

Award No. 6698
Docket No. MW-6714

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

J. Glenn Donaldson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
OF TEXAS

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

(1) The carrier violated the effective agreement when they failed to assign employees holding seniority in the Bridge and Building Department on the Northern District to the work of trucking, transferring, loading and unloading Bridge and Building material during the period August 6 to 17, 1951, and in lieu thereof assigned the work to Section Crews Nos. 126, 128, 129 and 130;

(2) The employees holding seniority in the Bridge and Building Department on the Northern District be paid at their respective straight time rates of pay for an equal proportionate share of the total man hours consumed by Section Forces in performing the work referred to in part one (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: During the period, August 6 to 17, 1952, both dates inclusive, the Carrier assigned various track forces to perform work customarily recognized as Bridge and Building work, such as loading, unloading, transferring and trucking of Bridge and Building material and equipment, for which it compensated the track forces at their regular rates of pay.

The assignment of work and compensation allowed was protested and claim filed requesting that the track forces be compensated at Bridge and Building helper's rate of pay for all time consumed in performing the Bridge and Building work and that all Bridge and Building employees holding seniority on the Northern District be allowed pay at their respective straight time rates of pay for an equal proportionate share of the total man-hours consumed by the track forces in performing Bridge and Building work.

The claim in behalf of the track forces was allowed in accordance with the following letter:

[1361]

of using other employees. Any such interpretation of the agreement would subject the Carrier to double jeopardy and penalty or would destroy the intent, purpose and effect of the Composite Service rule. It would also be contrary to the established and recognized interpretation of the agreement, which has been observed by the parties ever since the Composite Service rule first became effective December 16, 1919. This Composite Service rule is a special rule and this Board has also recognized that in the interpretation of contracts special rules take precedence over general rules. When the parties agreed to the Composite Service rule they agreed to the use of employees on two or more classes of work on any day is permissible and not in violation of the agreement. For the Petitioner to now contend such use of employees is a violation of the rights of other employees under the agreement is directly opposed to what the parties originally agreed to and, if sustained, would constitute change in the agreement without formal notice and negotiation in accordance with the Railway Labor Act. To contend and hold that the Carrier violates the agreement when it does something the agreement clearly and unequivocally authorizes and has been recognized by the parties as proper for more than thirty years is too ridiculous and absurd to discuss or consider.

The claim as described in Statement of Claim refers to the work of trucking, transferring, loading and unloading B&B material. The claim as handled on the property did not describe in detail the character and amount of alleged B&B helper's work involved. Trucking, transferring, loading and unloading B&B material in the course of transportation is not B&B or Maintenance of Way and Structures work, but is handling of non-revenue or company freight. This is true whether the material involved is carload, or an L.C.L. shipment, the handling of such freight is incident to transportation of freight and is not work generally recognized as B&B work.

Claim (2) is for employees holding seniority in the B&B Department on Northern Division at their respective straight time rates. No agreement rule has been cited nor will be found to support such a claim. The claim here is for right to perform work and not for work performed. The character of work allegedly performed was that of B&B helper. There was no work allegedly performed as B&B Foreman, B&B Lead Mechanic and B&B Mechanic. The Composite Service rule does not apply to work not performed but only applies to work performed as provided therein. Claimants performed no work and therefore are not entitled to any additional compensation under the agreement rules here involved.

As Petitioner has not affirmatively established any violation of the agreement as alleged or basis for the instant claim, the Carrier requests the Board to render an Award denying same.

Except as expressly admitted herein, the Carrier denies each and every, all and singular, the allegations of the Petitioner's claim, original submission and any and all subsequent pleadings.

All data submitted in support of Carrier's position as herein set forth have been heretofore submitted to the employees or their duly authorized representatives. (Exhibits not reproduced.)

OPINION OF BOARD: The burden of establishing facts sufficient to require or permit the allowance of a claim is upon him who seeks its allowance (Awards 4011, 3393, 3473, 2577 and others). The within case is devoid of the essential facts and any attempt to arrive at a decision would be mere speculation. Accordingly the case must be remanded to the property for determination in accordance with the opinions herein expressed.

