# Award No. 10969
# Docket No. MW-10634

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

## (Supplemental)

**Ralph D. McMillen, Referee**

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**CENTRAL OF GEORGIA RAILWAY COMPANY**

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

(1) The Carrier violated the effective Agreement when it required the employes assigned to MS Gang Nos. 1, 2 and 3 to remain at their respective headquarters and on their trailers throughout every Monday, Tuesday, Wednesday, and Thursday evening and night, and failed and refused to allow them compensation for such time.

(2) That MS 1 Foreman R. B. Simpson and the employes assigned in his gang, namely, Trackmen H. A. Curtis, P. Davis, E. R. Gillyard, B. Hankerson, C. Lott, J. Robinson, S. Wilson, Junior Appentice C. E. Wallace, Cook H. Lockhart;

MS 2 Foreman W. C. Simmerson and the employes assigned in his gang, namely, Trackmen R. Lattimore, W. Haynes, L. Murry, W. D. King, H. Williams, T. Robinson, W. F. Mullins, Cook Nelson Lyons;

MS 3 Foreman T. D. Kemp and the employes assigned in his gang, namely, Trackmen J. Lawrence, I. Pitts, R. Balkom, L. Lyman, O. Simmons, J. Sims, H. G. Lawrence, Junior Apprentice T. Lewis, Cook C. Boatright, and/or their successors, each be paid at their respective overtime rates in accordance with provisions of Overtime Rule No. 16 for each hour held on duty in excess of their regular assigned hours, retroactive sixty (60) days from August 30, 1957, and the claim to continue until the instructions issued by the division engineer and the supervisors have been canceled.

(3) Any successor or successors to the Claimants named in Part 2 of this claim can be determined by a joint check of the seniority roster and payroll records.

In the light of the circumstances prevailing, Carrier respectfully submits that the claim is completely unsupported by any contractual requirement and should be denied in its entirety.

All facts submitted in support of Carrier's position in this case have been presented orally and by correspondence to the Employes or duly authorized representative thereof, and made a part of this dispute.

Carrier, not having seen the Employes' submission in this dispute, reserves the right to present such additional evidence and argument as it deems necessary.

**OPINION OF BOARD:** There are basically two questions in the submission:

(1) Is the Carrier in violation of the effective Agreement when it required the Employes assigned to MS Gangs Nos. 1, 2 and 3 to remain at their respective headquarters and on their trailers throughout every Monday, Tuesday, Wednesday and Thursday evening and night, and failed and refused to allow them compensation for such time.

(2) The claim in the last paragraph of Part 2 and also the claim in Part 3 of the Employes' Statement of Claim, to wit: "and/or their successors."

In considering Part (1) the record shows that on May 13, 1957 the following instructions were issued by the Carrier to the Claimant Employes:

"These MS gangs Nos. 1, 2 and 3 should stay on the trailer cars all the time at night excepting Friday, Saturday and Sunday nights. During those hours off the foreman should let you know where to contact them if needed. The foreman should be able to contact his men if needed.

"These foremen are expected to stay in the cars at night on Monday, Tuesday, Wednesday and Thursday, and let his supervisor know where camped etc. each night."

The record also shows that on May 18, 1957 the foremen received instructions as follows:

"We now have instructions that all men assigned to trailer gangs will be required to stay on the trailers at night during the week, Monday, Tuesday, Wednesday and Thursday nights, unless you are camped at the man's home town. Impress this upon your men that this will be required, and will have to be conformed with if they expect to stay on your gang. If any men come under the exception, be sure you know how to get in touch with them. If you are called out on a week night, you will be responsible for the men assigned to your gang to see that they are available."

