Award No. 4756
Docket No. MW-4552

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles S. Connell, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

GALVESTON WHARVES

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

(1) That the Carrier violated the agreement by not negotiating a rate of pay applicable to the position of operator of the power driven grass mowing machine during the seasons of 1943, 1944, and 1945;

(2) That in the absence of a new rate of pay applicable to the above referred to position, the provisions of Article 33, Rule 5, must apply;

(3) That Trackman G. Martinez should be reimbursed for the difference in compensation received at Trackman's rate of pay, and what he should have received at the Carpenter's rate of pay while operating a power driven grass mowing machine during the seasons of 1943, 1944 and 1945.

EMPLOYES' STATEMENT OF FACTS: During the seasons of 1943, 1944 and 1945 the Carrier assigned Trackman G. Martinez to the work of mowing the grass on the Carrier's property, using a powered mowing machine.

This was a new position under the Scope of the agreement since prior to these dates referred to, the Carrier had no such powered mowing machine.

The representatives of the Employes requested that the Carrier set an agreed to rate on the operation of this power mowing machine. The Carrier refused to do so and arbitrarily paid the track laborer's rate of pay for the operation of the machine.

We quote below the pertinent correspondence exchanged with the Carrier in the handling of this dispute on the property:

"Galveston, Texas
1705 N ½
June 6, 1944

"Mr. F. W. Parker
Vice President and General Manager
Galveston Wharves

Dear Sir:

We have an employee operating a power mower machine receiving track labor pay.

standing that the General Chairman is connected with a large railroad operating through many states and that there are many fine points in jurisdiction, etc., met by a large railroad employer that have never confronted a line with a small amount of railroad, such as we have. We have done everything within reason to treat our employes properly, but do object to being summoned before your Honorable Board in the case presented against us here. We have never ratified the Agreement made between the Galveston Wharf Company and the Brotherhood of Maintenance of Way Employes. We have looked upon its provisions as a way in which seniority and other provisions of the Agreement are customarily handled in the railroad industry, and have given consideration to all arguments advanced by the Claimant, but we do not recognize the jurisdiction of the Board to consider claims made by the employes of the Galveston Wharves through an employe representative who is not and never has been an employe of the Galveston Wharves, and who is not a resident of Galveston. We respectfully petition the Board to decline the claim here presented by the Brotherhood for the foregoing reasons.

SUMMARY: The Galveston Wharves has shown that at no time has it negotiated an agreement with the Brotherhood of Maintenance of Way Employes and that it is an agency of the City of Galveston, that its operations are controlled by the laws of Texas, and that these laws forbid us to enter into a collective bargaining agreement with a labor organization. The Galveston Wharves has shown that the claim presented by M. L. Clark in November 1944 was one that purports to cover something known as "the seasons of 1943, 1944 and 1945", that it is indefinite and vague, and that it was not handled in the manner set out in the Railway Labor Act. It was shown that G. Martinez was paid the regular rate of pay for track laborers, that there was not such position as roadway machine operator or railroad mowing machine operator on this property, and that no such position had existed at the time the Galveston Wharves began operation of the railroad.

The Galveston Wharves respectfully requests an opportunity to appear before the Board in oral hearing and make such answer to the Organization's submission in this case as may be deemed proper.

Whereas, in consideration of the facts, applicable laws of the State of Texas, and decisions of your Honorable Board in similar disputes, the Galveston Wharves urges that the claim made by the Organization in behalf of G. Martinez be, in all things, denied.

(Exhibits not reproduced).

OPINION OF BOARD: The Carrier contends that the Agreement here sought to be interpreted is invalid by reason of the alleged failure of the Carrier to ratify or re-negotiate said Agreement after taking over the property from the Galveston Wharf Company. It further contends said Agreement is invalid by reason of a Texas statute passed by the Legislature of that State on April 29, 1947, and requests this Board to deny jurisdiction of the claim. The Board has jurisdiction to pass upon questions of the proper interpretation or application of Agreements but it is beyond its jurisdiction to pass upon their validity. The Board must decide whether the Agreement claimed violated was in effect at the time in question, or, stated another way, whether the Agreement of May 1, 1940, between the Employes and Galveston Wharf Company was in effect as an agreement between Employes and Carrier, Galveston Wharves, at the time in question. It is agreed that if said Agreement was effective between the parties, the contention that the Texas statute of 1947 invalidated the Agreement has no place here, since the claim is for a period of time prior to the passage of that statute.

