Award No. 7964

Docket No. MW-7636

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO GREAT WESTERN RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when it assigned Track Department employes to renew and replace a culvert at or near Mile Post 444-1 instead of assigning the work to B. & B. Department Employes;

(2) The Carrier further violated the Agreement when it failed to compensate the aforesaid Track Department employes at the applicable Bridge and Building rates of pay for the culvert renewal and replacement work performed;

(3) The Agreement was further violated when Traveling Carpenter Emil Larson was required to perform B. & B. Foreman's duties in connection with the work referred to in part (1) of this claim at his regular traveling carpenter's rate of pay;

(4) Section Foreman W. L. Fischer and Section Foreman A. W. Culvert be allowed the difference in pay between what they received at their section foreman's rate and what they should have received at the B. & B. foreman's rate for five (5) hours each on April 13, 1953;

(5) Section Laborers T. Roe, D. Switzer, A. Stucky, C. Whelldon, G. F. Grace, Paul Reich, C. D. Eastman be allowed the difference in pay between what they did receive at their section laborer's rate of pay and what they should have received at the B. & B. carpenter's rate of pay for five (5) hours each on April 13, 1953;

(6) Traveling B. & B. Carpenter Emil Larson be allowed the difference in pay in what he did receive at his Traveling Carpenter's rate of pay and what he should have received at the B. & B. Foreman's rate of pay for five (5) hours on April 13, 1953;

(7) Each B. & B. employe holding seniority on the Minnesota Division, (except Emil Larson), be allowed pay at their respective straight time rates for an equal proportionate share of the total

man-hours (45) consumed by the above referred to section crews while installing the culvert on April 13, 1953.

EMPLOYES' STATEMENT OF FACTS: A stone culvert approximately three feet square with a steel rail reinforced top which had been in service under the Carrier's man line at Mile Post 444-1 had deteriorated to the extent that replacement was deemed necessary.

Arrangements were, therefore, made to replace that broken-down stone culvert with a flat Armco corrugated iron culvert, which was three feet in diameter and twenty-four feet long.

The Armco corrugated iron culvert was purchased in two sections, one section being about eighteen (18) feet in length; the other section about six (6) feet in length.

On April 13, 1953, the section forces from the McIntire section and from the Elkton section installed the eighteen-foot length of new culvert. The culvert installation work was in charge of Traveling Bridge and Building Carpenter Emil Larson.

Several months later the six-foot section was installed by Bridge and Building forces.

The track forces were only allowed and paid as section men and section foreman respectively for the time they consumed in the culvert replacement work performed on April 13, 1953, and no attempt was made to send Bridge and Building forces to perform the work in question.

The instant claim was properly presented and progressed on the property in the usual and customary manner; the Carrier declining to allow the claim at all stages of appeal.

The Agreement in effect between the two parties to this dispute dated April 15, 1940, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: As pointed out in the Employes' Statement of Facts, on April 13, 1953 two (2) section crews installed an eighteen (18) foot length of a new culvert in the Carrier's main line track at Mile Post 444-1. The entire length of the culvert to be installed was twenty-four (24) feet, eighteen (18) feet of which was installed, as stated, by the two section crews, who were taking their orders from a Traveling Bridge and Building Carpenter, and the remaining six (6) feet being installed several months later by Bridge and Building forces. In the aggregate, a total of ten (10) employes, consisting of the following classifications, were used by the Carrier to make partial installation upon the project in question on April 13, 1953:

One (1) Traveling Bridge and Building Carpenter

Two (2) Section Foremen

Seven (7) Section Laborers

Rule 1, Scope of the effective Agreement provides:

"The rules contained herein shall govern the hours of service, working conditions and rates of pay of all employes in the Maintenance of Way and Structures Department but not including:

1. Supervisory forces above the rank of Foreman.
2. Signal, Telegraph, and Telephone employes.
3. Clerks."

straight time rate of pay and what they should have received at the section laborer's straight time rate of pay while so engaged in the work and on the dates referred to above;

(3) Section laborers and section foreman assigned to Section 'B', East Yard, Minneapolis, on the dates referred to in Part (1) of this claim be allowed pay at their respective straight time rates for an equal proportionate share of the total man-hours consumed by the extra gang employes in performing the work referred to in Part (1) of this claim."

"OPINION OF BOARD:

The Employes contend that Extra Gang No. 4, a lower wage rated class of employes, performing the work of a higher wage rated classification, and that those persons who actually did the work are entitled to be compensated at the difference between the lower wage rate of their class and that for Section Gang 'B'; also, that Section Gang 'B' should be paid additional compensation for the days in question at straight time rates for an equal proportionate share of the man-hours worked by the extra gang.

Rule 36 allows for composite service on payment of the rate applicable to class of work under conditions stated. While it has no application to the intermingling and commingling of which we here speak it adds to the need for observing classification lines and serves to restrain Carrier in the indiscriminate use of extra gangs to do section laborers' work.