The Carrier issued a further notice to the Claimants on November 14, 1957:

"While the management does not agree that the Agreement with the Brotherhood of Maintenance of Way Employes has been violated in any manner whatsoever, be advised that employes assigned to Maintenance or other extra gangs are not on a standby basis, and unless specifically instructed to remain on duty, are under no compulsion to linger or remain at or close to their living facilities after working hours or on rest days. However, it will be expected of the Foremen to know where his men live and their telephone number where they normally can be contacted, the same as is required of any other employe on the railroad."

The Board finds no rules of the Agreement requiring Employes to hold themselves ready for calls or to remain in stand-by service without compensation. Rule 15 (a) states "Eight consecutive hours, exclusive of the meal period, shall constitute a day's work." Rule 16 covers "Overtime, Calls and Holidays." In Award 1070 this Board held:

"No rule of the Agreement has been cited by the carrier which imposes upon the employes involved herein the obligation, when off duty, of holding themselves available for service at all time at their place of employment. This obligation would infringe seriously upon the freedom of the employes; if such an obligation exists, without provision for additional compensation, it must be found in some express stipulation of the Agreement governing the working conditions of these employes and not simply be assumed as a general conditioning requirement of their employment contract."

Also in Award 2072 this Board held:

"There is nothing in the rules which says men may be required to hold themselves ready for a call in emergencies. If such a requirement was intended, it would of necessity be included in the rules."

It is clear to this Board that the instructions issued to the Claimants, by the Carrier, restricted their freedom and the claim (1) should be sustained.

Part 2 in which the Carrier takes exception to the language "and/or their successors." The Carrier objected to this portion of the claim as prohibited by Article V of the November 5, 1954 Agreement. In the Award 10426 it is stated "This Board has frequently held in interpreting the National Agreement" . . . "that Claimants need not be specifically named so long as they are readily identifiable." In this claim there are only 3 gangs involved, and they are relatively small in number and can easily be identified by the Carrier.

We believe that the claim in the last paragraph of Part 2 and the claim of Part 3 should be sustained.

**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 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

Claims 1, 2 and 3 sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of December 1962.

**CARRIER MEMBERS' DISSENT TO AWARD 10969, DOCKET MW-10634**

**Award 10969** is palpably wrong. The fundamental law regarding proof of disputed facts is violated. The clear and controlling rules of the Agreement between the parties are ignored.

I.

Although the claim is sustained for both the "evening and night" of each date involved, evidence of record conclusively establishes that Claimants were merely required to sleep on their camp cars at night and were not restricted in any way during any evening of any day for which claim is made. Even the evidence relied upon by Claimant is expressly limited to "night".

The instructions that were admittedly given to the Claimants by their supervisors through their foremen are the instructions dated May 18, 1957, quoted in the Opinion. They state:

> "'We now have instructions that all men assigned to trailer gangs will be required to stay on the trailers **at night** during the week, Monday, Tuesday, Wednesday and Thursday nights, unless you are camped at the man's home town. * * *'"
> (Emphasis ours.)

Upon receiving a claim, the Division Engineer discussed the matter with the General Chairman and promptly advised the General Chairman that the facts in the case were as follows:

> "'It was not the intention of these instructions to limit in any way the normal social activities of these men while off duty, but only to place them in a convenient location during their normal sleeping hours, where they could be reached if necessary. On the Railway's part, we have gone to great expense in providing living quarters for these men, during the week, which are clean, sanitary and desirable.'"

The record discloses that throughout subsequent handling, Carrier has consistently maintained its position that the instructions given Claimants merely required them to live on their camp cars (trailers) during "normal sleeping hours".

While the Petitioner has submitted the claim to us with numerous unsupported allegations that Claimants were "required to remain on standby duty without pay during their unassigned work hours Monday through Thursday", such allegations are not supported by evidence.

It should not be necessary to cite authorities to establish that mere assertions are not sufficient to support a claim and Claimants have the burden of proving all essential elements of the claim with competent evidence.

