Award No. 11478
Docket No. MW-10923

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when, on May 23, July 3 and July 5, 1957, it assigned other than B&B employes to perform B&B work in connection with the construction of a highway crossing at Mile Post 186-42, Middletons, Indiana.

(2) B&B Foreman W. H. Fry and Carpenters Paul Hoyer, Webb Worth and Walter Eaton each be allowed three and one-half (3½) hours' pay at their respective straight time rates because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: In 1957 the Carrier assigned its Track employes to construct a new highway crossing at Mile Post 186-42 at Middletons, Indiana.

The work consisted of placing and securing wooden planking on each side of each rail and of filling the void with a bituminous mixture. The work of installing the wooden planking was performed on May 23, July 3 and 5, 1957 and the Track employes consumed a total of 14 man-hours in the performance thereof.

The Employes contend that the work of installing the above mentioned wooden planking should have been assigned to and performed by B&B forces and the instant claim was then duly and timely presented. The claim was handled in the usual manner on the property and declined at all stages of the appeals procedure.

The Agreement in effect between the two parties to this dispute dated February 1, 1951, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rule 52(b) provides that all work of constructing . . . highway crossings built of wood shall be performed by employes in the Bridge and Building Department and reads as follows:

All that is contained herein is either known by or available to the Employes.

(Exhibits not reproduced.)

OPINION OF BOARD: In the present dispute it is the contention of the Claimants that when the Carrier used Track Sub Department employes to perform the work of framing, placing and securing wooden planking on each side of each rail prior to the filling of the remaining opening of highway crossing at Middletons, Indiana, with a bituminous mixture on May 23, July 3 and 5, 1957, consuming a total of fourteen (14) "man hours" in the performance of such work which was the work of and belonged to the employes of the Bridge and Building Department, the Carrier violated Rule 52 (b) of the Agreement Effective February 1, 1951, which reserved this work to the Bridge and Building Department and provides, as follows:

> "(b) All work of constructing, maintaining, repairing and dismantling buildings, bridges, turntables, water tanks, walks, platforms, highway crossings and other similar structures, built of brick, stone, concrete, wood or steel, and appurtenances thereto, shall be performed by employes in the Bridge and Building Department. This work may be done by contract where there is not a sufficient number of employes available or the railroad company does not have proper equipment to perform it. * * *"

Carrier's version of what occurred at the highway crossing at Middletons is, as follows: On May 23, 1957, a section foreman and three Trackmen replaced the loose stone crossing of the main track by the construction of a **bituminous** highway crossing; that as a part of such construction and incidental thereto these men laid a row of second track ties along the inside and outside rail to provide a wheel flangeway and barrier to contain the bituminous material which gives this type of highway its name; that on July 3 and 5, 1957, these same men did the same type of construction work over the side track, the only difference being that in the latter instances oak planks were issued instead of second hand track ties to provide the barriers and flangeways; that a total of 55 hours time was spent by the Trackmen in the construction of this highway crossing of which only approximately 14 hours of this time was consumed in the laying of the ties and planks.

Carrier maintains that ever since 1946 when Rule 52 (c) was adopted under another number and prior to that time the work of this type in the construction of bituminous highway crossings has historically and traditionally been the work of the employes of the Track Department and that under 52 (c) of the present agreement this work was properly performed by them.

Rule 52 (c) provides, as follows:

> "(c) All work of constructing, maintaining, renewing and removing tracks, roadways, right of way fences and **bituminous highway crossings and other work incidental thereto** shall be performed by employes in the Track Department. . . ." (Emphasis ours.)

A question was raised as to whether or not this was a new installation; that, however, is not important in reaching a decision here.

Claimants contend that in Rule 52 (c) it is contemplated that the work delegated to the employes is at crossings which are constructed "wholly" of

bituminous material. Petitioner concedes that historically and traditionally the construction of bituminous highway crossings has been reserved to the employes of the Track Department but insists that this is true only where the crossing is "wholly" bituminous. It is Petitioner's further contention that the highway crossing with which we are immediately concerned was constructed neither entirely of wooden planks nor of bituminous material but was a combination of the two types of material and that under these circumstances that this was not strictly a bituminous highway crossing and that, as a consequence, the cutting and fitting of timbers was not part of the Trackmen's work but was reserved to the employes of the Bridge and Building Department.

In response to the Petitioner's position, the Carrier urges that after the planks were laid for the flangeway and barrier, bituminous material was applied and that all of this work is incidental to the construction of a bituminous highway crossing, and, that, as a further indication that this was not the work of B&B employes, the Trackmen were not paid a higher rate of pay.

On examination of Rule 52 (c) it will be noted that the following language is used: "bituminous highway crossings and work incidental thereto." What constitutes a bituminous highway crossing is not defined in the rule. There is nothing in the rules that indicates that such a highway crossing must be constructed "wholly" of bituminous material. We have a right to assume of course that bituminous material or "black top" will be used in the construction of the highway crossing. In the absence of any proof to the contrary, it is quite logical to assume that the laying of planks for flangeways and barriers is incidental to the construction of a bituminous highway crossing. There is no competent proof to the contrary offered herein by the Claimants.

Award 10828 — Miller has been cited by the Petitioner in support of Claimant's position. This award involved the building of new plank highway crossings and it was found the work belonged to Bridge and Building employes. It can be distinguished from the instant matter as neither the facts nor the rules are similar to those with which we are concerned. Furthermore it was stated there: "The Carrier ostensibly recognized it as such by establishing B&B rates of pay for the work project." That is not the situation here.

For the foregoing reasons we must find that the work performed by the employes of the Track Department at Middletons, Indiana, was in compliance with Rule 52 (c) of the agreement.

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: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of June 1963.