

Award No. 14383  
Docket No. MW-14474

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

Benjamin H. Wolf, Referee

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**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 the work of erecting buildings in connection with hot box detector systems at Benton and Ocowee, Tennessee and at Emlyn and Jones, Kentucky to employes holding no seniority in the Bridge and Building Subdepartment. [Carrier's file E-304-5 — E-304.]

(2) Lead Carpenter R. R. Ross and Carpenter W. F. Hendricks each be allowed eight (8) hours' pay at their respective straight-time rates for each day on which the work referred to in Part (1) of this claim was performed, retroactive to sixty (60) days from September 5, 1962 (date of claim presentation).

**EMPLOYES' STATEMENT OF FACTS:** During the period herein involved, Signal Department employes were assigned to and performed the work of erecting pre-fabricated sheet metal buildings at Benton and Ocowee, Tennessee and at Emlyn and Jones, Kentucky. This work consisted mainly of constructing forms, excavating, setting of forms, pouring and finishing of concrete foundations, removing forms, backfilling and assembling and erecting the subject building on said foundations. These buildings were erected for the purpose of housing electrical apparatus used in connection with the operation of hot box detector systems at the subject locations.

We attach hereto as Employes' Exhibit A, photographs showing the type of building referred to in this claim. These buildings are of sheet steel construction and are 5 feet, 4 inches wide by 8 feet long by 8 feet, 6 inches high. To provide entrances, they have a 2 feet, 10 inch wide by 6 feet, 8 inch high door in each end. The poured concrete foundations upon which the buildings are erected extends approximately 14 inches above ground level.

The Carrier's Bridge and Building Subdepartment employes have customarily and traditionally performed all work in connection with the construction of steel buildings.

The claimants were available, fully-qualified and could have efficiently performed the work described above, had the Carrier desired.

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.

(Exhibits not reproduced.)

**CARRIER'S STATEMENT OF FACTS:** This dispute involves the assignment of employes in Carrier's signal department to erect signal relay cases in connection with hot-box detector systems at Benton, Tennessee; Ocowee, Tennessee; Emlyn, Kentucky; and Jones, Kentucky. The General Chairman of the Maintenance of Way Department employes alleged that the provisions of Rule 41 of the current agreement between Carrier and its Maintenance of Way employes were violated, and consequently filed claim in favor of B&B Department employes R. R. Ross, lead carpenter, and W. F. Hendrix, carpenter, for 8 hours for each day at their straight time rates of pay, during the 60-day period retroactive to September 5, 1962.

The claim was handled with all Carrier officials designated to handle such matters and in each instance, since there was no basis for same, was declined.

**OPINION OF BOARD:** Signal Department employes were used to erect prefabricated sheet metal buildings at various locations. The Petitioners argue that the work was improperly assigned and belonged to the Carrier's B&B forces by virtue of the Agreement. Rules 1 and 2 read:

#### "RULE 1. SCOPE

Subject to the exceptions in Rule 2, the rules contained herein shall govern the hours of service, working conditions, and rates of pay for all employes in any and all subdepartments of the Maintenance of Way and Structures Department, represented by the Brotherhood of Maintenance of Way Employes, and such employes shall perform all work in the maintenance of way and structures department."

#### "RULE 2.

##### EXCEPTIONS TO RULE 1

These provisions shall not apply to the following, except as to the retention and exercise of seniority by the individual as outlined in the seniority rules:

- 2(a) Positions paying \$60.00 or less per month;
- 2(b) Engineering forces;
- 2(c) Supervisors and assistants, and other employes above that rank;
- 2(d) The floriculturist on the MNO&P Division;
- 2(e) Work of a character properly belonging to classes of employes covered by other agreements.
- 2(f) The railroad company may contract work when it does not have adequate equipment laid up and forces laid off, sufficient both in number and skill, with which the work may be done."

They also rely on Rule 41 (a) which reads:

**"RULE 41.**

**BRIDGE AND BUILDING WORK**

41(a). All work which is done by Company forces in the construction, maintenance, repair, or dismantling of bridges, buildings, tunnels, wharves, docks, water tanks, turntables, platforms, walks, and other structures, built of brick, tile, concrete, wood, or steel, the painting of bridges, buildings, docks, platforms, walks, turntables, tanks and other structures, hand rails in buildings and on bridges, and the erection and maintenance of signs attached to buildings or other structures, shall be performed by employees of the bridge and building subdepartment."

Carrier's reply is that the structures were "no different than those which had been erected by Signal Department employees throughout the past twenty years, and is in accordance with the Scope Rule of the Signalmen's Agreement, which states ' . . . as well as any other work generally recognized as signal work.' "

The question presented for determination is whether the work falls within exception 2 (e) of Rule 2.

The structures in question were 5 feet, 4 inches wide by 8 feet long by 8 feet, 6 inches high with two doors at either end 2 feet, 10 inches wide by 6 feet, 8 inches high and were used to house electrical apparatus used in connection with the operation of hot box detector systems at the subject locations.

The parties have attacked each other's proof as mere assertion. The Organization attacked Carrier's defense that "Signal Department forces have, in the past, been used to erect small buildings in which they house their equipment and they contend that this work belongs to them because of past practice" as an unsupported contention. It then asserted that "B&B forces have heretofore performed all such work." Carrier, in turn, pointed out that the Employees submitted no evidence to support their contention which, it stated, was not in accord with the facts.

These conflicting assertions, without a preponderance of corroborative evidence supporting one against the other make it impossible for this Board to resolve the issue. It is incumbent upon the Organization as the one affirmatively charging a violation to be in possession of the essential facts to support the charge before making it. See Award 12821 (Yagoda).

The only supporting evidence submitted by the Organization related to a prefabricated metal building 37 feet by 20 feet which, in another case (Award 11209), Carrier contended was work belonging to the B&B forces. There is an obvious difference between a building of that size and the small enclosure involved here. In an earlier Award (8177) we held a box 6 feet, 3½ inches high by 10 feet long by 1 foot, 10¼ inches deep as clearly not within the definition of "roadway buildings."

The conflict in the instant case is over whether these structures are buildings or cases for the enclosure of hot box detection equipment.

Although this issue was raised early in the processing of the dispute by the Carrier's Division Engineer, the Employees denied it merely in general terms, pointing to no single such building that B&B forces erected. In our opinion, the Organization had the burden of proving that such structures were not customarily erected by the Signal forces and were therefore, not work of a character covered by Rule 2, subdivision 2 (e), but failed to sustain that burden.

**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 5th day of May 1966.