Award No. 2095
Docket No. MW-2127

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Ernest M. Tipton, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Wilson McCarthy and Henry Swan, Trustees)

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

(a) The Carrier violated the provision of Rule 18 when it paid Frank Mazza, Nick Corelli, Joe Mazza and Robert Cox sectionmen's rate while assigned and engaged in performing work of carmen, as follows:

Frank Mazza	August 22, 1941	6:00 A. M. to	2:00 P. M.
	October 1, 1941	8:00 A. M. to	6:00 P. M.
	November 28, 1941	8:00 A. M. to	4:30 P. M.
Nick Corelli	August 22, 1941	6:00 A. M. to	2:00 P. M.
	October 1, 1941	8:00 A. M. to	6:00 P. M.
	November 28, 1941	8:00 A. M. to	4:30 P. M.
Joe Mazza	August 22, 1941	6:00 A. M. to	2:00 P. M.
	October 1, 1941	8:00 A. M. to	6:00 P. M.
	November 28, 1941	8:00 A. M. to	4:30 P. M.
Robert Cox	August 22, 1941	6:00 A. M. to	2:00 P. M.
	November 20, 1941	7:30 A. M. to	11:00 P. M.*
	November 28, 1941	8:00 A. M. to	4:30 P. M.

* Time and one-half rate (Legal holiday)

(b) That claimants be paid the difference between what they received at sectionmen's rate and the rate applicable to the work performed, which was that of carmen.

EMPLOYES' STATEMENT OF FACTS: The employes involved in this claim were instructed by the Carrier to perform work of carmen at derailments on the Crested Butte Branch as set forth below:

On August 22, 1941 the Carrier assigned Frank Mazza, Nick Corelli, Joe Mazza and Robert Cox to perform the work of carmen at a derailment, between the hours of 6 A. M. and 2 P. M.

On October 1, 1941, Frank Mazza, Nick Corelli and Joe Mazza performed carmen's work from 8 A. M. to 6 P. M.

in this dispute did not perform more than one class of work, as loading and unloading tools, assisting in jacking and blocking up cars connot be classed as other than laborer's work. Work of this nature, if ocurring at a terminal where carmen and carmen helpers would be readily available, would still be performed by laborers and not by carmen or carmen helpers. In addition to the work outlined, these laborers also did whatever track work was necessary throughout the day. The use of tools requiring skill or training was not required and service performed was characteristic of the duties usually performed by carmen laborers.

As previously stated, the Carrier, prior to the Board's notice of July 3, 1942, had no discussion whatsoever of the claim for October 1st, Nov. 29th and Nov. 28th, 1941, and has had no opportunity to investigate the claims for these dates. These claims were not handled with local or general officers in accordance with established procedure for progressing grievance claims.

OPINION OF BOARD: On August 21, 1941, a derailment occurred on the Crested Butte Branch, approximately 15 miles from Gunnison, Colorado, the District Terminal. On the next day, a work train with tool-car outfit and crew, consisting of a foreman and carmen, was ordered to this derailment. Just prior to departure of the tool-car outfit, the Roadmaster decided to have the Gunnison, Colorado, section foreman and his four laborers accompany the outfit. These claimants assisted in unloading track tools used at the derailment, and assisting in setting jacks, jacking up, and blocking the car. The claimants contend they were doing the work of carmen and should be paid carmen's rate of pay under Rule 18 of the current agreement.

The Carrier cites Rule 41 of the Carmen's Agreement as one of the reasons why the claim should be denied. Rule 41 reads:

> "WRECKING CREWS. (a) Regularly assigned crews, including engineers, will be composed of carmen, when sufficient men are available, and such other employes necessary to meet the requirements of the service in the various localities.
>
> "(b) In emergency cases, men of any class may be taken as members of the wrecking crews to perform duties consistent with their classifications. Where engines are disabled, machinist and helper, if necessary, shall accompany the wrecker and work under the direction of the wrecking foreman."

It is to be noted the rule states "In emergency cases, men of any class may be taken as members of the wrecking crews to perform duties consistent with their classifications."

This language is plain and unambiguous. It means sectionmen may be a member of the wrecking crews, and they will perform work consistent with their classifications—that is, do sectionmen's work. In other words, at wrecks sectionmen are required to repair the track.

Briefly, the Carrier contends that in many instances, on this property, sectionmen have done similar work and only received sectionmen's pay for doing the work. This Board has repeatedly held that past practices cannot change the meaning of a plain and unambiguous rule. As previously stated, this rule is unambiguous, and the Board holds the sectionmen were doing carmen helper's work at the time in question as originally contended for by the Employes.

For the reasons assigned in Award No. 2094, Docket No. MW-2126, the Board holds the claim should be sustained as to the date of August 22, 1941.

As to the other dates mentioned in the claim, the claim should be denied for the reason that they were not properly discussed 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 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 Carrier violated the current agreement on August 22, 1941, to the extent expressed in the Opinion.

AWARD

Claim ((a) and (b)) sustained as to August 22, 1941, in conformity with the Opinion and Findings and denied as to other dates stated in the claim.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 5th day of March, 1943.

DISSENT TO AWARD NO. 2095, DOCKET MW-2127

The decision in this case is made upon an interpretation not of an agreement which the petitioning organization held with the Carrier, but upon the provisions of an agreement held by another organization, to which agreement this Petitioner was not a party.

See in the Opinion of Board the quotations from that other Agreement, the Carmen's Agreement, and the paragraph in that Opinion immediately following those quotations which states:

> "This language is plain and unambiguous. It means sectionmen may be a member of the wrecking crews, and they will perform work consistent with their classifications—that is, do sectionmen's work. In other words, at wrecks sectionmen are required to repair the track."

Consider the limitation such a declaration places upon the work that sectionmen may do, as compared with the broad scope of sectionmen's work comprehended by the agreement which the Maintenance of Way employes have with this Carrier. Then consider the injustice of applying an agreement to which the Maintenance of Way employes are not a party to arrive at such a conclusion, as stated in the above quoted paragraph, as base for an Award.

At the same time that this Award assumed such unsound base for a decision it ignored the record and such existence as it contained in respect to the character of work which sectionmen customarily performed when at wrecks. Such probative evidence as existed in the record was from an employe with 40 years' service associated with such duties in the Maintenance of Way Department, who declared that work of this nature had always been considered part of sectionmen's duties. The record and evidence by the respondent to that effect was not even refuted by the petitioning organization,—its preponderant reliance, as is the total base of the Award, being upon an agree-

ment to which it was not a party. Certainly the burden rests upon one asserting a claim to show the facts that would justify an upholding of it, and particularly when the respondent presents facts and evidence contrary to that alleged by a petitioner the latter should have obligation to present evidence in support of its claim before it could be credited with validity. Here, however, we have an Award based upon interpretation of an agreement to which the Petitioner was not a party,—an Award upholding a claim in which the probative evidence of record supported the respondent's position and was neither contradicted nor refuted by the Petitioner.

Such an Award can have no results but those of a miscarriage of justice.

/s/ C. C. Cook
/s/ A. H. Jones
/s/ R. H. Allison
/s/ C. P. Dugan
/s/ R. F. Ray