

Award No. 3005

Docket No. MW-2972

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Edward F. Carter, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
GULF, MOBILE AND OHIO RAILROAD COMPANY**

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

1. That Road Carpenter Laborer, D. P. Jones, was improperly laid off and improperly held out of service from June 20 to July 10, 1944, inclusive;
2. That, by reason of that the Road Carpenter Helper was out of service from June 20 to July 10, 1944, inclusive, Road Carpenter Laborer, D. P. Jones, should have been advanced to the rank of Road Carpenter Helper during that period;
3. That D. P. Jones shall be paid for time lost from June 20 to July 10, 1944, inclusive, at the rate of seventy-four (74) cents per hour, for the same number of hours as that for which the Road Carpenter was paid during that period.

EMPLOYEES' STATEMENT OF FACTS: A Road Carpenter outfit, consisting of a Road Carpenter, Road Carpenter Helper, and Road Carpenter Laborer, with headquarters at New Albany, Mississippi, Seniority District No. 5, was established in accordance with provisions of Schedule Rule No. 37.

Road Carpenter Helper, Bob Toland, assigned to that unit, laid off sick from June 15, 1944 to July 10, 1944. D. P. Jones, Road Carpenter Laborer, assigned to that unit, was laid off on June 20, 1944, on account of the fact that Road Carpenter Helper Bob Toland was off sick and was called back to work on July 10, 1944, the date Road Carpenter Helper Toland returned to work. The Road Carpenter continued to work on that unit during this period.

The Agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: Prior to June 15, 1944, a Road Carpenter was assigned to perform B. & B. work on territory covered by Seniority District No. 5, with independent headquarters at New Albany, Mississippi, under the provisions of Rule 37 which reads:

"A road carpenter having independent headquarters, may be used to perform B. & B. work, and, when necessary, he may use two other employees, the first being a helper and the second a laborer. When the nature of the work is such that it requires a larger force, a foreman and gang will be used."

As is permissible under the provisions of this Rule 37, this Road Carpenter was allowed the use of two other employees, the first being a helper (Bob Toland) and the second a laborer (Claimant D. P. Jones).

It is hereby affirmed that all data herein submitted in support of our position have heretofore been presented to the Carrier and is hereby made a part of the question in dispute.

Opportunity for oral presentation and argument is desired.

POSITION OF CARRIER: As shown in Carrier's Statement of Facts, a Road Carpenter position was established on territory covered by Seniority District No. 5, having independent headquarters at New Albany, Miss., with two other employees, the first being a helper and the second a laborer, in exact accordance with the provisions of Rule 37.

The helper became ill and this created a temporary vacancy of less than thirty (30) days which, according to the provisions of Rule 20(c), needed not to have been bulletined—and there was no other helper available.

Compliance with Rule 37 could have been accomplished in either of two ways, (1) by promotion of a laborer to the rank of helper, and (2) by reducing the force of the Road Carpenterr. The Carrier chose the latter method, and it was made effective in accordance with the rules of the agreement.

During the period June 20-July 10, 1944, Claimant D. P. Jones had every right and privilege that the agreement provides for employees who are displaced by a reduction in forces.

While having no direct bearing on the question here **at issue**, the Board may be interested to know that Claimant D. P. Jones has seniority as Road Carpenter Laborer as of November 19, 1943, and is in tenth place on the seniority list. It is thus apparent that had the Carrier chosen the first described method of complying with Rule 37, the Claimant would not have stood for the promotion because of his low seniority standing.

The contentions of the Committee are believed to be without merit, and should be denied.

OPINION OF BOARD: A Road Carpenter outfit consisting of a Road Carpenter, Road Carpenter Helper and a Road Carpenter Laborer. was established at New Albany, Mississippi, in accordance with Rule 37 of the current Agreement. Rule 37 provides:

"A road carpenter having independent headquarters, may be used to perform B. & B. work, and, when necessary, he may use two other employees, the first being a helper and the second a laborer. When the nature of the work is such that it requires a larger force, a foreman and gang will be used."

The record shows that the Road Carpenter Helper laid off sick from June 15, 1944, to July 10, 1944. The Road Carpenter Laborer, the Claimant here, was laid off on June 20, 1944, and called back to work on July 10, 1944. It is the contention of Claimant that he was improperly laid off and that he should have been given the position of Road Carpenter Helper during the illness of the occupant of that position. Claim is made for pay during the time he was laid off at Road Carpenter Helper's rate.

Under Rule 37, if the Road Carpenter uses one employee to assist him, he must be a Road Carpenter Helper. If he uses two employees, the second may be a Road Carpenter Laborer. It is evident, therefore, that if Claimant was to continue to work after the Road Carpenter Helper laid off sick, he would do so as a Road Carpenter Helper unless that position was filled by an employee entitled to it.

The facts indicate clearly that Claimant was worked for the three days during which the Carrier was not required to fill the Road Carpenter Helper's position under the provisions of the Supplemental Agreement of May 17, 1944, and then laid off until the Road Carpenter Helper was able to return to work to escape the necessity of assigning him to the Road Carpenter Helper's position. This the Carrier cannot do.

The Carrier urges that it is within the province of management to make necessary force reductions and that its actions in this respect are not subject to review. This is generally true when it is done in good faith, but where it appears, as here, that the claim that a force reduction was being made is not sustained by the record, it may not be used to excuse a violation of the Agreement. If the rule should be otherwise, every contract violation depriving an employe of work could be excused by the simple expedient of announcing it as a force reduction. The Agreement does not contemplate the avoidance of its terms by so simple a method.

The evidence shows that Carrier was faced with a manpower shortage due to war conditions and that there was no necessity for a force reduction because of a shortage of work. The fact that Claimant was laid off at the moment he was entitled to be rated as Road Carpenter Helper and called back to service at the identical time the Road Carpenter Helper returned to work, evidences the contentions of the Claimant. It is also shown that he was told that he was laid off because of the illness of the Road Carpenter Helper. This evidence conclusively establishes that there was no force reduction made because of a lack of work.

Carrier urges that if the position of Road Carpenter Helper had been filled that Claimant would not have been entitled to it because of his low seniority rank. That is not a defense to the claimed rate of pay as this Board has many times held.

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 evidence supports a finding that the contract was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary.

Dated at Chicago, Illinois. this 29th day of November, 1945.