

Award No. 12846
Docket No. MW-12850

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Robert J. Ables, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
GEORGIA SOUTHERN AND FLORIDA
RAILWAY COMPANY**

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

(1) The Carrier violated the effective Agreement when, on or about August 12, 1960, it assigned or otherwise permitted Assistant Supervisor S. F. Simpson and his motor car operator (Seebern Brannan) to renew cross ties in the track between Mile Post 236 and 237-B.

(2) The decision by Division Engineer Perkins and the decision by Chief Engineer Midkiff were not in compliance with the requirements of Sections 1 (a) and 1 (c) of Article V of the August 21, 1954 Agreement because of failure to give reasons for disallowance of the above-mentioned claim.

(3) Because of the violations referred to above, the Carrier now be required to allow the claim which was presented in a letter reading:

"203-W-Moore Street,
September 11, 1960

Mr. P. A. Perkins, Division Engineer
Southern Railway Company
Southern Railway Office Building
Atlanta, Georgia

Dear Sir:

I understand that Mr. S. F. Simpson, Assistant Supervisor, and Seebern Brannan, his motor car man, renewed crossties, put crossties in the track between Mile Post 236 and 237-B August 12, 1960.

Will you please accept this as a time claim for V. E. Dennis, Track foreman, for eight hours' pay at straight time rate as foreman for this day's work, and eight hours' pay for Willie Coney, track laborer, at straight time laborers' rate for the work done by Mr. S. F. Simpson August 12, 1960, in putting crossties in the track. Please advise me of your decision.

cc: Mr. John H. Hall, Asst. Division Engineer
Mr. H. C. Crotty, President
Mr. J. H. Hadley, Vice President

Very truly yours,

/s/ J. W. Simpson
General Chairman"

EMPLOYES' STATEMENT OF FACTS: On or about August 12, 1960, Assistant Track Supervisor S. F. Simpson and his motor car operator (Seeburn Brannan) renewed a number of crossties in the track between Mile Post 236 and 237-B.

Consequently, claim was presented as set forth in the letter quoted in the Statement of Claim.

The claim was declined in a letter reading:

"Atlanta, Georgia
October 5, 1960

Mr. J. W. Simpson
General Chairman
B of M of Way Employees
203 W. Moore Street
Valdosta, Georgia

Dear Sir:

Receipt is acknowledged of your letter dated September 11, 1960, reading as follows:

'I understand that Mr. S. F. Simpson, Assistant Supervisor, and Seeburn Brannan, his motor car man, renewed crossties in the track between Mile Post 236 and 237-B, August 12, 1960.

Will you please accept this as a time claim for V. E. Dennis, Track Foreman, for eight hours' pay at straight time rate as foreman for this day's work, and eight hours' pay for Willie Coney, track laborer, at straight time laborer's rate for the work done by Mr. S. F. Simpson August 12, 1960, in putting crossties in the track. Please advise me of your decision.'

Claim as quoted above is declined.

Yours truly,

/s/ P. A. Perkins
P. A. Perkins
Division Engineer"

son and Track Laborer Seeborn Brannan did not renew crossties or put cross-ties in the track between Milepost 236-B and Milepost 237-B on August 12, 1960, as alleged. In fact, they were not in the immediate vicinity of Mileposts 236-B and 237-B on August 12, 1960. As pointed out by Carrier's Assistant Chief Engineer in his letter of November 25, 1960, to the Brotherhood's General Chairman (Carrier's Exhibit No. 8), on August 12, 1960, Assistant Track Supervisor Simpson went over the line between Lake City, Florida, and Valdosta, Georgia, and did not go near Mileposts 236-B or 237-B. He denied emphatically that the work was performed as alleged.

The work not having been performed as alleged, there cannot possibly be any basis for the claim which the Brotherhood here attempts to assert.

The evidence is, therefore, crystal clear that the effective agreement was not violated, as alleged by the Brotherhood, and that the claim is without basis.

CONCLUSION

Carrier has shown that:

(a) Claim should be dismissed by the Board for want of jurisdiction, because (1) it was not presented and handled through the usual appeal channels on the property as required by the Railway Labor Act and Rules of Procedure of the Adjustment Board, (2) the Brotherhood has waived any right to now cite Article V of the Agreement of August 21, 1954, which it now relies upon, and (3) the Brotherhood is now barred from creating issues at variance with the issues from what they were on the property.

(b) The effective agreement was not violated as alleged by the Brotherhood, and the claim is without basis.

The above expressed conclusions under (a) being fully supported by prior awards of the several Divisions of the Board, claim should be dismissed by the Board for want of jurisdiction. However, if, despite this fact, the Board assumes jurisdiction, it cannot do other than make a denial award, for an award of any other type would be contrary to the effective agreements.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts in this case are not so much in dispute as they are unascertainable.

The Employees claim that the Carrier violated the Agreement with the Brotherhood of Maintenance of Way Employees when on or about August 12, 1960, it assigned or otherwise permitted an Assistant Supervisor and his motor car operator to renew certain crossties in the track. Absolutely no facts are presented by the Employees to show the circumstances or conditions under which this work was alleged to have been performed. In fact, when the Carrier showed by substantial evidence that the Assistant Supervisor and his motor car operator were not even in the vicinity where the work was alleged to have been performed on the day stipulated, the Employees countered that "it is possible the work could have been performed on August 11th." The strongest statement in support of the claim (if, indeed, it can be called support) is the statement of the General Chairman that I "understand" the Assistant Supervisor and his motor car man renewed crossties in the track between Mile Post 236 and 237-B on August 12, 1960.

More than this is required to perfect a claim even before this Board which is, or should be, quite liberal in accepting broad pleadings and general argument. The claim, therefore, must be denied for failure of supporting evidence, which it was the duty of the Employees to introduce.

The Employees and the Carrier discussed at length in the record before the Board the procedural question whether the claims should be sustained because of the Carrier's admitted failure to give reasons for denying the claims, as required by Article V of the August 21, 1954 Agreement. The Employees' contention that the claims should be so sustained was not advanced in the latter stages of this proceeding in recognition of recent awards (relied on here) which hold that rights under Article V are procedural and not jurisdictional in character and if not asserted on the property (as they were not asserted here) such rights are waived. Awards 10684 and 11178 and Second Division Award No. 3858. Accordingly, Employees' position that the claim should be sustained by reason of Carrier's failure to observe the requirements of Article V of the 1954 Agreement should be denied.

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 Employees involved in this dispute are respectively Carrier and Employees 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 9th day of September 1964.