

Award No. 11861
Docket No. MW-11266

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**CHICAGO, ROCK ISLAND AND PACIFIC
RAILROAD COMPANY**

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

(1) The Carrier violated the effective Agreement when, on March 25, 1958, it assigned or otherwise permitted other than its Bridge and Building Department employes to perform the work of moving a Section Tool House from Willard, Kansas to Maple Hill, Kansas.

(2) Bridge and Building Foreman W. P. Ball, Mechanics Harry Ware and R. W. Swagerty each be allowed eight hours' pay at their respective straight time rates because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: On March 25, 1958, the Carrier assigned or otherwise permitted a Section Gang to perform the work of moving a Section Tool House from Willard, Kansas to Maple Hill, Kansas.

Consequently, the instant claim was presented to the Carrier, the Employes contending that the work of moving this structure was and is Bridge and Building Department work.

The claim and all subsequent appeals have been declined.

The Agreement in effect between the two parties to this dispute dated May 1, 1938, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Rule 2(a) provides for the acquisition and accumulation of seniority and reads as follows:

"Rule 2 (a)

Seniority begins when employe's pay starts, except promoted employes will establish seniority in the higher class only from the date assigned by bulletin to such vacancy or new position. Rights accruing

(d) Bridge & Building Helpers: Employees assigned to perform work generally recognized as helper's work and assisting mechanics in the performance of their work.

(e) Movable Bridge operators: Their work shall consist of the efficient operation of all levers connected with electric motors, gas engines and steam engines as pertaining to the operation of movable bridges. The oiling and lubrication of all machinery and power connections, the recording of the passage of boats and the making of all necessary reports in connection with delays to trains or boats, also reporting to superior officer all defects in appliances in power plants and signals connected with bridge and all other work generally recognized as movable bridge operator's work, including minor repairs to machinery and structures, and the keeping of the plant and surroundings clean and neat.

When safety of operation requires additional help same shall be provided, the helper performing such work as required by the operator.

(f) Laborers may be employed, as required, to do excavating or back filling and similar miscellaneous pick and shovel work."

Your Honorable Board will note that nowhere in the above rule does it provide that moving a small tool house of sectionmen is work of laying out, erection, altering, or maintaining, nor rough carpenter, bridge or repair work. Neither is it skilled work; to the contrary it is merely labor work and not covered by Classification of B&B employes nor the Scope Rule of the Agreement. Neither was this moving in connection with performance of any B&B work such as repairing, maintenance, or construction; to the contrary the tool house was equipment for the section gang. No tools were used in the process of moving the house.

We assert that the burden of proof is upon the petitioner to show proper evidence that their agreement is being violated. This, they have not done in handling the case on the property, nor can they show where in their agreement, the moving of such a tool house, or any moving, is covered by their agreement.

We wish also to point out that the claimants were fully employed at the time involved, they lost no earnings, and, in any event, the handling of the tool house on and off the trailer did not constitute 8 hours of work for three men, much less supervision.

We submit, on basis of the facts in this case, and for the reasons advanced above, there was no violation of the agreement nor have the employes produced any evidence of loss by the claimants, nor basis, under the rules, and we respectfully request denial of the claim.

It is hereby affirmed that all of the foregoing is, in substance, known to the organization's representative.

OPINION OF BOARD: The record shows that on March 25, 1958 section forces changed their headquarters from Willard to Maple Hill, Kansas. The sectionmen loaded their tool house on a trailer car and pulling it behind their motor car, moved it to a new location some five miles down the track.

The Carrier was presented with a claim for a foreman and two mechanics because the Brotherhood maintained that B & B forces should have moved the

tool house rather than sectionmen. Both groups of employes are members of the same Organization.

The Organization points to the Scope Rule and contends that the work in question properly belongs to those employes who hold Seniority in the Bridge and Building Department and should not have been assigned to any employes who were not members of this department.

The Carrier member states that where you have a broad and general Scope clause, there is no obligation to confine this type of work to the B&B department unless such work is traditionally and customarily performed by the said B&B department employes. In support of this position the Carrier member cites the following Awards: 11082, 7299, 7322, 8076 and 8173. There is also the legal proposition that the burden of proof falls on that party which is urging the claim. While the record is sparse it does state that the moving of the tool house represents the first time that such an activity has been performed by other than B&B employes. An isolated single instance can hardly be called a type of work that "traditionally and customarily is performed" by the said B&B department employes.

In a factual situation that bears a strikingly similar resemblance to the instant case, Award 9963, Referee Weston, stated in pertinent part as follows:

" * * * In this factual situation, it is essential to Petitioner's case that it prove by specific evidence or controlling rules that the disputed work belongs exclusively to Bridge and Building employes. Our examination of the record satisfies us that the Petitioner has neglected to support its contentions by competent evidence. * * * the point is that before the cited rules and principles can come into play, it must first be established, by affirmative proof and not by mere argument, that all labor work in moving a tool house belongs to the Bridge and Building Department employes. This the Petitioner has failed to do and claim will be denied. See Awards 9001, 8092, 7963, 7947 and 5869."

Similarly in the instant case, the Petitioner has failed to sustain its burden of proving that the work in dispute was traditionally and customarily performed by B&B department employes.

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

There was no breach of the Collective Bargaining Agreement.

AWARD

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of November 1963.