

Award No. 7793
Docket No. MW-7553

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, OF TEXAS

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

(1) The Carrier violated the Agreement when it compensated Section Foreman H. A. Logwood at the Section Foreman's rate of pay and the section laborers under his jurisdiction at the Section Laborer's rate of pay instead of at the Water Service Foreman's and the Water Service Helper's rates of pay respectively for services performed in connection with the installation of new water service lines beginning on May 3, 1954, and continuing through May 21, 1954, at New Franklin, Missouri;

(2) That Section Foreman H. A. Logwood be allowed the difference between what he received at the Section Foreman's rate and what he should have received at the Water Service Foreman's rate and that the Section Laborers in his Crew be allowed the difference between what they received at the Section Laborer's rate and what they should have received at the Water Service Helper's rate for the Water Service work performed during the period referred to in part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Section Foreman H. A. Logwood, together with his force consisting of Trackmen William Talbot, W. E. Ray, R. L. Ivy, R. L. Rugg and J. B. Estill, performed service in connection with the installation of new water service lines beginning on May 3, 1954 and continuing through May 21, 1954, at New Franklin, Missouri. The aforementioned employees assisted the water service employees in performing the work in connection with this project. Claimants' work consisted of digging and back-filling the trenches which housed the water pipe, stringing out of the necessary pipe to be laid, and assisting the water service mechanics in connecting the various joints of pipe. This work was repeated on each of the work days comprised in the period May 3, 1954 to and including May 21, 1954.

For the performance of the above work, Claimant employees were paid at the applicable Section Foreman's and Trackmen's rate of pay.

the Railroad, that digging, filling and backfilling is laborer's work; that it is not work of a water service mechanic or helper. This contract was written following Award 4553 and is controlling.

If the work performed by the Maintenance of Way Employees, complained about in this dispute, were Water Service Employees' work, as contended by the Maintenance of Way Employees in this case, then Water Service Employees who were present at all times while the work was under way would have complained about the Maintenance of Way Employees performing their work and would have presented time claims for violation of their agreement by the Carrier's use of Maintenance of Way employees to perform Water Service employees' work. No such complaints or claims were made by the Water Service employees, and this is indicative of the fact that Water Service employees' work was not performed by Maintenance of Way employees, and said employees performed only laborers' work.

As was said by the Third Division in Docket MW-6555, the Composite Service Rule (Article 15) upon which the claim is based requires payment of "the rate applicable to the character of work preponderating for the day." The Water Service and Plumbing Service Employees' Agreement makes it quite clear that laborers will be paid the helpers' rate only "when used as helpers" and that laborers may be used for work other than helpers' work, "digging, filling and backfilling."

It is established by the record claimants were not "used as helpers", but were used as laborers, under the immediate supervision of their own Section Foreman, digging, filling and backfilling. It follows that claimants were not entitled to the helper's rate and that no basis for a sustaining award exists.

All data submitted in support of Carrier's position have been heretofore submitted to the employees or their duly authorized representatives.

The Carrier requests ample time and opportunity to reply to any and all allegations contained in the Brotherhood of Maintenance of Way Employees', System Committee's and Employees' submission and all pleadings.

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company expressly denies each and every, all and singular the allegations of the Brotherhood of Maintenance of Way Employees, System Committee of the Brotherhood, and Employees' alleged unadjusted dispute, claim, or grievance.

For each and all of the foregoing reasons the Railroad Company respectfully requests the Third Division, National Railroad Adjustment Board, deny said claim, and grant said Railroad Company such other relief to which it may be entitled.

(Exhibits not reproduced).

OPINION OF BOARD: Claim is here made in behalf of a Section Foreman and Section Laborers for the difference in the rate paid these classifications and those paid the Water Service Foreman and Water Service helpers, account of certain work performed between May 3 and 21, 1954, inclusive.

It is asserted that the work consisted of digging trenches, stringing out of pipe, assisting water service employees in connecting pipe joints and backfilling these trenches which within the meaning of Article 15, and Award 4553 justify the payment of the higher Water Service employee's rate.

The Respondent asserts that the claimants' instructed duties consisted only of digging a trench, and the backfilling thereof, after a water line was laid by the Water Service employees and that if any material assistance other than digging and backfilling was given it was voluntary and not upon instructions of this Carrier, and further that in any event Claimants did not

perform the alleged work for a preponderance of each day during the period in question as required by Article 15. The Respondent relies upon Award 7049.

Claimants here are covered by the Maintenance of Way Agreement while Water Service employes are not. The latter Agreement does not carry a classification of laborer, as such, the lowest classification thereunder apparently being Water Service Helper.

The rule here involved is a composite rule requiring the payment of the higher rate of two or more classes of work when such higher rated work is performed for a preponderance of each work day.

Prior awards of this Division have held without exception that the burden of proof rests upon those presenting a claim. The main evidence of record here is the affidavit of claimants. It is noted that work which is unquestionably laborer's work was performed when the digging, filling and backfilling was accomplished, under the direction of their own Foreman. While the affidavit alleges they assisted water service employes no showing is made that they were so instructed. We have previously held (Award 4992) that voluntary service, absent direction and authority to perform can not be asserted to support a claim.

We are of the opinion that the affidavit likewise fails to support a violation of Article 15 in that no showing is made that Water Service Foreman or Helper work was the character of work preponderating for the day.

In view of the record here we conclude that the Claimants were properly compensated.

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 effective Agreement was not violated.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 15th day of March, 1957.