

Award No. 4638
Docket No. MW-4573

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

John M. Carmody, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: (1) That Section Foreman Meece and his crew of Liberty, Indiana, Indianapolis Division, were required by the Carrier on April 23 and 24, 1947, to perform services coming under the classification of Bridge and Building work:

(2) That Section Foreman Meece be allowed the difference in rate between what he received as Section Foreman and what he should have received at B&B Carpenter Foreman's rate:

(3) That the members of the crew of Section Foreman Meece who were engaged in this work be allowed the difference in rate between that paid as Section men and that they should have received at B&B Carpenter's rate.

JOINT STATEMENT OF FACTS: On April 23 and 24, 1947, Section Foreman Meece and gang consisting of three laborers worked eight hours each day replacing the old inner guard rail on Bridge No. 16, Liberty, Indiana. The former guard rail was composed of 58# section steel rail and the new guard rail was composed of 90# RA section steel rail. Bridge No. 16 is an open deck, single-track bridge, approximately 620 feet long, with a maximum height of 77 feet from bottom of stream to top of rail. For the service performed on Bridge No. 16 the employees were paid at their regular rates of pay.

The agreement between the parties to this dispute, effective April 17, 1930, and as subsequently amended, is by reference made a part of this statement of facts.

POSITION OF EMPLOYES: Rule 67(a) states as follows:

"Rule 67. COMPOSITE SERVICE.

(a) Bridge, Building and Structural Work—Work requiring the skilled use of tools customarily used in such work as carpentry, painting and glazing, tinning and roofing, plastering, bricklaying, paving, masonry, concreting, construction and maintenance of coaling stations, bridge construction and repairs, steel bridge and scale erecting and repairing, and such other work as is required in the construction and maintenance of railroad structures."

It will be noted that the above quoted rule defines Bridge and Building work as "such other work as is required in the construction and maintenance of railroad structures." It is the position of the Employees that this guard rail in question is a part of the bridge maintenance of Bridge Number 16.

The Carrier in its discussion of this claim on the property has held that because this guard rail so happened to be made of steel, and previously had been

"* * * the general acquiescence, over a long period of time, * * * in what was done, must be held to be the equivalent of a contemporaneous construction of the contract on the basic question here involved, and the claim now made comes too late. * * *"

In the latter Award, that Division together with Referee Norris C. Bakke found in part:

"It appears that the practice of the carrier complained of began over twelve years ago. The claims were not filed until 1941. Such a delay indicates concurrence in construction of agreement made by carrier."

The particular claim was denied.

This Carrier has conclusively demonstrated that the "Composite Service" rule in the current Maintenance of Way Agreement upon which this claim is based first appeared in its present form as Rule 68 in the Maintenance of Way Agreement, effective as of January 12, 1922. Thereafter it appeared in this same form as Rule 67 in the Maintenance of Way Agreements effective as of October 1, 1926, and as of April 17, 1930. During this entire period of time and in fact for many years prior thereto, track forces were required to perform the service herein protested. The record indicates that up to the present time they did so without specific protest. Under these circumstances the Carrier submits that the employees substantial acceptance of the interpretation placed upon the Agreement and of this particular practice is conclusive. On the basis of the above cited Awards, the Carrier submits that at this late date the employees are estopped by their inactivity over a period of more than twenty-five years from entering a protest that the Carrier had acted improperly on the specified dates in this dispute.

In view of the above the Carrier submits that the Awards of this Division do not support this claim.

In view of the above and in view of all that is contained herein the Carrier respectfully requests the Division to hold this claim as being one without merit and to deny it accordingly.

Exhibits not reproduced.

OPINION OF BOARD: The facts are not in dispute. A section foreman and his crew removed a 58# steel inner guard rail on Bridge No. 16, at Liberty, Indiana, and replaced it with a 90# steel inner guard rail. The claim here is for pay at the Bridge and Building rate.

Both groups, B&B and track forces, are covered by the same Agreement and by the same rule, Rule 67 (a) and (b). Guard rails, outer or inner, are not mentioned in Rule 67 (a) or (b) although many kinds of work are itemized. The outer guard rail, constructed of timber "to hold bridge ties in position so that they will not bunch together with the movement of traffic over the bridge" is conceded by the Carrier to be part of the bridge construction and belonging to B&B employees.

The purpose of the inner guard rail, which lies parallel to and within a few inches of the running rail, is to provide an extra element of safety in event of derailment. The Carrier says "safety of equipment"; the Organization says "safety to equipment and to the bridge." The argument has been broadened to cover inner guard rails on all bridges of this Carrier but the claim here is specific as related to Bridge No. 16. We shall confine our conclusions to this specific claim.

Bridge No. 16 was built in 1905. There is nothing in the record that indicates how many times the inner guard rail on this bridge has been changed or replaced.

The Carrier states, "Following the installation of the steel trusses and the platform of this open deck bridge (1905) track forces . . . were properly required to install the inner guard rail. Furthermore, in the period of time

represented by the opening of this bridge to traffic up to the present, track forces . . . have been . . . required as a part of their regularly assigned duties to perform whatever work was necessary in altering, repairing or maintaining the inner guard rail on this particular installation." It is this particular installation, Bridge No. 16, that we are dealing with here.

This statement of the Carrier is unchallenged except for the following statement by the Organization, "it is very evident that work of this type previously performed on Bridge 16 at Liberty, Indiana, was obviously performed by B&B men. Otherwise there would be no claim at this time." We find no factual support in the record for that supposition.

The Organization cites Award No. 2337 in support of its position, namely, that apart from the fact that the inner guard rail is an integral part of the structure, the "reason or purpose" for installing it is controlling. If other elements were not involved, there is much to be said for the applicability of that award. This is true also of Awards Nos. 3638 and 4077, cited in support of argument that "determination of the classification to which work belongs rests on the purpose for which the work is done." The facts, however, must support the conclusion. The purpose here is not a single one in the sense envisioned in those awards. The purpose here is to protect running equipment, passenger and freight, the bridge itself and trackage on the bridge and at the approaches. It is to protect life.

No single purpose is served to the exclusion of other purposes. The record shows this inner guard rail extends some 66 feet along the track from the back-walls of the bridge.

To paraphrase what we have said in Award No. 4637 in support of the Organization's claim there, we believe we will be less likely to "extend or expand" the present Agreement and less likely to interfere with rational negotiation of the issue on the property if we deny this claim than if we allow it.

We find support for our denial of the exclusive right to the replacement of the inner guard rail on Bridge 16 to B&B employees in Awards Nos. 1078, 1134 and 4160. Here, as in Award 4160, we emphasize that our finding is based on custom and practice and is confined to the facts as presented in this case.

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 employees 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 of record does not disclose any violation of the Agreement.

AWARD

Claims 1, 2 and 3 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of November, 1949.