**Award 10601** (Dolnick):

". . . They have not, however, presented proof of that fact, nor have they met the burden of proof requirements. Mere assertions by the Claimants' Representatives cannot be accepted as proof. See Awards 8065 (McCoy), 6359 (McMahon), 9932 (Weston), 9788 (Fleming), 9674 (Johnson), and 9609 (Rose). In Award 9674 this Board said that 'self-serving declarations and general statements [are] of no real probative value.'"

**Award 9788** (Fleming):

". . . Furthermore, the claim must fail for lack of proof. Mere assertions and conclusions are not sufficient to substantiate a claim."

**Award 9552** (Bernstein):

". . . The Claimant has the burden of proving all essential elements of the Claim. . . ."

**Award 8065** (McCoy):

". . . We have many times held that mere assertions cannot take the place of proof."

Also see **Awards 10256** (LaBelle), **9932** (Weston), **9757** (LaDriere), **9609** (Rose), **9261** (Hornbeck), **6169** (Wenke), **3003** (Carter), among many others.

With respect to the claim for evenings, it should be noted that there is no evidence of any kind in the record that indicates Claimants were either "on standby duties" or "required to remain on their trailers" on any evening. With respect to the claim for nights, the Organization has submitted no competent evidence, other than Carrier's instructions and admissions to the effect that on the dates involved Claimants were merely required to sleep on their camp cars during their normal sleeping hours.

In this posture of the record, there is no conceivable basis for sustaining the claim for the evening hours; and with respect to the claim for night hours, the claim that the Agreement was violated must stand

or fall on a determination as to whether or not the Agreement prohibits Carrier from requiring an employe to live on his assigned camp car at night when not located in his home town.

Rule 21(a) of the controlling Agreement states:

> ". . . Employes will not be required to live or board on camp cars while located at their home town. . . ."

The obvious and necessary implication of this rule is that such employes may be required to live on the camp cars when they are away from their home town. Carrier merely required Claimants to live on their camp cars **at night** when away from their home town.

In prosecuting this claim Petitioner was obviously seeking a decision that would destroy the portion of Rule 21(a) which relates to living on camp cars. The General Chairman made this perfectly clear during handling on the property when he argued that this rule:

> "'. . . was negotiated in the agreement when the company had charge of the commissary and was requiring the employes to eat on the camp cars while they were located at their home town and the language in this rule was for the purpose of discontinuing that practice.'"

As Carrier has stated, the rule says **live or** board.

We cannot expunge the reference to living on camp cars from the rule and leave only the reference to boarding. The situation here is comparable to that presented in **Award 8219** (Johnson) where we held:

> "In other words, this Board is asked to remove from the Rule the words 'during regular hours,' which were placed there by the parties.
>
> "In view of our obvious lack of any authority to rewrite the Agreement, the claim must be denied."

Under the Railway Labor Act, such a change in the rule must be accomplished by negotiations and agreement of the parties. As we stated in **Award 10585** (Russell):

> "This Board follows ordinary rules of contract construction, is bound by the provisions of the Agreement before it, having no power to add to or detract therefrom. See Award 2029 (Shaw); 6959 (Coffey); 7577 (Shugrue); 7631 (Smith); 7718 (Cluster); 9253 (Weston); 9314 (Johnson); 9606 (Schedler); 10008 (McMahon)."

The citation of **Awards 1070** and **2072** in the opinion as authority for **Award 10969** further demonstrates the palpable error in the latter Award for no rule such as Rule 21(a) was in evidence in either **Award 1070** or **2072**; furthermore, the facts in those cases were materially different from the facts here.

III.

That portion of the claim which purports to be on behalf of "successors" who are not named was not properly before this Board.

Article V, Section 1(a), of the November 5, 1954 Agreement here in evidence reads in part as follows:

> "1. All claims or grievances arising on or after January 1, 1955, shall be handled as follows:
>
> > "(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances."