There is no dispute that the former Company, Galveston Wharf Company, entered into an agreement with the Employes on May 1, 1940, and the Carrier here took over the property later in the same year. The present Carrier, Galveston Wharves, has never given notice to the Employes of its desire to change, revise, cancel or revoke that Agreement in accordance with the Railway Labor Act. The Carrier has entered into an agreement with Employes effective

August 1, 1944, and executed a Memorandum of Understanding affecting rates of pay effective September 1, 1947. The Carrier has stated in its own submission that ever since 1940 it has continued to recognize and handle grievances presented by Employes' representatives, and has handled claims of its employes in the light of seniority and other provisions of the Agreement in question. Also, the Carrier has appeared in numerous claims before this Board—Awards Nos. 2122, 2123, 2124, 2125, 2139 and 3677. In every case the claims were based on the Agreement of May 1, 1940, and in each Award this Board found:

> "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;"

We concur with the findings in the prior Awards cited and find that this Board has jurisdiction over the instant claim, and that there was constructive ratification of the Agreement of May 1, 1940 by the Carrier.

The Carrier has urged the defense of laches in the prosecution of this claim and states it is a "stale claim". Many Awards of this Board have dealt with such a defense, and have held that mere delay will not preclude consideration of a claim by the Board, and the Supreme Court of the United States has held that there is no bar to a claim by limitations set up in the Railway Labor Act. Since there is no statute of limitation, the rule to be applied in determination of laches or "stale claims" is that of reasonableness in view of the entire factual situation, and the injury sustained, if any, by reason of the entire factual situation, and the injury sustained, if any, by reason of the delayed prosecution of the claim. In the instant claim we do not believe the claimant guilty of laches and do not find this to be a "stale claim", and even if we felt the claim was not prosecuted as promptly as it could have been, we fail to see any damage thereby to Carrier. The defense of laches will be overruled. We also are of the opinion that the Carrier waived any such procedural defense, not bearing on the merits, when it failed to urge it as a reason for denial during the hearings on the matter on the property, and before the claim was progressed to this Board.

The merits of the claim present the question of Whether Claimant, Trackman G. Martinez, was entitled to a rate of pay as carpenter by reason of the fact that he operated a grass cutter driven by power such as is used on lawns and industrial property. Claimant was a section laborer, was paid laborer's rate of pay, and during part of the year his duties were cutting grass, using a hand sickle and part of the time a power lawn mower. This mower is not an on-track machine, is not transported over the tracks of Carrier, but is a hand mower propelled by motor. There is nothing in the record indicating the length of time during the day or the number of days during the year that Claimant operated the power mower.

The Claimant relies on Article XXV (Composite Service Rule) as having application and claims pay for time worked with the power-driven lawn mower at the carpenter's rate of pay, because of Article XXXIII, Rule 5, reading:

> "Rule 5. Employes assigned to lettering, stenciling, graining, varnishing, operation of power machines of any and all types shall be classed as shop mechanics and/or carpenters."

We cannot agree with the contention of Employes since it seems clear that Rule 5 clearly has no application to the operation of a power lawn mower. Rule 5 provides that carpenter's rate is paid for the operation of power machines in the shop and clearly does not apply to the operation of power-driven machines wherever located. If that were not so, it could be said that operators of pile drivers and automobile mechanics should be paid the carpenter's rate of 63c rather than the rates listed in the Agreements at 70c and 80c, respectively.

In Award 4430 there was a claim for the Claimant to be paid the difference between compensation received at Laborer's rate and what he would have received as Rail Derrick Operator and it was held:

> "It is evident that the term 'rail layer' and 'rail derrick' denote two distinct types of machine in the railroad industry. The addition of a small gasoline engine to a rail layer in the course of progress, makes it no less a rail layer. . . . . ."

And in Award No. 4536 where the Claimant paid at rate of Laborer claimed pay at the Track Bolt Tightening Machine Operator's rate, the Board said:

> "We think the circumstances here developed show that these bolt tightener machines have become common tools of track construction and track repair gangs. The fact that they are power-driven does not change the classification as power-driven tools are becoming more and more common. . . . . ."

We are in accord with the quoted Awards and it follows that in our opinion the use of a power lawn mower did not entitle the Claimant to the Carpenter's rate of pay.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 14th day of March, 1950.