Award No. 7771
Docket No. MW-7481

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, 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:

1. The Carrier violated the effective Agreement when it failed and refused to compensate Section Foreman H. C. Crist and Section Laborers J. H. Garcia, C. D. Latson, and A. G. Rios in compliance with the provisions of Rule 54 for higher pay-rate services performed on May 7 and June 24, 1953;

2. The Claimants named in part (1) of this claim each be allowed the exact amount lost account of the Carrier's Agreement violation.

EMPLOYES' STATEMENT OF FACTS: The factual situation is perhaps best described in the following correspondence:

"H. C. Crist—B.J.
Douglas 5-6-53

Arrange to assist Agent Naco move some heavy freight first thing tomorrow morning.

K. R. L."

"Douglas—June 22
H. C. Crist
Bisbee Jct.

Arrange to assist Agent at Naco load piece machy Wed. AM June 24. A 52

K. R. L. 245P"

"H. C. Crist

Per claim assisting Agent Naco handling freight forward soon as possible statement for each day separate of May 7 and June 24

"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 shall not be changed."

That rule is neither applicable nor involved. The claimants were not required to fill the places of other employes; on the contrary, they were merely used to unload and load an en route shipment of machinery which was too heavy for station forces to handle. Such work was properly required of the claimants as a part of their regular duties for which they were properly compensated at their own established rates of pay, in accordance with past practice which was in effect at the time the current agreement was negotiated and executed and which was in effect all during the life of the preceding and other prior agreements without claim or protest. Insofar as the force and effect of such a long-established and uncontested practice is concerned, the Board's attention is directed to its Awards Nos. 507, 522, 1257, 2040, 3604, 4020, 4086, 4160, 4240, 4354, 4493, 5747 and 5949.

At this point attention is directed to the fact that even if the claim in this docket were otherwise valid (carrier does not so concede but expressly denies), there still could be no valid basis for the claim presented in behalf of Section Laborer C. D. Latson for June 24, 1953, since he did not perform the work on that day which forms the basis for the instant claim.

CONCLUSION

Carrier asserts that the claim in this docket is entirely lacking in either merit or agreement support; therefore, requests that said claim be denied.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim involves the moving of 2880 pounds of freight. Request is made that named claimants, classified as Section Foreman and Section Laborers be granted the difference in their regular rate of pay to that of the higher rate paid Agents and Warehouse Clerks on the two dates enumerated in the claim, in violation of Rule 54 of the effective Agreement which provides:

"RULE 54. 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 shall not be changed."

The Organization asserts that claimants were assigned to perform, and did perform work normally performed by other groups of employes than the Maintenance of Way forces, and that Rule 54 contemplates that when higher rated work is performed, such higher rate will be paid to those performing it.

The Respondent took the position that the confronting claim is not properly before the Board for the reason that the same, as presented here, was at variance with that (claim) as handled on the property. It was asserted that such work could properly be required of claimants as part of their regular duties as had been done on this property over a period of time dating back to 1913, with the tacit agreement or acquiescence of the Organization. It was further contended that while claimants performed the work in question, they did not, within the meaning of Rule 54, fill the place or position of other employes; and finally that only a relative small

portion of claimants' working hours on the dates in question were alloted to the work in question.

A thorough examination of the record relative to the scope and coverage reveal that the claim as here presented contains no substantial variance with that (claim) as initially presented and subsequently handled on the property. The locale, date, time of the alleged performance as well as the nature of the work and by whom it was allegedly performed was made known to the Respondent, therefore we conclude that no material factor of this claim was absent when the same was discussed by the parties, that later affected this Respondent's ability to adequately prepare their defense thereto.

While the Respondent now contends that only a portion of claimants' work hours on the date in question were devoted to unloading freight, it is noted that claimants were directed to proceed to the point in question and perform the freight moving duties. Subsequent thereto Respondent's representative inquired of Claimant Section Foreman, requesting a report as to the time spent on the task in question. This report was filed, indicating a contention that a full day, on each date, was utilized by the claimants. The initial denial was on other grounds, no mention being made the time that was claimed was inaccurate or excessive.

The moving of freight cannot be said to be the type of work customarily or ordinarily performed by Section Foreman or laborers. Certainly there is no contention that such work had been performed by Section laborers exclusively. Therefore we cannot conclude that by custom and practice it came work covered by the Scope Rule of the confronting Agreement. It is contended that this is true by past performance, without objection by the Organization. This Board has often held that silent acquiescence will not preclude later reliance upon, or enforcement of the Rules. Such action merely precludes the granting of retroactive reparations. Rule 54 contemplates the payment of a higher rate for the performance of higher rated work. We can see no distinction between being directed to perform a task as was done here, and being required to fill the place of another employe.

We are impressed by the premise and the reasoning of this Board in Award 3489 wherein it was held:

> "* * * Claimant was employed as a Section Foreman, a position under the Maintenance of Way Agreement. This is the only agreement to which he is a party in his capacity as Section Foreman. It is fundamental that one must rely upon his own agreement in support of a claim based on a contract violation. One has no rights under contracts to which he is not a party except as they may become so by the provisions of his own agreement. In the present case, Claimant was directed to perform higher rated work falling outside the scope of the Maintenance of Way Agreement. When an employe is directed to perform service within the scope of another agreement, he is entitled to compensation at the rate of such position. Under his own agreement, therefore such higher rate is a proper one. * * *"

This Board in Award 2169, involving the parties hereto, enunciated its adherance to the same basic reasoning and principle.

What was true there is likewise true here. A sustaining award is justified.

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 effective Agreement.

AWARD

Claims (1) and (2) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 11th day of March, 1957.