Award No. 3879
Docket No. MW-3874

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John W. Yeager, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

INDIANA HARBOR BELT RAILROAD COMPANY

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

(1) That the position of Carpenter Foreman, which was awarded to Mr. J. O. Cloud on November 21, 1945, should have been awarded to Mr. V. B. Moffitt;

(2) That Mr. V. B. Moffitt be allowed the difference in pay between what he did receive and what he would have received had he been awarded the position of Carpenter Foreman on November 21, 1945;

(3) That Mr. V. B. Moffitt be accorded a seniority date as Carpenter Foreman as of November 21, 1945."

EMPLOYES STATEMENT OF FACTS: Claimant Victor B. Moffitt entered the service of the Indiana Harbor Belt Railway Company on November 25, 1924, in the capacity of carpenter and continued to hold rights as such from this date. Under date of November 21, 1945, a position of carpenter foreman was awarded to J. O. Cloud, who had a seniority date as a carpenter of March 25, 1926. On January 30, 1943, the Carrier and the representative of the Sheet Metal Workers International Association entered into an agreement providing that there would be one sheet metal worker attached to each carpenter gang. Subsequent to that time, V. B. Moffitt was assigned by the Carrier to perform sheet metal worker's work. However, while performing the duties of that assigned to a sheet metal worker, Mr. Moffitt continued his classification of carpenter. As proof of this, we are attaching hereto, as Employes' Exhibit "A", copy of roster dated January 1, 1944. When the 1945 roster was issued, Mr. Moffitt's name was deleted therefrom. This was duly protested by Mr. Moffitt, and under date of February 26, 1945, Division Engineer Hess wrote Mr. Moffitt, stating, in part, "We are agreeable to showing the names of F. C. Lemke, D. R. Blake, V. B. Moffitt and J. O. Cloud on the Bridge and Building roster showing their seniority as Carpenters, if this arrangement is satisfactory to you." We are attaching hereto, as Employes' Exhibit "B", copy of Mr. Hess' letter dated February 26, 1945.

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

POSITION OF EMPLOYES: The Scope Rule of agreement effective November 17, 1934, provides as follows:

In October 1945, the position now sought by Mr. Moffitt was bulletined in accordance with the M. of W. Agreement rules but no bids were filed by employes holding seniority under said agreement. Messrs. Cloud and Moffitt, who had no such seniority, both asked to be considered for the position and Mr. Cloud was assigned to it on November 21, 1945, with the status of a new man.

POSITION OF CARRIER: Rule 1 of the then current Maintenance of Way Agreement which had been in effect since November 17, 1934 read in part as follows:

> "These rules govern the hours of service and working conditions of all employes in the Maintenance of Way Department (not including supervisory forces above the rank of foreman) excepting employes coming within the scope of other agreements".

The exception clearly excludes employes coming within the scope of other agreements and as sheet metal workers, such as Messrs. Moffitt and Cloud, were and are under the shop crafts agreement, they had no bidding rights under the M. of W. Employes' Agreement.

Rule 14 (c) of the Agreement referred read as follows:

> "Promotion and the assignment to vacancies shall be based on fitness, ability and seniority. The senior qualified applicant will be assigned to the position within thirty (30) days after bids are closed."

As no bids for the position of Carpenter Foreman were received from any employe holding seniority under the agreement, the carrier violated no rule of said Agreement when it selected as foreman an employe from a different seniority group.

The carrier holds that the claimant has no right to the carpenter foreman position awarded to Mr. Cloud and consequently should not be awarded a seniority date as Carpenter Foreman as of November 21, 1945. Therefore, claim should be denied in its entirety.

It likewise follows that the claim for difference in pay between the Carpenter Foreman rate and the Carpenter rate since November 21, 1945 should also be denied.

(Exhibits not reproduced).

OPINION OF BOARD: There is but little factual dispute involved in this docket. V. B. Moffitt had a seniority date as a carpenter in the Bridge and Building Department of the Carrier from November 25, 1924. J. O. Cloud had a seniority date as carpenter in the same department from March 25, 1926.

Prior to February 1, 1943 the sheet metal work in the Bridge and Building Department was done by employes covered by the agreement between the Carrier and the Brotherhood of Maintenance of Way Employes.

Following protest of the Sheet Metal Workers' Organization, an organization covered by another and different agreement, an agreement effective February 1, 1943 was reached with the Sheet Metal Workers' Organization whereby one sheet metal worker would be assigned to each of four carpenter gangs who would be paid the sheet metal workers' rate. Sheet metal workers, however, were not assigned from that organization to the carpenter gangs, but four men were assigned from the carpenters' roster to perform the service. This was in accord with the agreement between the Carrier and the Sheet Metal Workers' Organization.

