

Award No. 15893
Docket No. MW-13614

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Bill Heskett, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
THE DELAWARE AND HUDSON RAILROAD CORP.**

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

(1) The Carrier violated the Agreement when, on or about December 19, 1960, it changed rates of pay for various welders and, subsequent to said date, neglected to pay such welders for work performed outside the regularly assigned hours.

(2) (a) Welders Raymond Tuttle, George Lawton and John Newcomb be paid at the rate of Five Hundred Dollars (\$500) per month while assigned to work with the Thomson-Manning Corporation through December 1960.

(b) Welders Raymond Tuttle, George Lawton and John Newcomb be allowed a wage adjustment to provide them with pay for work performed outside their regular assigned hours in accordance with the provisions of Agreement dated November 15, 1943, as presently revised.

EMPLOYEES' STATEMENT OF FACTS: On November 14, 1960, and on various dates subsequent thereto, the Claimants were assigned to work with the Thomson-Manning Corporation. During the period from November 14, 1960 to December 19, 1960, the Claimants were allowed pay at their respective rates.

On December 19, 1960, without prior notification to, or agreement with the undersigned General Chairman, the Carrier unilaterally and arbitrarily changed the rates of pay of the Claimants' position to \$500.00 per month and thereafter refused to allow overtime payment in accordance with the provisions of the Agreement.

The only defense offered by the Carrier during the handling of this dispute on the property has consisted of a contention that the work being performed by the Claimants is outside the scope of the Agreement.

The Agreement in effect between the two parties to this dispute dated November 15, 1943, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: On November 15, 1960, this corporation started on a rail welding program involving a total of about 10,000 sections of rail. This rail was to be welded into sections of approximately fourteen hundred (1400) feet in length with the work performed by the Thomson-Manning Corporation on the property of this carrier at Oneonta, New York.

By December 19, 1960, original technical difficulties having been overcome, it was possible to place this work on a three-shift operation, and such action was taken. In order to insure that the work was performed according to the specifications of the contract, it was felt necessary to assign three persons having experience with welding and welding process to inspect the work being performed. The named claimants involved in this claim were employed by this corporation as Welders and it was felt that they had sufficient knowledge to perform the inspection services required. Therefore, as of December 19, 1960, these employees were promoted to non-agreement positions as Inspectors and their rate of pay was increased to \$500 per month. While assigned as Inspectors, the duties of the claimants consisted of observing the welding to make sure that the work was being done in accordance with the contract and to observe and test the finished product for possible defects. They also kept records and made out the necessary daily reports. The claimants continued on this assignment until the welding was completed and were released from their positions as Inspectors on the following dates — Claimant Tuttle, March 7, 1961; Claimant Newcomb, March 8, 1961; and Claimant Lawton, March 10, 1961. After being released from their positions as Inspectors, these men returned to their regular positions as Welders in our Maintenance of Way Department.

It has been the practice on this property for a number of years to promote employees from the ranks to non-agreement positions as Inspectors to augment Engineering Department forces when necessary. Carrier records indicate that a full time Inspector was employed from 1927 to 1946, when he retired, and a second full time Inspector's position was created in 1930 and filled until 1952, when the employee retired. These full time Inspector positions were never considered by either the Carrier or the Organization as being within the scope of the Maintenance of Way Agreement which became effective in 1939. In addition to these full time Inspector positions, created in 1927 and 1930, carrier, records indicate that when additional Inspectors were needed, certain agreement employees were promoted from the ranks as necessary. Although it was the contention of the Organization in one instance that the temporary position of Inspector should be considered as an agreement position, Carrier has never agreed and this is the first claim which has been fully progressed in this regard.

OPINION OF BOARD: On 14 November, 1960, Claimants were assigned to work as welding inspectors with a rail welding contractor, and to 19 December, 1960, Carrier paid Claimants at their respective rates under the Agreement. Thereafter, Carrier changed Claimants' rates of pay to \$500.00 per month and in connection therewith, refused to pay Claimant's overtime. Organization contends that Carrier violated the 15 November, 1943, Agreement when it unilaterally took said action.

In its submission, Carrier first alleges that this Board does not have jurisdiction because Organization did not file these claims within sixty days of the occurrence and cites Article V, Section 1(a) of the 21 August, 1954, National Agreement. However, this allegation is without merit inasmuch as Carrier did not raise this aspect of the question on the property.

Carrier further contends that such work is not within the scope of the Agreement, and a perusal of the Scope Rule therein indicates that same is general in nature. Previous awards disclose that in such event it falls upon Organization to meet the burden of proving that for a sufficient duration, the work here involved was customarily and traditionally the work of the craft. See, Award 13666 (Kornblum), and awards therein cited.

Organization relies heavily upon a letter from Carrier's Chief Engineer, under date of 24 July, 1959, addressed to it wherein the following statements were made:

"Referring to our conversations in regard to D&H forces to be used in connection with the performance of welding rail into continuous lengths which we expect to be started at Whitehall in the month of August.

We anticipate that this work will operate either two or three shifts with the exception that, possibly, the first week will operate only on one shift.

* * * * *

Although the letter makes the conclusion "... that our proposal [classifications, rates, etc.] ... will not establish precedent," and restricts said proposal to the year 1959, same is probative in that it is conclusive evidence of Carrier's recognition that the character of the work was such that it too felt same was within the scope of the Agreement—and that acting upon said recognition Carrier negotiated with Organization concerning same.

Organization further proved on the property that by virtue of Carrier's own application and interpretation of the Agreement, Claimants performed under same for over a month in 1960. Upon Carrier's reassigning Claimants, it is clearly shown that their duties and assignments were in reality the same.

While inspecting continuous lengths of welded rails was a new position to both Carrier and Organization, it is abundantly clear that, although its history in period of time was brief, there is established sufficient continuity in the handling of same between the parties to conclude that Organization has met its burden of proof. Further, Carrier's evidence concerning other inspectors does not refute Organization's case. In the situations shown by Carrier, the inspectors were obviously permanent, one being so employed from 1927 to 1946, and the other from 1946 to 1952. The work here was of a temporary nature.

Clearly, the Carrier violated the Agreement as charged in Part (1) of the Claim. Obviously, where the Agreement was violated, as in this case, the Board must order a remedy. The Board in previous Awards have held that we are not a rate establishing body, but that the establishing of a rate of pay is a matter for negotiation between the Parties. Negotiation of a proper rate of

pay is so directed to satisfy Parts (1) and (2) of this Claim. The record in this case does not contain the necessary information for proper determination of the number of hours of service performed outside of the claimants' new regularly-assigned hours as requested in the Claim, therefore, as in previous Awards, this Board directs the Parties to make a joint check of records kept in the ordinary course of business to ascertain the number of hours, if any, worked outside claimants' new regularly-assigned hours and such hours, if any, be compensated at the appropriate rate for overtime as computed from the negotiated rate of pay for the service involved in this Claim. Such adjustment of total compensation should be made for the period commencing sixty days prior to the date this Claim was filed until cessation of said assignments, i.e., Claimant Tuttle 7 March, 1961, Claimant Newcomb 8 March, 1961, and Claimant Lawton 10 March, 1961. This ruling is in accord with Article V, Section 3, of the August 21, 1954 Agreement, a point which Carrier properly raised on the property.

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 Carrier violated the Agreement.

AWARD

Claim sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of October 1967.