

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
DELAWARE AND HUDSON RAILROAD CORPORATION

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

(1) That the Management violated the provisions of the current working agreement between the Delaware and Hudson Railroad Corporation and the Brotherhood of Maintenance of Way Employees when it failed to advertise and award a position of Plumber Foreman, on the Champlain Division;

(2) That a position of Plumber Foreman, Champlain Division, be advertised and awarded in accordance with the provisions of Rule 27-a of the current working agreement;

(3) That the senior Plumber working on the Champlain Division be allowed the difference in pay between what he did receive at the Plumber's rate and what he should have received at the Plumber Foreman's rate from January 16, 1945, until such time as the position of Plumber Foreman is properly advertised and awarded.

EMPLOYEES' STATEMENT OF FACTS: On January 16, 1945, T. J. Sheehy, who was employed as a plumber foreman on the Champlain Division, retired in accordance with the provisions of the Railroad Retirement Act. The position of plumber foreman thus vacated was not filled in accordance with the provisions of the effective agreement. Subsequent to January 16, 1945, plumbers working on the Champlain Division have been working under the direct supervision of either a B&B Master or a B&B Supervisor.

Agreement between the parties is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: On January 16, 1945, T. J. Sheehy, Plumber Foreman, Champlain Division, retired in accordance with the provisions of the Railroad Retirement Act. The position thus vacated has not been filled in accordance with the provisions of the effective rules of the current working agreement, but rather the duties formerly performed by Mr. Sheehy have been allocated to supervisory employees.

In the handling of this controversy with the Carrier, the Carrier has held that the position vacated by Mr. Sheehy was that of "General Plumber Foreman", and that, by reason of such classification, that the position was not within the scope of the effective agreement. The Employees hold that the position was in fact that of plumber foreman, and as proof of this state-

POSITION OF CARRIER: The employes are here claiming a position of Plumber Foreman on the Champlain Division which has never existed before or since the agreement with the Brotherhood of Maintenance of Way Employes became effective on July 1, 1939.

Records indicate that in 1919 we had the following positions on the Champlain Division: Supervisor of Water Service, Supervisor of Plumbing, 2 Water Service Helpers, 1 Plumber and 2 Plumber Helpers, all working under the supervision of the Bridge and Building Master. In 1927 the positions of Supervisor of Water Service and Supervisor of Plumbing were combined and position of Supervisor of Water Service and Plumbing established. In 1938 the title on position was changed to General Plumber Foreman without any change in duties and when position became vacant in 1945 the title was changed to Bridge and Building Supervisor, account duties on the position, which were not the ordinary duties of a General Plumber Foreman.

In addition to the duties of supervising and directing the Plumbers, the Bridge and Building Supervisor inspects buildings, bridges and culverts under the direction of the Bridge and Building Master and assists the Bridge and Building Master in supervising carpenter and painter gangs. In addition, in the absence of the Bridge and Building Master, the Bridge and Building Supervisor acts in that capacity. These duties are far beyond the duties of a Plumber Foreman and not within the scope of agreement held by the Brotherhood of Maintenance of Way Employes.

The plumbing force on the Champlain Division at the present time consists of 3 Plumbers and 2 Plumber Helpers. None of these employes is a qualified Plumber, licensed in the City of Plattsburg, N. Y., which is the Division headquarters of the Champlain Division. There is not sufficient work to justify creating a Foreman's position which would only supervise and direct the work of 5 employes, 2 of which are helpers working under the direct supervision of the mechanic they help. In the interest of economical and efficient operation, it must be recognized that the duties in connection with such a position have to be coupled with other duties on some other position. In this case the major portion of the duties on the Bridge and Building Supervisor position are of a supervisory nature, beyond the scope of the Maintenance of Way Agreement. Request that such position be advertised and assigned under rules of that agreement is not supported by rules of the agreement and Carrier respectfully requests that the claim be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The System Committee claims the Carrier violated their agreement when it failed to advertise and award a position of Plumber Foreman on its Champlain Division. It asks that such a position be advertised and awarded. It also asks that the senior plumber working on that Division be allowed the difference in pay between what he did receive at plumber's rate and what he would have received at Plumber Foreman's rate. This difference to be allowed from January 16, 1945 until such time as the position is properly advertised and awarded.