These four men received the sheet metal workers' rate of pay which was above the rate for carpenters. The Bridge and Building Department appears not to have been a party to the agreement but the arrangement apparently was acceptable and accepted. F. C. Lemke, D. R. Blake, V. B. Moffitt and J. O. Cloud were the carpenters assigned to this work.

Following the completion of this arrangement a separate sheet metal workers' roster was set up by the Carrier. The four were placed on this roster. Moffitt was given a seniority date of February 17, 1943 and the other three February 1, 1943. They were during 1943 and 1944 also carried on the Carpenters' roster. There was a protest by the General Chairman of the Carpenters' Organization with regard to these four men being carried on two rosters so their names did not appear on the January 1, 1945 roster of carpenters. The General Chairman in February, 1945, requested restoration of the names to the Carpenters' roster and abolition of the Sheet Metal Workers' roster. The Carrier expressed a willingness to restore them and to also allow them to remain on the Sheet Metal Workers' roster. This was declined so when the events here involved arose they remained off the Carpenters' roster and appeared only on the Sheet Metal Workers' roster.

In October 1945 a position of carpenter foreman was bulletined agreeable to the Maintenance of Way agreement. No bid was received from any employe whose name was carried on the Carpenters' roster. Both Moffitt and Cloud sought the position. The Carrier, in view of the fact that these two men were off the Carpenters' roster and were on the Sheet Metal Workers' roster, regarded them as having seniority rights only as sheet metal workers. The effect of this was to put them in the status of new men asking for the position of carpenter foreman. The Carrier on November 21, 1945 assigned Cloud to the position as a new man, as it had the right to do if these men no longer had seniority rights on the Carpenters' roster.

The determination in this respect then depends upon the status of these two men with regard to the Carpenters' roster at the time of bulletining and assigning the position of carpenter foreman. This status must be ascertained by analysis of the events already described.

It is to be noted that the four carpenters who became classified as sheet metal workers became so classified not by negotiation and agreement by the Carrier with representatives of the Bridge and Building Department but with representatives of the Sheet Metal Workers' Organization which agreemen was imposed by the Carrier on the Bridge and Building Department. Apparently, the Sheet Metal Workers' Organization did not exact that one of the craft represented by it be assigned to the carpenter gangs, but only that men in the Carpenter's Organization who had been doing the sheet metal work in Maintenance of Way bridge and building should be classed as sheet metal workers and that they should receive the sheet metal workers' rate of pay.

It is to be noted further that nothing appears in this docket to indicate that the jurisdiction of the positions was to be transferred to the Sheet Metal Workers' Organization. It reasonably appears that the positions were to remain under the jurisdiction of the Bridge and Building Department and that they should continue to be filled by members of that craft, but should be denominated sheet metal workers and receive their rate of pay.

The Carrier thereupon without bulletin or agreement with the Carpenters' Organization set up within the Bridge and Building Department a new class and a new roster wherein and whereon it placed these four employes. As pointed out these four were not at first taken off the Carpenters' roster, and it was never agreed that they should be taken off. Later they were taken off thus, according to the contention of the Carrier, leaving them without any rights thereunder at the time of the assignment of Cloud as carpenter foreman.

Seniority rights may not be destroyed or taken away in the manner described. To deny the claim on the basis of the contentions of the Carrier as analyzed would be to say that the Carrier may in part by agreement with another organization and part unilaterally, and without formality of abolishing an old position or establishing a new one, transfer an employe from an old position to a new one and by so doing, destroy the seniority rights of the transferred employe.

It must be said therefore that at the time the position of carpenter foreman was advertised Moffitt had unimpaired seniority on the Carpenters' roster.

The Carrier, in further defense against the claim, contends substantially that since the work done by these employes did not fall within the Scope Rule of the Maintenance of Way agreement, but that the positions were within the scope of the Sheet Metal Workers' agreement, Moffitt had no right to a position bulletined under the Maintenance of Way agreement.

This position is not tenable on this record. The reasonable inferences to be drawn from the facts disclosed are that these men were carpenters and were carried on the roster as such, that prior to the agreement with the Sheet Metal Workers' Organization they did the sheet metal work in the Bridge and Building Department; that after and pursuant to the agreement with the Sheet Metal Workers' Organization they were permitted to continue as before, but with a higher rate of pay and were called sheet metal workers, all of which happened without agreement with the organization which represented these men in their positions.

If we are to assume or to say that these men doing the work of sheet metal workers were performing work within the scope of the Sheet Metal Workers' agreement and not within that of the Maintenance of Way agreement, the reasonable conclusion is that they were doing it outside of the scope of their own agreement by direction of the Carrier and with the consent of the Sheet Metal Workers' Organization. If this is a correct analysis of the situation, and we think it is, no seniority rights as carpenters were lost by these men.

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 claim has been sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of April, 1948.