

Award No. 8092

Docket No. MW-7707

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY**

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

(1) The Carrier violated the effective Agreement when the work of moving a telephone booth building from Adobe to Goodnight was assigned to section forces who hold no seniority under the effective agreement.

(2) That B&B Foreman O. S. Dunbar, B&B Carpenter R. J. Knoll, F. C. Cesario, John K. Martin and Ralph Zerfas and B&B Helpers Lest Volk and Reuben Williams each be allowed pay at their respective straight time rates for an equal proportionate share of total man-hours consumed by the section forces in performing the work referred to in part one (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On or about August 27, 1954, the Carrier had a telephone booth building moved from Adobe to Goodnight, utilizing the services of a section crew from Florence to perform this work. This work consisted of removing the structure from its location at Adobe, loading the structure for transporting it to Goodnight and then unloading the structure upon arrival at Goodnight.

The employees of Bridge and Building Gang 7182, in charge of B&B Foreman O. S. Dunbar, were assigned to perform the work required in setting this building up at Goodnight, after it had been unloaded by the section forces.

The instant claim was presented to the Carrier, the Employees contending that the work of removing and moving this building structure from Adobe is Bridge and Building work.

The claim and all subsequent appeals have been declined.

The Agreement in effect between the two parties to this dispute dated February 1, 1941, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rule 2, captioned "Seniority", of the effective Agreement reads as follows:

As your Honorable Board has often stated in its Awards, the burden of establishing that the work involved is reserved exclusively to Bridge and Building employees is, of course, upon the parties asserting the claim. The Brotherhood cannot do, for the reason the work involved has been performed by both classes of employees for a period of many years and neither group, either by agreement rule or settlement has the exclusive right to perform the work.

The Carrier contends the claim is without merit or basis and must, therefore, be denied.

All data in support of Carrier's position has been presented to the Brotherhood and made a part of the particular question in dispute. The Carrier reserves the right to answer any data not heretofore presented to it.

OPINION OF BOARD: The Organization here charges that:

"The Carrier violated the effective Agreement when the work of moving a telephone booth building from Adobe to Goodnight was assigned to section forces who hold no seniority under the effective agreement."

The Organization asserts that under the applicable Agreement "the seniority rights of the employees working in each (Bridge and Building Department, Track Department, Road Equipment Department) of these separate sub-departments are not interchangeable in any way." It quotes Awards 2050 and 4667 in support of its position.

Following is a portion of Rule 2, Seniority:

"BRIDGE AND BUILDING DEPARTMENT:

"All employees engaged in work rightfully coming under the jurisdiction of the Bridge and Building Department."

The Agreement itself, however, is silent as to what constitutes "work rightfully coming under the jurisdiction of the B&B department."

The Scope Rule of the Agreement states that "This agreement governs the rates of pay and working conditions of the following employees in the Maintenance of Way and Structures Department:

"(1) All bridge, building, fence, painting, construction, mason and concrete foremen and assistant foremen of these classes.

"(2) All mechanics in the Bridge and Building Department, except pipefitters and scale inspectors.

"(3) All helpers to mechanics in the Bridge and Building Department, except pipefitter helpers.

"(4) Laborers in the Bridge and Building Department."

The Organization claims that "it is common knowledge that employees of the Bridge and Building Department perform such work as that required in erecting, maintaining, dismantling, etc., of Carrier owned buildings and structures. The fact that Carrier assigned B&B Gang 7182 to perform the necessary work in connection with the actual setting up of this structure at Goodnight, lends support to our contention that any and all work performed in this claim, should have been allocated to Bridge and Building Department employees. The purpose for which the work in dispute was performed was solely in connection with and related to the construction, reconstruction, maintenance, repair or dismantling of Carrier owned structures. The work here involved is in no way related to the usual and customary work of section

forces and served no purpose in connection with the construction, repair, maintenance and dismantling of roadway and track. This Division has consistently held that the method of determining to which class certain work belongs is by an examination of the reason for the performance of the work."

With respect thereto, Carrier states the telephone booth was moved " * * in order that a telephone connected with the train dispatcher's office at Pueblo, Colorado would be available during the period the second main track between Adobe and Swallows was being dismantled and retired. It is obvious therefore the telephone booth was moved primarily as result of dismantling of roadway and track."

Carrier further asserts "the moving of telephone booths has been performed by both classes of employes, Bridge and Building Department forces and Section or Track forces, for many years. Neither group—until the instant claim was submitted—have ever contended the work belonged exclusively to them. Each group has performed some of it and furthermore each group—as proven by the absence of any protest—has acquiesced in such performance."

The actual work here in dispute is as follows:

"A section gang located at Florence, Colorado, while enroute to work at Swallows, Colorado, picked up telephone booth at Adobe, Colorado, loaded it on push car, and with motor car pulled the push car and telephone booth to east switch at Swallows, a distance of approximately twelve (12) miles where section gang unloaded the telephone booth."

This Division has repeatedly held that the burden of proof in a claim rests on those seeking its allowance.

From the record here established it is clear that the work here complained of its not reserved exclusively to B&B forces by the applicable Agreement, nor is it reserved by specific reference in said Agreement.

The parties here are in conflict, the Organization asserting this particular work "is Bridge and Building work—the work of removing, moving, and re-locating buildings on this property, irrespective of the size of the buildings, has heretofore been exclusively assigned to B&B forces"; while Carrier claims "Bridge and Building Carpenters and Helpers, as well as section forces, have performed this work for many, many years and up to the present time neither group has claimed the work as belonging exclusively to them. Both groups have acquiesced in and recognized the right of the performance of such work by the other."

In Award 5869 (Yeager) this Division noted:

"The question for determination is one of fact as to whether or not the work involved belonged to the Bridge and Building Department. This fact cannot be ascertained from any specific provision of the Agreement. The Organization says it was customarily done by the Bridge and Building employes, and the Carrier says the exact opposite. Neither cites other similar incidents of the performance of like work in support of its position.

"This leaves the matter in the field of uncertainty insofar as the Division is concerned. An affirmative Award on a matter of this importance cannot be permitted to rest on conjecture and uncertainty. There should be evidence sufficient to convince that this work reasonably, by reference to the Agreement, belonged to the Bridge and Building employes or that the parties by their acts so treated it before the Division would be justified in upholding the contention of the Organization. The evidence is not so convincing."

Among the Awards cited by or in behalf of the Organization's position is Award 4077 (Carter). It is argued on behalf of Carrier here, that Award 4077 has no reference here as it is not a case "dealing with the exclusive right to perform work, but rather * * * with rate of pay applicable under a composite service rule; in addition since Agreement between parties there (4077) specifically set out the work that belongs to the B&B department, and since no rule comparable to Rule 45 (in 4077) appears in the Agreement between the instant parties and the record fails to show how the work has here (been) performed, that Award (4077) has no application."

Because the Organization here has failed to prove that Carrier in the instance cited has violated the applicable Agreement, the claim will be denied. Award 5869.

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.

AWARD

Claim (1) and (2) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of October, 1957.