that a period of two years, seven months elapsed between the time the carrier finally declined the claim and the time the employes submitted the dispute to this Board. Such delay does not bar the claim, since the controlling agreement contains no cut off rule; and the Railway Labor Act places no time limitation upon the submission of claims to the Adjustment Board. See Award No. 685. Assuming that the Board may, in its discretion, dismiss a claim on the ground of laches, we do not think we would be warranted, upon this record, in granting the carrier's motion. The motion to dismiss is denied.

On the merits the claim is grounded upon Rule 49, of the current Maintenance of Way Agreement, which provides:

> "When an assigned employe is required to fill the place of another employe receiving a higher rate of pay, he shall receive the higher rate; but if required to fill temporarily the place of an employe receiving a lower rate, his rate will not be changed."

That claimants, on the days specified in the claim, were assigned to fill the place of employes who, had they been used, would have received a higher rate of pay, we have no doubt.

The carrier has an agreement with System Federation No. 114, Railway Employes Department, American Federation of Labor, Mechanical Section, covering employes in the Telegraph Department. Rule 2 of that agreement sets up a classification of Lineman's work. Rule 4 of that agreement, entitled "Classification of Groundmen," provides:

> "Groundmen's work shall consist of work generally recognized as such, in assisting cable splicers, equipment installers, district linemen and other linemen, but will not be required to climb poles."

Rule 28 of that agreement established the rate of pay for Groundmen at $125.00 per month. (It is conceded that at the time involved in this dispute Groundmen's rate of pay was $137.17 or $4.51 for an eight hour day.)

The carrier takes the position, however, that claimants are not entitled to the Groundmen's rate because the work they did on the days in question was common labor of the same character that they were accustomed to perform as track laborers. We do not think this is the criterion by which their rights are to be measured under Rule 49. In order to invoke the rule they are not required to perform **all** the duties of the employes whose places they fill. If they perform some of such duties the rule applies. In its submission the carrier says: "It may be admitted that a groundman will, while serving as such, perform some work that is common labor; for example, he may at times trim trees and underbrush." It argues that that, however, does not make him a common laborer nor, conversely, does such work, when performed in assisting linemen, make a common laborer a groundman. With the converse statement we cannot agree. In contemplation of Rule 4 of the

System Federation No. 114 agreement such work, when performed in assisting linemen is Groundmen's work. See Awards Nos. 674, 675. If it is common labor, it is common labor of a class for which the carrier has agreed to pay a higher rate than it has agreed to pay for the common labor of track laborers. Consequently, if the carrier assigned track laborers to assist linemen it must pay them the Groundman's rate.

The carrier argues that track laborers always have performed this character of work in assisting linemen both before and after the current agreement became effective in 1926; that since that agreement became effective they performed such work without protest until the present claims were made. We do not think they are thereby estopped from now pressing the claims. Until the carrier entered into the agreement with System Federation No. 114 in 1936, there was no established rate of pay for the work of assisting linemen. In other words there was no criterion upon which Rule 49 of the current agreement could be invoked. See Award 1659. When the System Federation 114 agreement was entered into claimants invoked their rights under Rule 49 of the current agreement with reasonable promptness.

It has also been suggested that to sustain the claim is to make claimants the beneficiaries of an agreement (The System Federation 114 agreement) to which they are not parties. This is not the case. That agreement simply affords evidence of the rate of pay to which they are entitled under Rule 49 of their own agreement. We find ample support for the view we take of this dispute in numerous decisions of this Division. See Awards Nos. 674, 675, 729, 1544, 1600, 2094, 2095.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the carrier violated the agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of April, 1943.