

Award No. 11705

Docket No. MW-11108

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, 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 effective Agreement when, on January 31, February 1, 2, 3 and 4, 1958, it permitted other than its own welding forces to perform welding work at the AT&SF crossing at Woodward, Oklahoma.

(2) Welder George N. Blackerby and Welder Helper B. A. Lawson each be allowed pay at their respective welder and welder helper's rate as follows:

January 31, 1958 — 8 hours straight time

February 1, 1958 — 8 hours time and one-half

February 2, 1958 — 8 hours time and one-half

February 3, 1958 — 8 hours straight time

February 4, 1958 — 8 hours straight time

EMPLOYEES' STATEMENT OF FACTS: About 1911, The Wichita Falls and Northwestern Railway Company (Missouri-Kansas-Texas Railway Company successor) was granted permission to construct, operate and maintain its tracks at grade, over and across the roadbed and tracks of the Atchison, Topeka and Santa Fe Railway Company at Woodward, Oklahoma.

Under the aforementioned contract arrangement, the Wichita Falls and Northwestern Railway Company and its successor, the Missouri-Kansas-Texas Railway Company, is responsible for the construction, maintenance and repair of this railroad crossing.

Nonetheless, on January 31, February 1, 2, 3 and 4, 1958, the Carrier permitted AT&SF welders to perform welding work on the afore-mentioned railroad crossing.

from the contract between the M-K-T and the Santa Fe covering operation and maintenance of the interlocker (which is the exclusive property of the Santa Fe, and on right of way owned by the Santa Fe); that the same contract which makes it possible for the Maintenance of Way employes on this Carrier to have the right to perform any work on this crossing expressly reserves to the Santa Fe the right to make such repairs to the interlocker or crossing which in its judgment are necessary.

Clearly the agreement has not been violated and the Carrier respectfully requests the claim be denied.

All data submitted in support of the Carriers' position have been heretofore submitted to the Employes or their duly accredited representatives.

The Carriers request ample time and opportunity to reply to any and all allegations contained in Employes' and Organization's submission and pleadings.

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, deny each and every, all and singular, the allegations of the Organization and Employes in alleged unadjusted dispute, claim or grievance.

For each and all of the foregoing reasons, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, respectfully request the Third Division, National Railroad Adjustment Board, deny said claim and grant said Railroad Companies, and each of them, such other relief to which they may be entitled.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier, usually referred to as Katy, has an agreement with Atchison, Topeka and Santa Fe Railway Company (hereinafter referred to as Santa Fe) giving it the right to cross over the Santa Fe tracks at Woodward, Oklahoma. Paragraph 7 of the Agreement between the two railroad companies reads, in part, as follows:

"7. Crossing To Be Kept In Proper Repair.

In case the Katy shall at any time fail or refuse to maintain and keep in repair the crossings to be maintained by it hereunder, the Santa Fe may at its option make such repairs and renewals as in its judgment may be necessary and the Katy agrees to repay to Santa Fe, within twenty (20) days after bill shall have been rendered therefor, the cost of such repairs and renewals. . . ."

On January 30, 1958 Santa Fe notified Carrier's Superintendent by Western Union as follows:

"Have slow order on MKT crossing our main track Woodward. Necessary weld crossing frog in main and possibly siding. Will repair and submit bills 94478."

Santa Fe made such repairs with their employes and billed Carrier therefor. Carrier paid the charges.

Petitioner contends that it is "the Carrier's responsibility to maintain and repair this crossing and only when they fail to maintain the crossing or refuse to do so is the work to be done by employes of Santa Fe." Since the record does not show that Carrier refused to properly maintain the crossing or re-

fused to make necessary repairs, the work belonged to Maintenance of Way employes covered by the Agreement with the Carrier. Further, there is no evidence that an emergency existed which authorized employes of Santa Fe to do this work. Petitioner argues that Carrier, upon receipt of the telegram from Santa Fe, could "have protected their own employes by advising they would perform this work since they had, by message, been made aware of the fact of the track's condition which now necessitated repair."

The Agreement between Santa Fe and Carrier gives Santa Fe every right to make repairs at the crossing and bill Carrier for the work, whether or not an emergency existed and whether or not Carrier felt that such repairs were necessary. If Santa Fe directed Carrier to make such repairs and Carrier was of the opinion that the repairs were unnecessary, Santa Fe could still make such repairs and the question of necessity and Carrier's liability would be a controversy between the two Carriers. Petitioner would still have no claim to the work performed.

There is nothing in the record to show collusion between Santa Fe and Carrier to deprive the employes covered by the Agreement of this work.

The right of Maintenance of Way employes, under contract with the Carrier, to perform this work depends upon the nature of the contract between Santa Fe and the Carrier. In Award 11002 (Boyd) we said:

"There have been many instances where two or more rail Carriers have found it necessary and desirable to enter into contracts for the performance by one of them a joint or mutual duty or in other ways to share work required to be performed. . . . The work to be performed under these circumstances falls to the Carrier and its employes who by reason of such agreements between Carriers, have the superior or contractual duty to perform it."

Santa Fe, under its contract with the Carrier has a superior right to perform such maintenance and repair work when, in its judgment, such work is necessary.

There is no reason to rule on the jurisdictional question raised in the record by the Carrier.

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 did not violate the Agreement.

AWARD

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of September 1963.