Claim (3) will be denied. The violation, under facts and circumstances of record, appearing to be one of working employes under the same contract out of classification, rather than a clear invasion of another's work domain, we see no need to look beyond the composite service rule in the Agreement for a remedy. Actual overtime not being involved, and there being nothing of record on which to base a finding that the extra gang was worked in place of regular section gang to avoid overtime, Rule 26 (g) is not applicable to the facts in dispute."

In the instant case the work was performed during regular working hours —not on overtime—and in view of the Board's findings in Award 6953, it is apparent that **even if** the Carrier violated the Agreement by working section crews out of classification (which we again deny) the proper and only penalty is payment of the higher rates under the Composite Service Rule.

In view of the foregoing claim should be denied in its entirety.

OPINION OF BOARD: A corrugated iron culvert, 3 feet in diameter and 24 feet in length, was purchased by Carrier in two lengths—one 18 feet, the other 6 feet. The 18 foot section was installed by Carrier's Section forces, the 6 foot section by B. and B. employes some several months after the original section.

It is Organization's contention the installation belongs exclusively to B. and B. employes.

It is Carrier's contention the Agreement is silent as to what class of employes should have the exclusive right to install or repair culverts; that the practice was "to use section crews to install culvert pipes where actual or potential disturbance of the roadbed is involved, or where it is only necessary to remove track and roadbed over culvert, roll in pipe, then replace roadbed and track; especially when, as here, no timber work is necessary to close openings or support track while work is being performed."

The only comment offered by the Organization is that Carrier's argument, above, is "directly in conflict with * * * Rule 51 (c), with the Opinion of this Board in Award 5485 and with the history of work assignments on this property as we know them to be."

The original culvert, which the one here involved replaced, was installed by an outside contractor prior to 1899.

While Organization contends the Carrier "unquestionably recognized they had improperly * * * used * * * section crews (to install the 18 foot section) because B. & B. employes were permitted to complete the installation of the remaining six feet of the culvert in question," Carrier states installation of the 6 foot pipe three months later "did not involve removal of rails or ties or potential disturbance thereof but consisted primarily of applying connecting band to one end of the 18 foot pipe thereby extending culvert pipe to permit proper passage of the water."

Rule 51 (c), relied upon by the Organization reads as follows:

> "An employe assigned to construction, repair, maintenance or dismantling of buildings, bridges or other structures, (except the iron or steel work), including the building of concrete forms, erecting false work, etc., or who is assigned to miscellaneous mechanic's work of this nature shall constitute a Bridge and Building carpenter and/or mechanic."

It is argued on behalf of Organization that "certainly the work which is the subject of this claim falls squarely into this category. The Carrier points out that a culvert is a drain. Of course it is that, but as the Employes have pointed out at page 26, it is also a bridge over which the tracks are placed. It is work belonging to Bridge and Building employes and the assignment of this work to other employes was a violation of the Agreement."

On the other hand, it is argued on behalf of Carrier that the "record in this case shows that where the installation of culvert pipes necessitates disturbance of rails, ties and roadbed, it has been the practice for track employes to perform such work. The record also shows that when culvert pipes are installed without disturbing the roadbed employes of the B. & B. Department have in some instances performed the work. Petitioner has not overcome these statements. Neither has petitioner shown that the particular work involved has been reserved to B. & B. employes exclusively by rule, practice, custom or tradition. We have consistently held that the burden of presenting positive and substantive evidence in support of a claim is upon the party seeking its allowance. (Awards 7584, 7362, 7353, 7180, 7179, 6964 and 6748 among many others.) Petitioner has simply failed to sustain the burden of proving a violation."

Organization relied on Award 5485 (Donaldson) but the basic facts of that claim are not analogous. In Award 5485, Carrier contracted out the building of an extension to an existing concrete culvert.

Carrier cites Award 6053 (Begley) where Organization charged Carrier violated the Agreement when it assigned Track Department employes in an Extra Gang to install culverts. In denying that claim, this Board said:

> "This claim to be allowed must be supported by rules of the Agreement. Neither the scope rule or the seniority rules cited grants the work in question exclusively to the Bridge and Building employes. This Board has decided this question many times starting with Award 615 down through Award 6007. We find the work here performed * * * to be work incident to and directly attached to the duties of their jobs and work of a type they have performed in the past under all the agreements including this effective agreement."

The following excerpt from Award 5491 (Donaldson) is also offered on behalf of Carrier:

> "* * * the case is peculiarly similar to that subject of Award 1134. We affirm what we there said, namely, 'In digging the trench beneath three main tracks of the railroad, as was done, and its extensions otherwise, in the circumstances appearing, potential disturbance of the roadbed at vital points challenged the Carrier's concern to a degree not lightly to be regarded, and the back filling partook of the same potentialities. Throughout the process, as we are persuaded, responsibility for the finished job in relation to the trench proper—digging and back filling—rested on the track force.
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> "We cannot conclude that under circumstances here proven that claimants were required to fill the position of other employes within the meaning of Rule 32. Rather, they were performing divisible work, under and along the roadbed, their recognized domain, for which they were responsible and to which their regular rate of pay applied."

In view of the record here established we must and do conclude a denial award is indicated.

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 has not been violated.

AWARD

Claim denied in its entirety.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 13th day of June, 1957.