The clear, unambiguous and mandatory language quoted, and the historical background of the rule, no Division of the Board may issue a valid award in a dispute unless **the employe involved** is identified. Otherwise, why were such precise, mandatory and personalized words as—

> "**All** claims or grievances **must be presented in writing** by or on behalf of the employe involved, * * *. Should any such claim or grievance be disallowed, the carrier **shall * * * notify whoever filed** the claim or grievance (**the employe or his representative**) * * *." (Emphasis ours.)

used if it had not been the intention to make certain that an aggrieved employe would be definitely identified? Like all simple words, they are strong, clear and positive. They are not ambiguous. Their meaning is exact. These simple words are used in Article V in their common, everyday, practical sense.

Article V of the November 5, 1954 Agreement (same as in the National Agreement of August 21, 1954) was the rule recommended by Emergency Board No. 106, May 15, 1954, in resolving a dispute between the carriers and their non-operating employes as to whether a time limit rule should be incorporated in their agreements. The rule recommended was the same rule which had "already been agreed to by the operating employes represented by the Engineers', Firemen's, Conductors', Trainmen's and Switchmen's Organizations". See pages 60-63, Report of Emergency Board No. 106. The recommended rule is identical to Section 17(a) of the August 11, 1948 National Agreement with the Engineers, Firemen and Switchmen, and to Article V(a) of the August 12, 1954 National Agreement with the Railroad Yardmasters of America.

In all three of these agreements the identification of the employe involved "is made mandatory by the use of the word 'must'." **Fourth Division Award 535,** BSCP v. CB&Q, Referee Rader (1949). This is true since all of the provisions of Article V of these Agreements are "clear and unambiguous and afford us little latitude in their application." **Third Division Awards 9189,** Clerks v. Belt Ry., Referee Weston (1960); **9447;**

Clerks v. FEC, Referee Johnson (1960). The Board does not have the right to disregard "a requirement expressly made essential" in such plain words because, as was said in **Third Division Award 8564,** Clerks v. T&P, Referee Weston (1958)—

> "* * * each of the parties is responsible for the inclusion of this language in the Agreement and what we may think of its wisdom, relative importance or soundness is not at all material. It is our function to interpret the Agreement as it now stands and not to rewrite it in accordance with our own theories of labor-management relations. We are not disposed to strain interpretations and distortions to spell out a waiver, where none exists, in an effort to avoid a decision based on procedural defects rather than on the merits.
>
> "Here the Agreement is clear and unambiguous with respect to the immediate point in issue and it is entirely certain that the Petitioner has not complied with a requirement expressly made essential by the Agreement between the parties."

In **Third Division Award 8383,** dated June 27, 1958, Clerks v. SAL, Referee Vokoun, it is said:

> "This Board must uphold the agreement made in Article V and * * * we hold that the 'notice in writing' is mandatory and not regulatory * * *. "

The Board is required to interpret Article V "by the same standards of decision as other written contracts." **First Division Award 5080,** E. v. TRRA of StL, Referee Royal A. Stone (1940), and the Board may not disregard the fact that, under the principles of contractual construction, the use of the word "must" makes the requirement to which it relates mandatory. In Barnhart, et al, v. United Automobile, Aircraft, Agricultural Implement Workers of America (UAW-CIO) et al, **79 Atl. 2d 788** (1951), it is said:

> "It is significant that the word 'must' is used in Sections 1 and 2, Article 48, where charges are presented and filed against members. It is one of the recognized standards of statutory construction that the word 'must' ordinarily is read in a mandatory or obligatory sense. There is no apparent reason why the term should not be given this interpretation in the present instance. Gordon v. Tomei, 19 Atl. 2d 588, 592. * * *."

In Berg, et al. v. Merchant, et al., 15 Fed. 2d 991 (CGA 6th 1926) it is said:

> "* * * the words of a statute are to be liberally construed, unless the context requires a strict construction, and the courts of Ohio have also held that the word 'may' shall be read 'must', where public interest or rights are concerned, or where something is directed to be done for the sake of justice or public good, **yet the word 'must' is so imperative in its meaning that no case has been called to our attention where the word has been read 'may'.** Certainly there is no reason why it should be so read in this statute, which specifically provides that the heirs of the testator 'must' be made parties to the action'." (Emphasis ours.)