The Carrier places undue importance upon the composite service rule. Such rule is of value in measuring compensation due on permissive work of differing classes of service during a day's tour of duty. However, it cannot serve as a passto cross craft lines if such lines are discernible. It would appear to be of no pertinent application in the settlement of this dispute. Further, if it could be determined that the work in question was properly

that of the B&B Department, the mere fact that such employes were employed upon the days in question is no excuse for taking work from them in absence of the showing of an emergency. No citation need be supplied for this basic principle.

The Organization, on the other hand, excuses the need for setting forth specific rule violation, and the circumstances under which its claims arose by the fact that a subordinate officer, the District Engineer, granted additional compensation to the section crews for performing the work in question. It is perhaps true, as Carrier contends, that this officer had no authority to make a precedent determination for the Carrier. The fact remains that we are not enlightened by sufficient facts surrounding the settlement to determine whether the granting of the extra pay constituted a gratuity, a compromise settlement, or proper compensation for work performed. At any event, it does not provide a key to the basic question involved here which must be decided upon the pertinent facts and rules applying to B&B workers.

The Organization relies upon Award 3589 which concerns the identical contract provisions present here. There two section laborers were assigned and engaged for three days in unloading and storing bridge and building timbers. The Organization there asserted Rule 11, contending that under such the section laborers were performing B&B work and entitled to receive B&B helpers' rate under the composite service rule. It was further asserted by the Organization that the laborers were not assigned to assist a B&B gang to unload but "were performing that service independently and exclusively." From the docket in that case it appears that the material was stored and not applied by B&B forces until three weeks later. The Award of this Division arrived at with the assistance of a referee, granted the claim for the difference between section laborers' rate and that of B&B helpers. The Award unequivocally states that "Unloading and storing bridge piling is Bridge and Building work." No rule, past practice, or prior award of this Board is cited in support of such statement. The Opinion goes on to say that occasional assistance to B&B gangs in the handling of heavy materials is permitted under Rule 11 but that the unloading of piling was not performed as assistance to any B&B gang but for the purpose of releasing cars. Hence, since the work was not within the exceptions allowed, the claims were sustainable, it was there reasoned.

In Award 4516, we stated, in part, as follows:

"We quite agree that awards interpreting agreements ought not to be overturned except for very sound reasons. Changes in the interpretations of identical provisions of agreements tend to confuse rather than facilitate their application. We must point out, however, that an award cited as a precedent is no better than the reasoning contained within it, especially where awards in conflict with it exist."

It is obvious that the author of Award 3589 started from a false assumption when it is stated unequivocally that the unloading and storing of bridge piling is B&B work. As we have previously noted, such bald assertion stands unsupported by rule, practice or Board precedent. The author continued in that Award to recognize permissive infringement upon this assumed rule by way of occasional assistance but when performed alone, he concluded the permissive limits of Rule 11 were passed. It should be noted that the claim was paid under the composite service rule and the award approached the question from the standpoint of the section laborers. Perhaps relying upon said Award, the Division Engineer, settled the claims of the section crews in our case by paying them on the basis of the B&B helpers' rate.

There is no express parceling out of work to the B&B Department by Rule 11 of Article 5. It refers back to past practice by prohibiting the use of laborers to perform work generally recognized as Bridge and Building work. The question of what that work is, is begged not determined. In connection with such work, the Rule allows the use of laborers to dig, backfill and to occasionally assist B&B gangs in the handling of heavy materials. Obviously

such materials are contemplated as are being used at the time in the construction or maintenance of a bridge or other work customarily handled by such crews. It is a rule of reason and entitled to a reasonable application.

We have had subsequent occasion to reconsider Award 3589 and we believe the better reasoning is expressed in Award 5885, wherein we state:

"The conclusion to be drawn from the several (subsequent cases) is that where the handling is done in connection with or as part of particular bridge construction or maintenance, it is work belonging to Bridge and Building employees, but where it amounts only to handling and storage for use generally or at some future time, it may be regarded only as the handling of company material."

To the above we might add that simply because a bridge is under construction, it does not justify the assignment of all material handling to section laborers. Their part, in this regard, is only to assist when needed in the handling of heavy materials. See also Awards 5749, 4797. The mere fact that the handling involves materials commonly incorporated into bridges is of no significance.

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 docket presents insufficient facts upon which to render an award.

AWARD

Case remanded for handling upon the property in line with the Opinions herein expressed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 25th day of June, 1954.