

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John Day Larkin, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

ATLANTA JOINT TERMINALS

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

(1) The Carrier violated the Agreement on May 25, 1955, when it permitted and/or required other than employees in the B&B Sub-Department to perform alterations to a building commonly referred to as the "Old Freight House" in the dismantling and the removal of a "Hold Bin" therefrom;

(2) B&B Foreman G. O. Carithers and B&B Carpenters P. J. Tolbert and G. W. Pickard each be allowed five hours' pay at their respective straight time rates account of the violation referred to in part 1 of this claim.

EMPLOYEES' STATEMENT OF FACTS: The Building commonly referred to as the "Old Freight House" at Atlanta, Georgia contained a "Hold Bin", approximately 10 feet square which was attached to and became an integral part of said building.

During the hours between 11:00 A.M. and 4:00 P.M. on May 25, 1955, the Carrier permitted and/or required three Clerical Department employees, who hold no seniority rights under provisions of this Agreement, to perform alterations to the aforementioned building in the dismantling and removal of the "Hold Bin" therefrom.

The work was of the nature and character usually and customarily performed by the Carrier's Bridge and Building forces.

The claimants were available and could have performed the work described above, had the Carrier so desired.

The agreement violation was protested and a claim filed in behalf of the claimants.

The claim was declined as well as all subsequent appeals.

The Agreement in effect between the two parties to this dispute dated December 16, 1944, together with supplements, amendments and interpretations thereto are by reference made a part of this Statement of Facts.

OPINION OF BOARD: This dispute arose when Carrier assigned Clerical Department employees to dismantle a storage bin which was located in what has been known as the Old Freight House, between the hours of 11:00 A. M. and 4:00 P. M. on May 25, 1955, while the bridge gang forces were at their regularly assigned work, pouring concrete in the Terminal Building. The amount of actual time devoted to this work is in dispute. While the claim is for five hours' pay for three employees, Carrier now insists that the actual dismantling of the "Hold Bin," which was about ten feet square, was performed by two employees working two and one-half hours each, without supervision.

However, the Carrier did not question this part of the claim while the matter was being processed on the property. The denial was based upon the fact that the B&B Sub-Department employees were otherwise employed; and the contention that the work was not reserved exclusively to these employees, since The Scope Rule "Carries no definition of work and the Agreement contains no classification of work rule." Therefore, since this question as to the amount of time consumed and the number of employees involved was not raised on the property, it cannot be raised before the Board. Awards 5469, 7785, and many others.

Rule 1 of the Agreement is as follows:

"These rules govern the hours of service, working conditions, and rates of pay of the employees in the Maintenance of Way and Structures Department, except clerical forces, roadway shop employees, telephone, telegraph and signal employees, camp car cooks and watchmen."

In many previous awards this Division has interpreted this and similar rules and has held that the usual and customary work of the positions embraced within the scope of the effective Agreement is the work of the employees who are subject to the terms and provisions of such Agreement. The work involved in the instant case was definitely of the character usually performed by the Carrier's B&B employees and is covered by the above quoted Scope Rule, which specifically excepts the clerical forces. No one has suggested that this was in any sense work belonging to those covered by the Clerk's Agreement.

As to Carrier's contention that these Claimants were occupied with another assignment at the time the work in question was performed, we have disposed of many similar assertions. As was stated in the language of Referee Wenke in Award 6063:

"Carrier contends that the claim should be disallowed because none of the Claimants lost any time as a result of this company doing the work. This claim is primarily to enforce the scope of the Agreement and not for work performed. If the scope has been violated then a penalty is imposed to the extent of the work lost. This is done to maintain the integrity of the Agreement. As to who gets the penalty, that is but an incident to the claim itself and not a matter in which the Carrier is concerned for if the Agreement is violated, it must pay the penalty therefor in any event." (Emphasis ours)

In short, we believe that the work of tearing down the "Hold Bin" was work belonging to the Terminal's B&B employees, covered by the Agreement with the Maintenance of Way Employees, and not work belonging to employees covered by the Clerk's Agreement. Therefore, we must conclude that the Agreement was violated.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of the THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 4th day of August 1961.

DISSENT TO AWARD NO. 10025, DOCKET NO. MW-8450

Petitioner at no place in the record stated that Carrier did not question the time element or the number of employees used while the matter was being processed on the property. Petitioner raised no issue in its rebuttal statement over Carrier's position in this respect, but, as an afterthought in its surrebuttal, simply stated that the Superintendent, who initially handled the claim, had not questioned the number of men used or the hours consumed. In addition, Carrier stated without refutation that the practice has been for freight house laborers, as well as carpenters on the agency rolls as distinguished from Claimants, to perform minor jobs in the freight house.

Accordingly, Award 10025 is based upon speculation and an underscored immaterial factor in order to sustain the claim and divert attention away from the controlling fact of record that no rule or practice grants to Claimants exclusive rights to work of dismantling, particularly the dismantling of a nondescript bin made of old doors as in the instant case. Furthermore, no rule of the Agreement provides for payment of penalties in any event.

For the foregoing reasons, Award 10025 is in error and we dissent.

/s/ W. H. Castle

/s/ P. C. Carter

/s/ R. R. Carroll

/s/ D. S. Dugan

/s/ J. F. Mullen