Award No. 5361
Docket No. MW-5289

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Angus Munro, Referee.

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD

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

(1) That the Carrier violated the Agreement by not assigning Steel Bridge Foreman John H. Slipp and the members of his crew to the work of installing Steel Bridge No. 89.98 at Franklin, N. H. on Sunday, November 9, 1947;

(2) That Steel Bridge Foreman John H. Slipp and the members of his crew be reimbursed 8 and one fourth hours' pay at their respective punitive rates because of this violation of this Agreement by the Carrier.

EMPLOYES' STATEMENT OF FACTS: On Sunday, November 9, 1947 a carpenter bridge crew was sent from Concord, New Hampshire to Franklin, New Hampshire for the purpose of setting in place steel bridge No. 89.98. Eight and one-quarter hours were consumed by the carpenter bridge crew in the placing of this steel bridge.

The steel bridge crew of Foreman John H. Slipp were available on Sunday, November 9th, but were not called to perform the work.

Claim was filed in behalf of Steel Bridge Foreman John H. Slipp and his crew and claim was declined.

The agreement between the two parties to this dispute, dated May 15, 1942, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: As stated in the Employes' Statement of Facts, the Carrier deemed it advisable to place steel bridge No. 89.98 on Sunday, November 9, 1947. The carpenter crew assigned to place the bridge were so engaged for a period of eight hours and fifteen minutes.

Sunday, November 9, was a rest day for the carpenter bridge crew who placed the steel bridge. It was also a rest day for the steel bridge crew assigned to work under the supervision of Foreman John H. Slipp. Had the Carrier so desired they could have called the steel bridge foreman and his crew to place the steel bridge.

In failing to call Slipp and his crew, the Carrier ignored the seniority rights of Foreman Slipp and the steel bridgemen assigned to work under his supervision.

4. THE CLAIM IS EXCESSIVE

Petitioner demands time and one-half rate for claimants, the entire steel crew under the foremanship of John H. Slipp, for the hours used by the carpenter bridge crew in setting bridge 89.98 in place.

Even were there any merit in the claim, which there is not, it could not be sustained for time and one-half rate. The only rule specifying time and one-half is the Overtime Rule. In order to secure this rate employes must work overtime. Claimants did not work overtime, in fact, they did not work.

There is no rule support for such a punitive penalty.

SUMMARY:

The Carrier has clearly shown that there is no justification for the claim in this docket because:

(1) It is not sustained by any rule or rules of the controlling agreement.

(2) It is not sustained by past practice.

(3) Claimants were not available to perform the work even were it ruled that the work is generally recognized as theirs to perform (which it is not).

(4) The penalty demanded is excessive.

There is no merit in the claim and it should be denied.

OPINION OF BOARD: Carrier has in its employ what is styled a steel bridge crew and what is styled a carpenter bridge crew. The complaint here is that the former type crew should have protected the work concerned with the act complained of instead of the latter type.

Where the work to be protected is entirely steel work we think as a general rule steel employes have the exclusive right to protect the same. This is not to say there is no exception which may arise by reason of special circumstances surrounding the work. The same applies to carpenter employes.

What is difficult to determine is the situation wherein a job requires performance of steel and carpenter duties but is wholly performed by carpenters or by steel men. We think such is the situation we are here faced with. Upon hearing hereof Petitioner most emphatically stated it is a case "of all or nothing". With that we cannot agree. For example, the predominant duties of a job could consist of carpenter duties whereas the steel duties could be minor and insignificant or, as is sometimes said, be "touch up" duties. Under such circumstances must we hold steel employes have the exclusive right to protect "touch up" duties? We leave the question unanswered in that here by reason of the record we cannot determine whether the steel duties were or were not of that class. In connection therewith we regard the issues of laches and practices as purely ancillary.

We have hereinabove found the factual situation facing the Board and we think we should next find what class of duties are predominant in the act complained of. Certainly petitioner has made out a prima facie case. On the other hand Respondent has discharged its burden of going forward. In particular Petitioner avers the purpose of the act complained of was to set in place a steel bridge. Respondent alleged the bridge we are concerned with was "small" and was set in place as a unit; that even if incidental assembly work were necessary such work did not belong to Petitioner. The Board is unable to find in the record that from which it could definitely determine is the consist of steel or carpenters' duties and definitely

what acts were performed in placing the bridge in question and the importance of each act in relation to the principal act.

Under such circumstances the Board may either (1) deny or dismiss the claim as not being proven, or (2) remand the claim to the property with instructions the claim be more fully developed with reference to the matters hereinabove discussed. We are inclined to the latter procedure.

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 claim herein be and it is hereby remanded to the property with instructions the parties hereto meet and confer with reference to more fully developing the matters referred to in the above and foregoing Opinion.

AWARD

Claim remanded to the property in accordance with the above and foregoing Finding and Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 15th day of May, 1951.