

Award No. 14345

Docket No. MW-15440

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**NORFOLK AND WESTERN RAILWAY COMPANY
(LAKE REGION)**

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

(1) The Carrier violated the Agreement when it assigned other than Bridge and Building Department employees to dismantle and to replace a wooden highway crossing at Cherry Street, Findlay, Ohio. (Carrier's File 30-20-112).

(2) Bridge and Building Department employees Fred L. Bales, Donald Perkins, Oliver Hawk, R. A. Norbeck and A. J. Taylor each be allowed eight (8) hours' pay at their respective straight time rates because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The claimants have established and hold seniority rights in their respective classifications in the bridge and building department.

Within the period beginning with September 9th, 1963 and ending on September 17, 1963, the work of dismantling and replacing a wooden highway crossing at Cherry Street, Findlay, Ohio, was performed by employees of the track department. A total of forty (40) man hours were expended by the track department employees in performing this work.

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

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

CARRIER'S STATEMENT OF FACTS: Claimants in this case are subject to the working agreement effective February 1, 1951, between The New York, Chicago and St. Louis Railroad Company (now the Lake Region of the Norfolk and Western Railway Company) and its employees represented by the

- Exhibit "B" — October 29, 1963 — Acknowledgement of claim—Bridge & Building Supervisor to Vice Chairman.
- Exhibit "C" — December 6, 1963 — Denial of claim—Bridge & Building Supervisor to Vice Chairman.
- Exhibit "D" — December 10, 1963 — Letter making addition—Bridge & Building Supervisor to Vice Chairman.
- Exhibit "E" — December 20, 1963 — Appeal—Vice Chairman to Division Engineer.
- Exhibit "F" — January 6, 1964 — Denial of appeal—Division Engineer to Vice Chairman.
- Exhibit "G" — January 22, 1964 — Appeal—Vice Chairman to Assistant Chief Engineer.
- Exhibit "H" — March 17, 1964 — Denial of appeal—Assistant Chief Engineer to General Chairman.
- Exhibit "I" — March 27, 1964 — Appeal — General Chairman to Chief Engineer.
- Exhibit "J" — May 4, 1964 — Denial of appeal—Chief Engineer to General Chairman.
- Exhibit "K" — May 25, 1964 — Appeal—General Chairman to Director of Personnel.
- Exhibit "L" — July 22, 1964 — Denial of appeal—Director of Personnel to General Chairman.
- Exhibit "M" — July 30, 1964 — Letter—General Chairman to Director of Personnel.
- Exhibit "N" — August 27, 1964 — Affirmation of denial—Director of Personnel to General Chairman.

(Exhibits not reproduced.)

OPINION OF BOARD: The issue presented by this dispute is whether or not the work performed at the Cherry Street crossing in Findlay, Ohio, belongs to Maintenance of Way employees under the Bridge and Building Department or those of the Track Department under Rule 52, of the Classification of Work Rule of the Agreement between the parties.

Rule 52 is as follows:

"Rule 52.—Classification of Work.

(a) This rule classifies the work to be performed by employees included within the scope of this agreement and is not intended to cover the work to be performed by employees included within the scope

of other agreements with railway labor organizations.

(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.

Nothing contained herein shall prohibit employes in the Track Department at their regular rates of pay from continuing the present practice of loading and unloading materials used by bridge and building forces or cleaning up the site after bridge and building work has been completed.

(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. 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.

Nothing contained herein shall prohibit employes in the Bridge and Building Department from continuing the present practice of loading and unloading materials used by bridge and building forces or cleaning up the site after bridge and building work has been completed."

The Brotherhood contends that the work performed belonged to Bridge and Building Department employes under subdivision (b) of Rule 52 and past practice under that rule; the Carrier contends that the work performed belonged to Track Department employes under subdivision (c) of Rule 52 and past practice under that rule.

The Brotherhood's position is that the language of Rule 52(b) is not ambiguous and that under the provisions of that subdivision "All work of constructing, maintaining, repairing and dismantling of * * * highway crossings and other similar structures, built of * * * wood * * * and appurtenances thereto, shall be performed by employes in the Bridge and Building Department." That the work performed falls clearly within the language of the rule.

