

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Don Hamilton, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
LOUISVILLE AND NASHVILLE RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it assigned or otherwise permitted an employe outside the scope of the Agreement to perform maintenance of way welder's work at DeCoursey, Kentucky, on October 17, 1962. (Carrier's file E-304-2 E-304)

(2) Welder R. Y. Bennett be allowed two (2) hours' pay at his straight time rate account of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Track department employes were engaged in the work of removing a crossing at DeCoursey, Kentucky, on October 17, 1962. The assistant foreman attempted to remove the lag screws which held the crossing planks in place, but could not do so because he lacked the necessary tools. A section laborer was then instructed to find the motor car maintainer in that area and advise him to come to the crossing with an acetylene torch to burn the heads off the lag screws.

When the motor car maintainer arrived at the crossing, Local Chairman W. G. Wynn advised him that a claim would be presented if he proceeded to perform the work of a maintenance of way welder. The motor car maintainer acknowledged that it was not his work, but proceeded to burn the heads off the lag screws as he was instructed to do.

The claimant was working at DeCoursey when the subject work was performed. He was available, fully qualified and equipped to perform the subject work and would have done so had he been so instructed.

Claim was timely and properly presented and handled at all stages of appeal, up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated May 1, 1960, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rules 1 and 2 read:

Employees contended that such action on the part of the motor car maintainer violated the provisions of Rule 38(b) of the current Maintenance of Way Agreement, and filed claim on behalf of Mr. R. Y. Bennett for two hours at the welder's straight time rate of pay.

The claim was declined by officers designated to handle such matters, and it was declined in each instance.

POSITION OF CARRIER: Employees claim that the motor car maintainer violated their agreement when he used an acetylene torch to burn the heads off of lag screws of the crossing planks. The motor car maintainer who was working in the vicinity happened to pass by, and seeing that the section gang was unable to perform its duties, volunteered his services. No one instructed him verbally or otherwise to render such assistance. It was solely voluntary on his part. There was nothing unusual in his helping the section men for welders and track men have always worked in conjunction with one another, and even if the welder had not rendered assistance, certainly no welder's earnings would have been adversely affected in any manner. A welding gang was working in the vicinity, under pay, and if a welder had been called, it would have been from that gang. There is no reason to even suspect that any employe was deprived of employment by the assistance of the motor car maintainer, and, actually, it is surprising that such a claim would be filed because the motor car maintainer, of his own volition, simply showed a spirit of cooperation.

The employees have not contended that additional men were needed, but claim two hours at the welder's straight time rate. It is, therefore, obvious that the claim is, in fact, nothing more than a penalty claim, but there are no provisions in the Maintenance of Way Agreement that provide for such penalty payments. This is also contrary to the findings of this Division which has held in numerous awards that penalties cannot be awarded unless the agreement so provides.

OPINION OF BOARD: The record in this case indicates that a motor car maintainer "burned the heads off the lag screws, to remove some crossing boards." This is essentially the only fact involved in this case which is not in dispute. It would appear that a section gang at DeCoursey, Kentucky, was lining a portion of the track where crossing boards were attached to the ties. The Assistant Foreman attempted to jack the boards out of the track, but found it was necessary to cut the heads from the lag screws to remove the crossing boards.

The Organization contends that a section laborer was instructed to find the motor car maintainer in the area and advise him to come to the crossing with an acetylene torch to burn the heads off the lag screws.

The Carrier offers other versions of the incident:

"A motor car maintainer who happened to pass by, and who had in his possession an acetylene torch, offered his services and burned the heads off the lag screws while the section men stood by and did nothing."

and

"The motor car maintainer who was working in the vicinity happened to pass by, and seeing that the section gang was unable

to perform its duties, volunteered his services. No one instructed him verbally or otherwise to render such assistance. It was solely voluntary on his part."

In any event, the motor car maintainer did use the torch to burn the heads off the lag screws. The Organization says that this is work which belongs to the welders. They further allege that the Claimant, Welder Bennett, should be allowed two hours' pay at his straight time rate for the alleged violation of the Scope Rule and Rule 38 (b).

It should be noted that Bennett was working in a welding gang in the vicinity of the incident involved in this claim. There is no evidence in the record of the time consumed by the motor car maintainer in performing this work.

We are of the opinion that in order for us to hold that the Carrier has violated the agreement, we must require the Organization to produce some evidence which would manifest such violation.

We believe that one of the essential elements necessary to the proof of this claim is a showing that the Carrier performed some overt act which would indicate that it was their intent to violate the agreement.

There is no evidence in this record which substantiates the claim that "the Carrier violated the Agreement when it assigned or otherwise permitted, etc." Therefore, the claim will be denied for failure to prove the essential elements of the alleged violation.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 21st day of May 1965.