



**Award No. 19079**

**Docket No. MW-17042**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Clement P. Cull, Referee**

**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**THE BALTIMORE AND OHIO 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 shop men to assist Carpenter Foremen Long repair the door on No. 3 Track at the Cumberland Back Shop, South Cumberland, Maryland, on Saturday, April 16, 1966.

(2) B&B Mechanics Grant L. Hymes and Virgil J. Lattea each be allowed three (3) hours' pay because of the violation referred to in Part (1) of this claim.

**EMPLOYEES' STATEMENT OF FACTS:** The claimants are regularly assigned B&B mechanics with a work week extending from Monday through Friday (Saturdays and Sundays are rest days).

On Saturday, April 16, 1966, Carpenter Foreman Long was called to the Carrier's back shop at South Cumberland, Maryland to inspect and, if necessary, to repair a door that was jammed and thereby preventing operation of the door. Foreman Long required assistance to correct the malfunctioning of this door. Instead of calling the claimant B&B mechanics, who have customarily performed all work of this character, the Carrier assigned two shopmen, who are not covered within the scope of the Maintenance of Way Agreement, to assist Carpenter Foreman Long remove two guides, approximately twenty (20) feet long and four (4) inches wide and thereby permitting the door to be raised. The work was performed from 7:30 A.M. to 10:30 A.M.

During a conference held on June 21, 1966, the Carrier's highest appellate officer agreed to pay the claimants for three (3) hours' each at their straight time rates of pay but, in a letter dated July 7, 1966, he declined the claim in its entirety.

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

posture to examine, review and reach conclusions as to the basic work assignments in this case and to decide, upon hearing all the evidence, as to the particular craft or class to whom this work belongs. It is the position of this Carrier that this work has traditionally and properly been performed by shop employes under circumstances comparable to those found in the instant case.

**OPINION OF BOARD:** On Saturday, April 16, 1966, a rest day for Claimants, Carpenter Foreman Long was called to inspect a jammed door in Carrier's back shop at South Cumberland, Maryland. As the door was in a half closed position locomotives using Track No. 3 could not enter the building for repairs. The Foreman required assistance in the removal of two guides and employes in another class and under another collective agreement were assigned for this purpose. The guides were removed in the period 7:30 A. M. to 10:30 A. M. and the door was raised.

Aside from the Third party situation which will be discussed below Carrier raises several contentions as follows: (1) that the work was of an emergency nature; (2) that the work does not come within the Scope of Petitioner's agreement; (3) that there is no showing that the Foreman made any attempt to secure employes from the B&B group or to request employes from the Master Carpenters and (4) that it has been an accepted practice on the property to permit shop employes to perform minor, emergency work in the shop.

Petitioner relies on Rule 1, Classification, in part, its Scope Rule and Rule 18(b). It contends that the failure of the Foreman to call Claimants does not have the effect of denying them rights under the agreement. It also contends that no emergency was involved. The pertinent parts of the Rules are reproduced here for convenience:

#### Scope

"(a) These rules govern the hours of service and working conditions of all employes in the Maintenance of Way and Structures Department, and the following classes of employes in the Transportation Department, subject, however, to the exceptions provided in paragraph (b) of this rule:

\* \* \* \* \*

(b) This agreement does not apply to:

\* \* \* \* \*

6. The following work when performed by other than B&B forces:

(a) Minor repairs to roundhouses, storehouses and other shop buildings and material storages within the confines of the shop or store yards pertaining to safety, when B&B forces are not available, such as repairing broken boards in floors or platforms, and installing window panes.

(b) Maintaining " \* \* "

The relevant part of Rule 1 reads as follows:

"(c) Bridge, Building and Structural Work, Carpentry, painting, glazing, tinning, roofing, plastering, bricklaying, paving, masonry and

concreting required in the construction and maintenance of railroad structures, other than tunnels, shall be performed by B&B forces. Such work in tunnels and all concreting by the gunite method shall be performed by tunnel forces."

Rule 18(b) reads as follows:

"(b) Where work is required by the Management to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have 40 hours of work that week; in all other cases by the regular employee."

There are assertions in the record made by Carrier and denied by Petitioner as to past practices. In this regard we find that even if there was evidence supporting Carrier's assertions, practices not in accord with an agreement cannot have the effect of changing the agreement. There seems to be in Carrier's position a tacit admission that the right to do the work by other than Claimants existed only in the case of emergencies. We have considered the record carefully and in view of the lack of evidence to show that an emergency existed we are not persuaded that one did. Awards 13738, 16454.

We find that the work comes under the Scope Rule of the herein agreement. Awards 13836, 2009. We also find that the failure of the Foreman to seek out Claimants does not operate to deny them their rights under the agreement.

There remains for consideration arguments raised by Carrier as to the availability of Claimants and whether repair work within the contemplation of the agreement was performed. We find that unless Carrier attempted to contact Claimants it can raise no question as to their availability. The record shows no such attempt was made. Award 13267. As to whether repair work was done, the record shows that when the guides were removed the door could be raised. The fact that other work on the guides including their re-application would be necessary does not render the intermediate step of removal any less repair work as contemplated by the herein agreement.

We find that Rule 18(b) required Carrier to call the Claimants. There is no evidence of an available extra or an unassigned employee who would not have had 40 hours. We are mindful that the Scope rule does not specifically list the removal of guides. We find, however, that such work is "minor repairs to roundhouses" in the Scope Rule quoted above which Claimants have a right to do unless they are unavailable.

Accordingly we shall sustain the Claim.

The possible Intervenor herein is International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers. In accord with Transportation-Communication Employees Union vs. Union Pacific Railroad Company (385 U.S. 157, 1966) said Organization was notified of the dispute by this Board and of its possible involvement therein and invited to participate. Copies of the submissions of Petitioner and Carrier were supplied to it. Said Organization chose not to participate. It submitted no comments, no submission and made no response to the invitation. As the possible Intervenor

was fully informed as to the situation we find that its action constitutes an unqualified disclaimer in the matter herein. Accordingly, we find that we have discharged our obligation under the TCEU doctrine.

**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 has been violated.

**AWARD**

Claim sustained.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
By Order of THIRD DIVISION

**ATTEST:** E. A. Killeen  
Executive Secretary

Dated at Chicago, Illinois, this 24th day of March 1972.