The Carrier argues that the issue is whether or not the work performed by the Track Department encroaches upon the duties and work reserved exclusively under the agreement to B&B employes. The Carrier further contends that Rule 52 does not specifically and exclusively give to B&B employes the right to perform the work performed by the Track Department employes and therefore past practice is controlling. It also points to subdivision (b) of the rule as supporting its contention that the work performed was and is an incident of the work reserved to track employes. To support its contention Carrier cites recent awards involving these same parties where this Board denied claims of B&B Department employes for work done by others on wooden farm crossings and wooden frames on bituminous highway crossings, holding that such work to be incidental to Trackmen's other duties. (Awards 11485, 11725, 11478,

12726 and 12731)

It is significant to note that the Brotherhood when it initially presented its claim, it claimed that "The carrier violated the effective agreement when on September 9, 1963, it allowed section forces located at Findlay, Ohio, to remove and replace moss slab section timbers on Cherry Street, Findlay, Ohio."

(Emphasis ours.)

The record further discloses that the Brotherhood used identical language, in all of its communications addressed to the different officers of the Carrier, while this dispute was being handled on the property.

When, however, this Board received notice from the Brotherhood, under date of February 12, 1965, that it intended to file an ex parte submission in this dispute, we find that the claim reads as follows:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned other than Bridge and Building Department employes to dismantle and to replace a wooden highway crossing at Cherry Street, Findlay, Ohio. (Carrier's File 30-20-112.)"

The reason for the change in the language used in the claim when it was being handled on the property and the language in the claim before us is evident.

The material facts in this case are not in dispute. The Carrier states that the track in the highway crossing at Cherry Street in Findlay, Ohio, needed resurfacing and relining; that in order to accomplish this work it was necessary that some of the timber slabs in the crossing which were adjacent to the rails had to be lifted up and/or removed; that after the track work was completed the timber slabs were returned to their original positions; that this work was incidental to the work being performed by the trackmen in the resurfacing and relining of the track.

It is the Carrier's position that this work was properly performed by the track forces pursuant to the provisions of Rule 52(c) of the Agreement.

It is the Brotherhood's position that this work was exclusively the work of the B&B Department pursuant to the provisions of Rule 52(b) of the Agreement. The burden of proving such contention rests with the Brotherhood by either a showing the specific language in the Agreement or by past practices if the language be ambiguous.

The power of the Board is limited to interpreting agreements made between the parties. We have no power to alter, amend or add to the terms the parties agreed upon. In construing a written contract the words employed will and must be given their ordinary and popular accepted meaning, in the absence of anything to show that they were used in a different sense. We look to the whole agreement and all the language used in the agreement to ascertain the intention of the parties to it.

On examination of Rule 52(c) we note that the following language is used: "All work on * * * maintaining, renewing and removing tracks, * * * and other work incidental thereto shall be performed by employes in the Track Department." There can be no question but that in order to ac-

compish the work of resurfacing and relining the tracks that the timber slabs had to be removed. This certainly comes within that portion of the rule which states "and other work incidental thereto." Without the removal of the timber slabs, the work could not be performed.

On examination of Rule 52(b) we note that the following language is used: "All work of * * * dismantling * * * highway crossings * * * and appurtenances thereto, shall be perfromed by employes of Bridge and Building Department."

It is evident from a reading of the record in this case that there was no evidence to show a dismantling of the wooden highway crossing as that word is used in its ordinary and popular accepted meaning. The burden of proving such dismantling was on the Brotherhood. Such evidence is not in the record. The Brotherhood has failed to prove a violation of the Agreement.

This Board accepts as controlling the interpretation of Rule 52 as set forth in the prior awards cited.

We note that in its reply submission the Carrier for the first time contends that this claim "has never been considered in conference." This is evidently in reply to the Brotherhood's categorical statement that the "Claim was timely and properly presented and handled at all stations of appeal up to and including the Carrier's highest appellate officer."

Against the present state of the record, best characterized as one of counter-assertions, unsupported by any evidentiary matters, we find and hold that this Board does have jurisdiction.

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 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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of April, 1966.

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