

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

James M. Douglas, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

- (1) That the Carrier violated Agreement in effect between itself and the Brotherhood of Maintenance of Way Employees by contracting work in the Track Department, thus assigning that work to outsiders who do not come within the scope of said Agreement;
- (2) That G. W. Mendelhall was entitled to and should have been assigned to the position of section foreman on June 15, 1943;
- (3) That G. W. Mendelhall shall be paid the difference between what he has received and that which he would have received as section foreman retroactive to June 15, 1943.

EMPLOYEES' STATEMENT OF FACTS: Effective June 15, 1943, the Carrier assigned work in connection with maintenance of certain part of its tracks to an outside contractor or to men who do not come within the scope of or governed by Agreement in effect between the Carrier and the Brotherhood of Maintenance of Way Employees, effective November 1, 1938.

The contractor engaged in the performance of the track work assigned three Section or Yard Foremen. These positions of Section or Yard Foremen were not advertised by bulletin to the Carrier's regular employees in the Track Department.

George W. Mendelhall had, previous to June 15, 1943, been promoted and had qualified for the position of Section or Yard Foreman. He had worked in the rank of Section or Yard Foreman, but because of reduction in force has been returned to the rank of Section Laborer and was working in the rank of Section Laborer on June 15, 1943, when the three contractor's Section or Yard Foremen were assigned as above referred to. Mendelhall was denied the opportunity to resume work as Yard or Section Foreman on June 15, 1943.

The Agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Rule 1, "Scope" of Agreement in effect between the Carrier and the Brotherhood of Maintenance of Way Employees reads:

"SCOPE

Rule 1.

These rules shall govern the hours of service and working conditions of the Maintenance of Way Employees in the following Departments, Groups and Classes:

He remained on the Laborer's job filling in occasionally on Extra Foreman positions, while not at any time making claim for a Foreman's position on account of the contracting work being performed.

OPINION OF BOARD: Mendenhall had held in time past a position of Section or Yard Foreman. Because of a reduction in force he was returned to the rank of section laborer. He was working as such on January 15, 1943, when Carrier employed an outside contractor to do track work. The contractor employed three foremen on the work. Because of the extra track work being performed by the outside contractor Mendenhall, holding seniority for track foreman, on March 4, 1944, made a claim for the difference in the pay he was receiving as laborer and that received by an extra gang foreman. Subsequently Carrier assigned Mendenhall as track foreman and he was thereafter paid the rate for that position.

The only question for decision is whether Mendenhall is entitled to the difference he claims retroactive to June 15, 1943, when the contractor began work or merely to the date of his claim.

There have been a number of awards of this Division which have ruled that monetary benefits may not be recovered retroactive from the date the claim was made. The basis for these rulings seem to fall into two general categories; first where the rate paid was under a mutual misunderstanding of the terms of the Agreement; and second, where the employee by long concurrence or by long acquiescence in the rate paid him, as shown by receiving it without protest over a long period, has under principles of ordinary fairness and justice thereby barred himself from later claiming a higher rate for the past period.

We find neither situation in this case. The Agreement sets no limitation on the time within which a claim must be presented. Because Mendenhall delayed from June 15, 1943, to March 4, 1944 in asserting his claim does not of itself show acquiescence for such a long period as to prejudice his rights. Nor can it be said that his delay operated to mislead Carrier. "It is the duty of the Carrier in the first instance to apply correctly the Agreement". Award 1597. The fact that Mendenhall during such period bid on a bulletined position of another kind does not indicate his acquiescence in remaining a laborer. The claim should be sustained.

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 employees involved in this dispute are respectively carrier and employees 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 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 2nd day of November, 1945.

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Interpretation No. 1 to Award No. 2971

Docket MW-2989

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Employees.

NAME OF CARRIER: Kansas City Terminal Railway Company.

Upon application of the representatives of the Employees involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The claim under consideration in this award was stated in three counts. Briefly, there were:

1. Carrier violated agreement by contracting work in the Track Department to outsiders;
2. Employee should have been assigned as section foreman on June 15, 1943;
3. Employee is entitled to difference between pay received and pay of section foreman retroactive to June 15, 1943.

Carrier seriously disputed only the third count, contending employee was entitled to the additional pay only from March 4, 1944, the date he first made claim on the carrier, and not retroactive to June 15, 1943.

The award sustained every count of the claim. Under the award employee was entitled to have been assigned as section foreman on June 15, 1943, and to be paid the same as other regular section foremen during the period under dispute which was retroactive to June 15, 1943.

Accordingly, carrier's present contention that the award entitled employee only to what he would have earned as an extra gang foreman on the days the contractor used an extra gang foreman during the period is contrary to the award. It must be disallowed.

Referee James M. Douglas, who sat with the Division as a member when Award 2971 was adopted, also participated with the Division in making this interpretation.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 11th day of June, 1946.