

Award No. 4248

Docket No. MW-4274

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee.

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD COMPANY**

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

(1) The Carrier violated the provisions of its agreement with the Brotherhood of Maintenance of Way Employees when it allocated the work of unloading, feeding, and loading livestock at Miles City, Harlowton, Deer Lodge, and Othello, to employees represented by the Brotherhood of Railway Clerks;

(2) The work of unloading, feeding, and loading livestock at Miles City, Harlowton, Deer Lodge, and Othello be reassigned to employees formerly performing this work and who are represented by the Brotherhood of Maintenance of Way Employees;

(3) All employees who have suffered a loss in earnings by reason of the Carrier arbitrarily allocating the work of unloading, feeding, and loading livestock at Miles City, Harlowton, Deer Lodge, and Othello, to employees represented by the Brotherhood of Railway Clerks be allowed an adjustment in wages covering the difference in what they have earned and what they would have earned had the Carrier continued to permit employees represented by the Brotherhood of Maintenance of Way Employees to perform this work.

EMPLOYEES' STATEMENT OF FACTS: Prior to January 16, 1946, employees represented by the Brotherhood of Maintenance of Way Employees have been required to perform all the services necessary in feeding stock enroute on the western lines of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. This arrangement has been in effect from the time that the western lines of the Chicago, Milwaukee, St. Paul and Pacific Railroad were constructed. During certain periods, because of the large number of cattle to be handled it has been necessary to put on additional gangs for the purpose of performing this work. As proof of this statement, we are attaching hereto, identified as Employees' Exhibit "A", copy of bulletin dated July 23, 1945, advertising for a Night Section Foreman at Othello; and as Employees' Exhibit "B", copy of bulletin dated February 21, 1946, again advertising for a Night Section Foreman at Othello; and as Employees' Exhibit "C" copy of bulletin dated November 22, 1946, advertising a vacancy of Night Section Foreman at Othello. Under date of December 31, 1946, the Carrier issued instructions to various Section Foremen instructing them that effective January 1, 1947, the position of Night Section Foreman at Othello was being abolished

The Carrier maintains that the scope rule of the Maintenance of Way Employees Agreement, which is quoted above, does not include employees **outside** of the Maintenance of Way and Structures Department. Laborers engaged in icing refrigerator cars, cleaning stock cars, loading and unloading live stock are **NOT** in the Maintenance of Way Department. Such employees are generally carried on the Station Agent's payroll or some other Operating Department payroll.

In any event, the payroll expense of such employees is transportation expense which is charged against the Operating Department and not the Maintenance of Way or Engineering Department.

It is the Carrier's position the claims are not supported by the Maintenance of Way Schedule and respectfully requests that they be declined.

Exhibits not reproduced.

OPINION OF BOARD: On December 31, 1946, the Carrier issued instructions that the position of Night Section Foreman Othello was being abolished and that all work theretofore performed by him in connection with the feeding of livestock en route was to be performed by the Perishable Freight Inspector, a position within the Clerks' Agreement.

The Scope Rule of the Maintenance of Way Agreement is as follows:

"The rules contained herein shall govern the hours of service, working conditions, and rates of pay of the employees in the Maintenance of Way & Structures Department represented by the Brotherhood of Maintenance of Way Employees but do not apply to supervisory forces above the rank of foreman, except the agreement is applicable to general foremen in charge of terminal yard crews. These rules do not apply to employees covered by other agreements." Rule 1, current Agreement.

The record shows that prior to December 31, 1946, Maintenance of Way employees performed the work of unloading, loading, feeding cattle, cleaning stock cars, and unloading sand which is put on the floors of stock cars after they are cleaned. After that date, Maintenance of Way forces retained only the work of cleaning cars, unloading sand and placing sand in the cars after cleaning at the points involved in this claim. At all other points on its Lines West, Maintenance of Way employees are required to do all the work in loading, unloading, and feeding cattle. The Carrier contends that the loading, unloading, and feeding of cattle is the work of freight handlers and turned the work over to the Perishable Freight Inspector, a position placed under the Clerks' Agreement on January 16, 1946.

Whatever the proper allocation of this work might have been in the first instance if we had been called upon to determine that question, the Carrier placed it under the Maintenance of Way Agreement. For many years the work was performed by Maintenance of Way employees. The foremen who supervised the work held positions bulletined under the Maintenance of Way Agreement. Employees doing this work were building up seniority under the Maintenance of Way Agreement. Without question, the work belonged to employees under the latter agreement. As such, it could not be taken from them except by negotiation. This was not done and an affirmative award is in order.

The argument that the work naturally belongs under the Perishable Freight Inspector and, that position now being under the Clerks' Agreement, that the work should be placed under that Agreement is untenable in so far as these claimants are concerned. An Agreement between the Carrier and Clerks which purports to remove work from the Maintenance of Way employees, is not binding on the latter employees.

The Carrier also urges that Maintenance of Way employees were used only on a temporary basis during a period of labor shortage. The record does not sustain this statement. They were used continuously. The foremen

positions were bulletined. Grievances with reference to the doing of this work were handled and concluded which were favorable to Maintenance of Way employees. This is strong if not conclusive evidence that the work was placed under the Maintenance of Way Agreement by the Carrier.

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 employees involved in this dispute are respectively carrier and employee 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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of December, 1948.

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Interpretation No. 1 to Award No. 4248

Docket MW-4274

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Employees.

NAME OF CARRIER: Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

Upon joint application of the parties involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The question to be determined by this interpretation is the effect to be given paragraph (3) of the claim after a general finding by this Board that it was sustained. It will be noted that paragraph (3) states that "All employees who have suffered a loss in earnings * * * be allowed an adjustment in wages covering the difference in what they have earned and what they would have earned" except for the violation. We say at the outset that no issue was made of this point by either of the parties in their submissions to the Board. The question appears to have first arisen when compliance with the award was attempted. Under such circumstances, the Board will interpret paragraph (3) in such manner as to apply the correct penalty for the violation of the Agreement. A general finding upon an issue not argued or presented will not operate to add to or detract from the application of correct rules governing the fixing of penalties for agreement violations.

The original submissions show that the Carrier assigned the unloading, loading and feeding of livestock at Miles City, Harlowton, Deer Lodge and Othello to a position under the Clerks' Agreement. We held that it belonged to employees under the Maintenance of Way Agreement. In other words, it was work lost insofar as Maintenance of Way employees are concerned. The value of work lost is the number of hours' work lost multiplied by the pro rata rate of the position, except that work lost on Sundays and holidays will be paid at time and one-half. This yardstick establishes the worth of the work lost by the Maintenance of Way employees and at the same time adequately penalizes the Carrier who has already paid once for having the work performed. The claim is valid under the award made from the date of the violation to the date the violation is corrected.

Referee Edward F. Carter, who sat with the Division as a member when Award No. 4248 was adopted, also participated with the Division in making this interpretation.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 4th day of August, 1950.