The record discloses that T. J. Sheehy, an employe of the Carrier, retired as of February 1, 1945 under the provisions of the Railroad Retirement Act. That during the period from February 1, 1945 to February 16, 1945 the duties he had been performing were performed by the B&B Master. On February 16, 1945, Carrier created the position of B&B Supervisor and the duties that had been performed by Sheehy, along with others, were assigned to this position. It is undisputed that when Sheehy retired his position was not advertised and awarded in accordance with Rule 27 of the parties' agreement.

The Scope Rule of the parties' agreement provides:

"The rules contained herein shall govern the hours of service, working conditions and rates of pay of all employes in any and all

sub-departments of the Maintenance of Way and Structures Department, represented by the Brotherhood of Maintenance of Way Employees, except:

1. Employees above the rank of foreman."

It will thus be observed that Foremen are included within the Scope of the agreement but that positions above that rank are not. Consequently the question here is, was Sheehy performing the duties of a Plumber Foreman, as contended by the Committee, or was he performing the duties of a General Plumber Foreman, as contended by the Carrier?

The record discloses that the Carrier has plumbers and plumbers' helpers on the Champlain Division and as evidenced by Rule 36-(a) of their agreement, which sets forth the rates of pay for a Plumber Foreman, it is evident that such position was within the contemplation of the parties.

Employees show that on the Carrier's Seniority Roster of Plumbers on the Champlain Division as of February 1, 1943 and October 1, 1944, issued pursuant to Rule 6 of their agreement, that Sheehy was shown as a Foreman with seniority as of January 1, 1904. That on the Roster dated May 1, 1945, which is after he retired, that his name was no longer carried as an employee and that no Plumber Foreman is shown on that Division. The Committee contends that if Sheehy was an employee to be carried on the Roster under the provisions of Rule 5 then, by virtue of their oral agreement with the Carrier, it should have shown that fact by showing he was not employed as such.

Carrier admits that the Seniority Roster listed Sheehy as a Foreman and that it failed to show that he was not employed as such. It says that this was occasioned by a typographical error and that he was, in fact, a General Plumber Foreman since 1938 and performing work of that class and carried on the Pay Roll as such. It claims that his duties and position were outside the Scope of the agreement and that it had the right to have his duties performed by the B&B Building Master and assign them to the position of B&B Supervisor.

It is, of course, true that if the duties performed by Sheehy were not within the Scope of the agreement then what the Carrier did in assigning such duties and having them performed would be of no concern to the Committee. However, if the duties that were performed by Sheehy were actually those of a Plumber Foreman then the Carrier could not assign them to or have them performed by employees outside of or excepted from the agreement for, as this Board has often said, the Carrier cannot turn over to or assign the duties of a position covered by the agreement to employees or officials outside of or excepted therefrom. Whatever duties remain of the position must be given to employees covered thereby.

The question then presents itself as to the nature of the duties which Sheehy actually performed. But this cannot be determined by the title which the Carrier may have attached to the employee. We have carefully searched the record in an endeavor to find facts from which the question can be determined but have found insufficient information for that purpose.

In this respect we have not overlooked the memorandum of the Carrier's Division Engineer to the Chief Engineer as of March 15, 1940 wherein he expresses the thought that General Chairman McGuire felt that General Foreman Sheehy should remain on the roster, although his position did not come within the Scope of the Agreement. The Memorandum does not show that a copy was sent to the General Chairman but indicates that it was the Division Engineer's interpretation of what he understood was the General Chairman's views on the subject, and it passed only between the personnel of the Carrier. It is, at best, only a self serving declaration and without probative value. If the Carrier had desired the Committee to be bound thereby it should have sent the General Chairman a copy thereof.

Nor have we overlooked the letters of the several employes who are titled as General Plumber Foremen, particularly that of the retired employe Sheehy. It is apparent that these are from employes on the different Divisions of the Carrier. They merely express the views of these men as to whether or not they feel that the Maintenance of Way Agreement is applicable to their position. It is significant that none of them, and particularly that of Sheehy, in any way set forth the duties actually performed.

We have come to the conclusion that the record is insufficient to factually determine the nature of the duties which Sheehy was actually performing and that the case should be returned to the property for the purpose of submitting further evidence in relation thereto. If the duties he was performing were actually those of a Plumber Foreman, then the claim should be sustained as of February 1, 1945. On the other hand, if Sheehy was actually performing the duties of a General Plumber Foreman, then the claim should be denied.

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 question of whether the Carrier violated the agreement cannot be determined from the record.

AWARD

That the claim be remanded to the property to permit further submission of facts as to the nature of the duties actually performed by Sheehy.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 19th day of February, 1948.