

Award No. 5491

Docket No. MW-5437

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Glenn Donaldson, Referee.

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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

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

(1) That the Carrier violated the agreement on September 28 and 29, 1949, when they assigned General Section Foreman N. F. Alberts and Laborers P. A. Levato, Sam Bartolone, George Owens, John Scorza and Domenick Mengarelli to work with electricians engaged in replacing underground conduits and wires and compensated them at their regular rate of pay;

(2) That General Foreman N. F. Alberts be paid the difference between what he did receive at the General Section Foreman's rate of pay and what he should have received at the electrical foreman's rate of pay for a period of 16 hours, and that Laborers P. A. Levato, Sam Bartolone, George Owens, John Scorza and Domenick Mengarelli be paid the difference between what they did receive at the section laborer's rate of pay and what they should have received at the electrician helper's rate of pay for the 16 hour period each, in which they were engaged in the work referred to in part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: On September 28 and 29, 1949, General Foreman Nick Alberts and Laborers P. A. Levato, Sam Bartolone, George Owens, John Scorza and Domenick Mengarelli were instructed by Division Engineer Clark, through his Assistant, to work with Electrical Department employes, who were engaged in installing and replacing electrical conduits and wires. The work in question was performed in the vicinity of the Western Avenue Roundhouse, and consisted of digging and back-filling of the trenches that carried the conduits and wires.

The Track Department employes assigned to this work were compensated for services rendered at their regular rates of pay.

The Employes contended that this service was covered by the provision of Rule 32 of the effective agreement, which provides that an individual required to fill a higher rated position shall be paid the rate of such position for the work day, when the time so engaged is in excess of 4 hours.

The Carrier contended that the disputed work was purely Laborer's work and that the claimants' regular rate of pay was applicable.

Claim was declined.

“Division Engineer Clark has in his office a file of correspondence regarding the claim of N. F. Alberts and his crew for September 28 and 29, 1949 when they were instructed to excavate a trench in order for the electricians to make the installation of conduits and replacements of electric wires.” (Underscoring ours.)

In other words, when the claim was originally presented General Chairman James agreed all the claimants did was to “excavate a trench in order for the electricians to make the installation of conduits and replacements of electric wires.”

The only question here involved is whether or not the digging and back-filling of a trench would be work within the scope of the Electricians' Agreement and in that connection the Board's attention is directed to Rule 73 of the Electrical Worker's Agreement, effective September 1, 1949, reading:

“Employees regularly assigned as helpers to assist electrical workers and apprentices, including electrical lamp trimmers who do no mechanical work, also to perform such battery work as may be agreed upon locally as being helper's work.”

It is noted in that Rule there is no reference made to digging or back-filling trenches.

The attention of your honorable Board is directed to Award 1134 by this Board in which principles pertinent to the instant case have been set down.

Apparently the employees, after having made the claim, realized there was no merit in it because the Carrier has a letter from General Foreman Alberts and each of the laborers involved except John Scorza, who has since left the service, in which they indicate that they wish to withdraw the time claims from the higher rate of pay on the dates in question. This information was given General Chairman James. However, in his letter of August 22, 1950 he advised:

“Mr. Alberts and his men have no right to withdraw a claim that has been handled by the System Officers through your office.”

The Carrier has no information as to the laws of the Organization with respect to individuals withdrawing claims after they have been submitted to the General Chairman, however, the fact that the claimants did address a communication to the Carrier withdrawing the claim indicates that the claimants feel there is no merit in the claims.

To sum up, it is the Carrier's position:

1. Because of this claim involving the Electrical Workers' Agreement it is not properly before the Third Division of the National Railroad Adjustment Board.

2. Even though it may be considered as being properly before the Third Division it is the Carrier's position that the digging and back-filling of the trench would not be work that would entitle the claimants to the higher rate of pay.

The Carrier respectfully requests that the claim be declined.

OPINION OF BOARD: This dispute arises over compensation paid to a section foreman and five laborers assigned to dig and back-fill a trench. The trench was two hundred and twenty feet in length under ten yard and four main tracks and then ran parallel to said tracks for approximately three hundred and thirty-five feet. The work was done in the vicinity of Carrier's Western Avenue Diesel House. Claimants were so assigned in

conjunction with electricians who were engaged in replacing underground conduits and wires at this point. While the facts are not wholly clear, it appears that after the trench was prepared by claimants, the electricians alone laid their conduit and wires and claimants then filled in the trench. The record reflects that the claimants were so engaged for sixteen hours. They were compensated at their regular Maintenance of Way rate of pay. The section foreman claims the difference between what he was paid and what he would have received at the electrical foreman's rate of pay. The section laborers claim the difference between what they received and the electrician helper's rate of pay. One further fact merits mention. The Carrier asserts and claimants do not deny that the section crew worked under the supervision of their own foreman. His claim supports this conclusion.

Carrier resists the claims on the grounds that the work was common labor and as such is not covered by the scope of any particular Agreement. It states that regular gangs, organized to travel, include groundmen or laborers who usually perform work of digging ditches; that in some instances, shop laborers have performed such work in the shop area. Carrier further contends that claimants did not assist electricians or their helpers in the performance of any work which was a part of the classification of work performed by the latter.

The claimants rely upon Rule 32, Composite Service, providing:

"An employe required to fill the position of another employe received a higher rate of pay, shall be paid the rate of such position for the work day when the time so engaged is in excess of four (4) hours. * * *"

and a number of past awards of this Division.

If the claimants in fact assisted the electricians and their helpers in the actual laying of the conduit and wires, the submission is not sufficiently clear to establish it. From what is before us, we must conclude that the groups worked separately, i.e., they worked on an overall project in conjunction with one another, but claimants did not "assist" within the meaning of prior awards. Therefore, many of the cited awards, we find, are not applicable to the dispute at hand.

Secondly, while again not clear, it appears from the whole record that the section laborers worked under the supervision of their own foreman. This fact, while alone not determinative, has some weight in carrying this case outside the application of a number of the awards relied upon by claimants.

Thirdly, the case is peculiarly similar to that subject of Award 1134. We affirm what we there said, namely, "In digging the trench beneath three main tracks of the railroad, as was done, and its extensions otherwise, in the circumstances appearing, potential disturbance of the roadbed at vital points challenged the Carrier's concern to a degree not lightly to be regarded, and the back filling partook of the same potentialities. Throughout the process, as we are persuaded, responsibility for the finished job in relation to the trench proper—digging and back filling—rested on the track force."

We cannot conclude that under circumstances here proven that claimants were required to fill the position of other employes within the meaning of Rule 32. Rather, they were performing divisible work, under and along the roadbed, their recognized domain, for which they were responsible and to which their regular rate of pay applied.

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 amended June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

The Agreement was not violated.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 27th day of September, 1951.