

Award No. 10075

Docket No. MW-9185

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles W. Webster, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**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 work of constructing and assembling battery box racks is encompassed within the scope of this Carrier's Agreement with the Brotherhood of Maintenance of Way Employes and the Carrier violated said Agreement when it assigned such work to employes outside the scope thereof;

(2) The work of constructing and assembling battery box racks be restored to employes holding seniority under the aforesaid Agreement in accordance with a practice and recognition of some thirty (30) years;

(3) Furloughed B&B Mechanic H. H. Harvey be allowed fifty (50) hours' pay at the B&B Mechanic's rate because of the amount of such work transferred and/or assigned to other than B&B forces between November 21, 1955, and January 29, 1956.

EMPLOYEES' STATEMENT OF FACTS: Maintenance of Way B&B Department employes have historically and traditionally performed the work of constructing and assembling battery box racks on this Carrier.

Between November 21, 1955, and January 29, 1956, the Carrier assigned and/or permitted Signal Department employes, who hold no seniority rights under the effective Agreement, to perform this work and failed and refused to utilize the services of B&B Department employes in connection therewith. The Carrier had been placed on notice of our position in a letter reading:

"300-245-C

October 5, 1955

Mr. E. T. Lytle
Division Engineer
M-K-T Lines
Denison, Texas

Dear Sir:

It is our information that recently Bridge and Building Gang

The Third Division, National Railroad Adjustment Board, is without jurisdiction to provide the relief requested by the employes and the Carriers respectfully request that the claim be denied.

* * * * *

All data submitted in support of the railroads' position have been heretofore submitted to the employes or their duly authorized representatives.

The railroad requests ample time and opportunity to reply to any and all allegations contained in submission and all pleadings of the employe or employes and the Brotherhood of Maintenance of Way Employees.

Except as herein expressly admitted the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas deny each and every, all and singular, the allegations of the employe or employes and the Brotherhood of Maintenance of Way Employees.

For each and all of the foregoing reasons, the Missouri-Kansas-Texas Railroad Company of Texas respectfully request the Third Division, National Railroad Adjustment Board, deny said claim and grant said Missouri-Kansas-Texas Railroad Company of Texas all other relief to which they or either of them may be entitled.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a claim wherein the Organization alleges that the Carrier violated the Agreement by assigning work belonging to it to the Signalman.

In addition to the issue on the merits the Carrier has raised certain procedural questions which they claim determine the issue without consideration of the substantive issue.

First: They state that because the claim is made on behalf of a furloughed employe that he is not an employe under the Railway Labor Act. This Division has so often awarded relief to furloughed employes that this argument must be dismissed without merit.

Second: The contention is made that the appeal to the National Railroad Adjustment Board was untimely in that the ex parte submission was not presented to the Board within the time period. The fact is that the Organization notified the Executive Secretary of its intention to file its ex parte submission well within the time. This Division feels this issue has been determined adversely to the Carrier on many occasions. A well reasoned opinion is found in Award 9059 by Referee Johnson in which he stated:

"This claim was finally denied on the property on December 31, 1954; the Brotherhood on December 29, 1955 gave notice of its intention to file an ex parte submission within thirty days, and filed it on January 25, 1956. The Question is whether the appeal was taken to this Board on December 29, 1955, within twelve months after December 31, 1954, or not until January 25, 1956, more than twelve months later.

"This Board's Rules of Procedure provide as follows:

'EX PARTE SUBMISSION.—In event of an ex parte submission the same general form of submission is required. The petitioner will serve written notice upon the appropriate Division of the Adjustment Board of intention to file an ex parte submission on a certain date (thirty days hence), and at the same time provide the other party with copy of such notice. For the purpose of identification such notice will state the question involved and give a brief description of the dispute. The Secretary of the appropriate Division of the Adjustment Board will immediately thereupon advise the other party of the receipt of such notice and request that the submission of such other party be filed with such Division within the same period of time.'

"The Third Division has held (Award 7144) that the filing of the notice of intention to present an ex parte submission constitutes the institution of the proceeding here. Like holdings have been made by the Second Division (Awards 2135, 2285, and 2342) and by the Fourth Division (Award 976). (The First Division has apparently abolished the notice of intention.)

"The Carrier argues that the Board's rule and the above awards are void because Section 3 First (i) of the Railway Labor Act provides that unadjusted disputes 'May be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the dispute.'

"The argument is that since under that statute, a proceeding is to be 'referred' to the Board 'by petition * * * with a full statement of the facts and all supporting data,' the Board acquires jurisdiction only by the filing of the ex parte submission, and that the Board's Rules of Procedure and awards to the contrary are void.

"While such a construction is possible, we do not consider it reasonable. The National Agreement of August 21, 1954 prescribed the time for appeals to this Board because the Congress had not seen fit to do so. The Congressional Act evinced no concern with the time or manner of this Board's acquisition and conduct of proceedings, but provided by Section 3 First (u) that the Board should 'adopt such rules as it deems necessary to control proceedings before the respective divisions * * *.' It did provide, of course, that such rules must not be 'in conflict with the provisions of this section.' But it seems clear that in providing how proceedings were to be 'referred' to the Board the congressional intent was directed toward the matters to be presented for consideration rather than the time or manner of giving jurisdiction. Until otherwise decided by the courts we cannot conclude that the Board's established procedure and awards regarding the institution of a proceeding by the filing of notice of intention is in conflict with the Railway Labor Act."

