Award No. 3219
Docket No. MW-3269

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY

Joseph B. Fleming and Aaron Colnon, Trustees

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

1. That the Carrier violated the Agreement in effect between itself and the Brotherhood of Maintenance of Way Employes when it contracted to outsiders certain bridge and building work on the Pan Handle Division, beginning on or about September 1, 1943;

2. That Jesse R. Gulledge, a bridge and building foreman, who had been reduced to the rank of B&B mechanic because of force reduction, shall be paid the difference between what he received as B&B mechanic and that which he should have received as bridge and building foreman during all of the time that the bridge and building work on the Pan Handle Division was being performed by outside contractors, retroactive to September 1, 1943.

EMPLOYES' STATEMENT OF FACTS: As stated in letter addressed to Superintendent C. C. Cunningham by General Chairman C. G. Fisher under date of January 17, 1944, quoted in Position of Employes, beginning on or about September 1, 1943, the Carrier contracted and assigned the performance of bridge and building work to outside contractors, such contractors employing foremen, carpenters, and laborers, men who had no seniority rights whatsoever in the Bridge and Building Department of the railroad.

While these contractors employed foremen and other employes who had no seniority rights on the railroad, Jesse R. Gulledge, who held seniority rights as a bridge and building foreman and who because of force reduction had been required to accept service in the rank of B&B carpenter, was continued in the rank of B&B carpenter and denied an opportunity to work as B&B foreman.

Agreement effective May 1, 1938 between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rule 1, Scope, of agreement in effect between the Carrier and the Brotherhood of Maintenance of Way Employes reads in part:

> "RULE 1. SCOPE. These rules will govern the hours of service and working conditions of all employes not including supervisory forces above the rank of foreman, performing work of a maintenance and construction character in Maintenance of Way De-

The contracting of this work was not for the purpose of depriving anyone under the agreement of work; all were employed full time according to seniority in their own classification; it was done in good faith for the purpose of preserving the carrier's property and there was no attempt at evasion of the Maintenance of Way Agreement to the disadvantage of the employes. If we had been able to hire additional men, or the organization could furnish the required employes—they knowing our need—a gang would have been established and the work carried on under the provisions of the Maintenance of Way Agreement. That, however, was impossible, and the carrier took the only course open to them under the circumstances.

In this connection we desire to call the Board's attention to their Award No. 1453 in a similar case on this property. The Findings and Decision of the Board in that award should likewise apply to this case because the necessity and reason for the actions of the carrier therein were the same as in the instant case.

OPINION OF BOARD: The record discloses that the Carrier found it necessary in the fall of 1943 to make extensive repairs to roundhouses, stockyards, treating plants, stations, platforms, etc., on the Pan Handle Division. There were no furloughed or extra employes available and its regular B&B employes were fully employed on programmed work. The Carrier contracted the work to persons not within the scope of the Agreement with Maintenance of Way employes. The work was clearly within the scope of that Agreement.

Claimant was a B&B Foreman who was working as a B&B Mechanic at the time. It is his contention that if the work in question had not been contracted out, he would have worked as a B&B Foreman. He makes claim for the difference in pay.

Carrier contends first that Claimant was not the senior B&B Foreman available and that one Bough would have been entitled to the work. This is not a defense. The claim of a junior employe will stand until a claim is made by an employe senior to him. Awards 1058, 1605 and 1646.

Carrier further contends that there is no basis for claim for the reason that Claimant by reason of overtime worked earned the equivalent of a B&B Foreman's pay. This argument is not persuasive. As a B&B Foreman, Claimant would have earned $218.96 per month. As a Mechanic working his regular assignment, he would earn $166.28 per month. He has suffered a wage loss amounting to the difference in the rates of pay. Award 1453 is distinguishable in the fact that the employes involved in that case suffered no loss in pay and the violation was held to have been technical because no wake loss could be shown.

The work clearly belonged to Maintenance of Way employes. By farming out the work under the circumstances shown by the present record, the Scope Rule of the Agreement was violated and Carrier is obligated to pay wage losses accruing to the employes entitled to the work where such can be shown. Awards 2701, 2812, 2819, 3060 and 3061. An affirmative award is required.

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 Agreement was violated as alleged.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of May, 1946.

DISSENT TO AWARD No. 3219, DOCKET MW-3269

This Award No. 3219 gives recognition to our preceding Award No. 1453 involving the same parties and agreement covering a similar case, which award was rendered two years prior to the origin of the instant case, discussed by both parties in this record, and available to them for their guidance under the circumstances of the case now before us.

This Award No. 3219 was rendered with the knowledge that all regular employes were fully employed, no furloughed employes were available, and none could be hired. These conditions prevailed in the case of Award No. 1453 and constituted the basis of the reasons for the decision there that the violation of the agreement was but a technical violation.

The Opinion there stated those reasons for its decision that no loss resulted to the claimants in the following words:

> "We are of the opinion that there was a violation of the agreement by the carrier, but it was a violation that, under the circumstances, cannot be said to be more than a technical violation. Because it was not intended to deprive employes under the agreement of work by letting the paint job in question under the contract; because it was done in good faith by the carrier, acting in its discretion to preserve the property and to avoid the reasonably probable futility of painting during the worst winter weather; because none of claimants were deprived of work during the period of painting and there was no attempt at evasion of the contract to the disadvantage of the employes, we are of the opinion that no loss resulted to claimants."

But here Award No. 3219 holds that:

> "Award No. 1453 is distinguishable in the fact that the employes involved in that case suffered no loss in pay and the violation was held to have been technical because no wage loss could be shown."

The conditions, which alike in Award No. 1453 and in this Award No. 3219 made it impossible to secure men additional to the regular force, made it impracticable in this case to have given assignment of the claimant here to work in the position of foreman (in respect to which he here is judged to have suffered a wage loss) for the simple reason that there were no employes who could have been constituted as a gang over which this claimant could have exercised supervision as a foreman.

To hold, as this Award No. 3219 does, that contrasted with Award No. 1453 the employe here suffered a wage loss while recognizing that in Award No. 1453 the claimants there did not suffer a wage loss, is to misapprehend not only the facts of the circumstances involved but also the reasons which resulted in the denial of the claim in Award No. 1453.

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