

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
MISSOURI PACIFIC LINES**

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

(1) That the Carrier violated the Agreement by assigning to contractors certain B&B work on the Kingsville Division;

(2) That Assistant B&B Foreman V. W. Pressley be compensated for the difference between what he received as an Assistant B&B Foreman and what he should have received as B&B Foreman each day the contractors worked on account of the Carrier's violation of the Agreement, during the period beginning October 13, 1946 and continuing as long as the Contractors performed this work, or until V. W. Pressley was again assigned to the position of foreman.

EMPLOYEES' STATEMENT OF FACTS: Prior to October 18, 1946 V. W. Pressley, Kingsville Division, was a regularly assigned Bridge & Building Foreman Carpenter and had been engaged in the maintenance of the Carrier's buildings and structures on this Kingsville Division. However, effective on that date, October 18, 1946, B&B Foreman Pressley's position of Foreman was abolished and he was thus required by the exercising of his seniority rights to work on a position of Assistant B&B Foreman. This, of course, resulted in a loss of compensation earned because of the lower rate paid an Assistant Foreman's position.

However, during this period subsequent to October 18, 1946 the Carrier employed contractors to make repairs and maintain the Carrier's buildings on this Kingsville Division. Thus, while the Carrier reduced its forces by cutting off positions, such as Foreman Pressley's, the Carrier continued to hire and employ contractors having no seniority under the scope of this Agreement.

The Employees have contended that the Carrier violated the Agreement, and that Foreman Pressley should have been compensated for the difference in earnings and wages received at the Assistant Foreman's rate and what he should have received at the B&B Foreman's rate beginning with the period October 18, 1946 and continuing until such time as he was again re-employed in the capacity of a Foreman.

The Carrier has denied our claim.

The Agreement in effect between the two parties to this dispute, dated August 1, 1938, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: As we have stated in our Statement of Facts the Carrier assigned to contractors the work of repairing and main-

Rule does not specify the work which falls within the Agreement. That it was intended that certain work did belong to the Clerks is an accepted fact if the Agreement is to have any validity at all. On the other hand, the contention that the Scope Rule provides that clerical employes under the Clerks' Agreement shall perform all clerical work has no foundation."

There is no material difference between the Scope Rule of the Clerks' Agreement and the Scope Rule of the Maintenance of Way Agreement. All either of them do is to specifically designate therein the various classes of employees covered by the agreement. Paragraph (a) of Rule 1 in the agreement here involved covers the Bridge and Building Department. It will be noted that there is nothing therein specifically or otherwise showing what work will be performed by employes in that department. It is understood, of course, that they will perform certain work in connection with bridges and buildings. However, to say that this rule specifically or otherwise gives employes in the B&B Department a contractual right to perform all maintenance or construction work requires reading into the rule something that is not now there. Primarily the duties of B&B forces consist of maintaining already existing facilities such as bridges and buildings. Throughout the entire history of the railroad it has been the practice to contract out certain construction and maintenance work.

CONCLUSION

In light of the foregoing record it is clearly evident that the Employees' contention and claim in the instant case is without basis and should be denied for the following reasons:

1. Claim is not supported by any rule in the working agreement.
2. Any work that may have been performed by contractors during the period in question was due entirely to inability of the Carrier's B&B forces to perform it.
3. Under the circumstances there was no violation of the agreement as alleged by the Employees.
4. It has always been the practice for the Carrier to have work performed by contractors where the Carrier did not have sufficient force to perform it, and the character and urgency of the work was such as to preclude its being deferred indefinitely, and until comparatively recently the practice has been acquiesced in by the Employees.
5. Claimant lost no time in any capacity as a result of any work being performed by contractors.
6. Your Board has previously denied claims for pay in favor of Carrier forces when work was performed by contractors, even though it was recognized that such work properly belonged to Carrier Maintenance of Way forces, when the Carrier forces lost no time. (Third Division Awards 1453, 1610: Second Division Award 1042).
7. The Board has recognized that a claimant must assume the burden of presenting some consistent theory which, when supported by the facts, will entitle him to prevail. In this case claimant has not presented any consistent theory supported by facts which would entitle him to prevail.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier assigned to contractors the work of repairing certain buildings on the Kingsville Division which were used in connection with the growing of fruit and vegetables. The work done belonged to B&B employes under the Maintenance of Way Agreement. Claimant contends that the contracting of the work resulted in his being assigned as an

assistant foreman instead of foreman of a B&B gang. The record shows that except for nine days in October, 1946, 24 days in November, 1946 and 18 days in December, 1946, he worked as a relief foreman during the period of the claim. The claim, consequently, involves the difference in pay of an assistant foreman and a foreman for 51 days.

The record in this case shows that the Carrier had six B&B gangs working during all the times mentioned herein. It contends that two additional gangs were required to complete the maintenance work programmed on this division but due to Carrier's inability to obtain necessary personnel, such maintenance work was not completed. It is evident from the record that this claimant, even if the two additional gangs had been established, would not have been affected by the contracting of the work. He would have served as foreman of a gang engaged in programmed maintenance work which had not been performed at the end of 1946.

It is evident from the record that claimant was required to work for 51 days as an assistant foreman because of the manpower shortage in the B&B forces. If additional employees could have been hired, claimant would have served as foreman by virtue of his seniority. It was an economic condition and not the contracting of the work here complained of that resulted in his claimed loss. For this the Carrier is not liable.

The Organization contends that adequate employees could have been obtained if greater compensation had been offered and working conditions had been improved. This is pure speculation and does not constitute proof of any dereliction of duty on the part of the Carrier. The record will not sustain a finding of bad faith on the part of the Carrier in its attempts to augment its B&B forces by hiring additional employees.

We are obliged to hold that claimant's alleged loss was in no way due to the contracting of the work herein described. A denial award for compensation 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 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 agreement was not violated as to claimant Pressley.

AWARD

Claim denied as per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 26th day of June, 1950.