Other awards have so followed this opinion. See especially Award 2342 of the Second Division involving this same Carrier.

Third: The Carrier has contended that because the Signalmen were also involved in this dispute this Division had no jurisdiction to act unless the Signalmen were also served and allowed to appear. This issue is however moot in that

the Signalmen were given the right to appear on June 6, 1951 and declined to exercise this opportunity.

As to the merits this is a scope rule case. The Maintenance of Way Employees contend that the work of constructing and assembling battery box racks is work reserved exclusively to them and that the Carrier violated their Agreement by allowing employees under the Signalmens Agreement to do the work. While the Scope Rule is ambiguous and only lists positions, this Division has held that custom and tradition on a particular Carrier determines the work governed by the Scope Rules. Carriers own correspondence verifies the fact that this work has been reserved exclusively to the Organization.

The letters between the Division Engineer and another member of the Carrier are reproduced herein to document this position.

“Denison — November 1, 1956

9 5 9

“SUBJECT: Construction of Signal Boxes
by B&B Shop, Denison

“Mr. J. E. Foster:

“General Chairman Jones has made formal complaint reference certain work in connection with building Signal Department battery boxes which we are handling on shop orders, leaving a portion of the construction work to be done by Signal Department employees which, it is contended, has formerly been handled by B&B men.

“We are asked for a statement giving all the facts in detail. Please let me have a letter accordingly giving me full information in such shape that our personnel department at Dallas can readily understand the entire matter.

/s/ E. T. Lytle”

Reply to the last quoted letter was as follows:

“Denison — November 4, 1956

959

“SUBJECT: Construction of Signal Boxes
by B&B Shop, Denison

“Mr. E. T. Lytle

“Yours above file and subject, for as long as this class of material has been required by the signal Dept, the B&B Shop has constructed them for the past few years a lot of them,

“Grates is made up of 1x2 strips cut from 12” to 30” long and nailed to gather making a Grate to go in concrete box for the batteries to set on and as I said various sizes,

“Frost lids is made up usely of 1x6” flooring cut to a length from

24" to 30" od length and nailed to gather with cleats making a frost lid that fits just in side of these concrete boxes,

"Terminal boards are 1x4" cut to length and fastened in side of these concrete boxes to hold up the frost lids,

'Gun boats lids are made up to 2x4" frames covered with 1x6 flooring and galvanized iron cut and shaped to fit over the lids and these lids cover the concrete boxes.

"Mr. Woods, Signal Engineer called me some time ago to ask me to get them out some of this material in long length and that the signal department was going to cut them to length required and nail them to gather, and that is why this question was raised, by the B&B forces.

"I am passing to you a few of the Shop Orders I have filled in the past year or two will give you some iday of what it amounts to, trust this information such that you fuly understand it all.

"I should like to have these Shop Orders back soon as the accounting Dept, calls on us very often and we have to refer back to them. (Emphasis ours)

/s/ J. E. Foster"

The Carrier also contended in its submission that it was completely conjectural on the part of the Organization that this work was ever carried out by the Signalmen. Again, however, we find that the Asst. Personnel Manager stated that the particular work was done by the Signalmen.

In a letter of June 15, 1956 he stated:

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

"A. F. Winkel
Assistant General Manager "Dallas 2, Texas — June 15, 1956
E. J. HAMMANN
Director of Personnel 2579

"Mr. E. Jones,
General Chairman,
Brotherhood of Maintenance of Way Employes,
Post Office Box 433,
Denison, Texas.

"Dear Sir:

"Referring to your letter of February 21, 1956, file 300-245-C, appealing claim of furloughed B&B Mechanic H. H. Harvey for 50 hours' time at B&B Mechanic's rate of pay, which matter was discussed in conference June 12, 1956:

"Your were advised in conference June 12, 1956, that the Brotherhood of Railroad Signalmen of America had claimed the work of constructing battery box racks and for this reason, the timbers were

ordered ripped to size and left uncut for future assembling by Signal Department forces of the battery box racks.

“For these reasons and reasons given you in our letter of March 9, 1956, and other correspondence, we reiterate declination of the claim contained in our letter to you of March 9, 1956.

“Yours very truly,
“/s/ A. F. Winkel”

The Carrier further contends that there is no showing that 50 hours of time were spent in building these battery racks. In light of the fact that the Carrier has admitted that these racks were built, it behooves the Carrier to mitigate its own damages. The Organization is in no position to know the number of hours that were involved and obviously could only estimate from its own experience.

Finally, the Carrier Member of the Board has called attention to Article V, Section 3, of the National Agreement of 1954 dealing with the question of time limits for processing grievances. The Argument of the Carrier Member is an excellent one and had it been raised on the property would have brought about a different disposition of this case. However, not having been raised on the property and being analogous to a statute of limitations it is deemed waived as it is procedural and not jurisdictional. (See Award 9578)

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 has been violated.

AWARD

Claim sustained as per Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of September 1961.