Here, also, there is no apparent reason why the word "must" should be read in an indefinite, rather than mandatory, sense in agreements which specifically provide: "All claims * * * must be presented * * * by * * * the employe involved, * * * ". The simple words "all", "must", "by", "the", "employe", and "involved", are clear, definite and positive. They do not connote uncertainty. "All" does not mean "some"; "must" does not mean "may"; "by the employe involved" does not mean "in this claim there are only 3 gangs involved, and they are relatively small in number and can easily be identified by the Carrier." They are as clear, unambiguous and mandatory as the words used in other sections of Article V.

In **Second Division Award No. 3576,** Referee Lloyd H. Bailer, System Fed. No. 26 (Carmen) vs. Central of Georgia Railway Co., the carrier relied upon Article V of the very same November 5, 1954 Agreement here in evidence — and the Board held, in part:

> "The state of the record in this case is such that we are unable to render a proper award to determine the merits of the dispute. **The complaining employes are not named in the claim itself.** * * * It will be further noted that the amount of work for which claim is made is not specified either in hours or dollars. It cannot be said that this information was beyond the Organization's ability to obtain.
>
> "As the initiator of this claim, the Organization has not met its responsibility to make a presentation which, if accepted with respect to the theory advanced, would enable this Board to render a final and definitive award. (Emphasis ours.)
>
> "AWARD
>
> "Claim dismissed without prejudice."

In **Fourth Division Award 1502,** RPIU v. NYNH&H, Referee Murray, October 10, 1960, it is said:

> "In the present case, the Patrolmen are not identified and it has often been held that where the Carrier is charged with having injured an employe in any way, that employe must be identified and the Carrier cannot be compelled to seek out and identify injured or aggrieved employes. **That is the duty of the claiming Organization.** (Emphasis ours.)
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> "We, therefore, believe it to be the general view of this Board that indefinite claims, in that they do not identify the employes, do not satisfy at least most contract agreements, so that claims on behalf of 'employes similarly situated' or the 'next available employe' do not satisfy the requirements of the Agreement and do not satisfy the requirements of Rule 24 in this case."

In **First Division Award 19913,** F. v. A&S, Referee Sempliner, dated May 3, 1961, the Statement of Claim read:

> "Time claim of the General Grievance Committee for Extra Engineers and Extra Firemen or Emergency Engineers and Emergency Firemen for two (2) days on each of the following

dates: July 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28, 1951. Account, Carrier violation of Article 24 and 25."

Thus, the only "relevant matters" omitted were the names of the engineers and firemen involved in the alleged violation. The Organization sought to avoid this defect by alleging that it had been the Carrier's practice to pay "Blanket time claims for unnamed personnel" and that such practice should "apply to this blanket time claim for unnamed personnel." In dismissing the claim, in spite of the Labor Members' of the First Division contention that the identity of the unnamed claimants "could be readily ascertained", Referee Sempliner said:

> "The claim is improperly before the Board. It is axiomatic in any interpretation of contract law that the proceedings be either proceedings to enforce a contract in the nature of specific performance, or proceedings in damage. Here the claim being one for monetary amounts, is essentially one of damages. If the action is one for damages, **it must be brought in the name of the real party in interest.** Here the claimants are not named. Many awards of this Division (see Awards 2145, 11642, 12312, 16201, 18849) have held that claims must be specific. The Railway Labor Act requires that claims be handled in the usual manner for handling claims on the property. Blanket claims are not so handled on the property in the absence of specific agreement. No such agreement relative to blanket claims can be found here."

The importance of naming the employe on whose behalf an Award is sought should be obvious to everyone. It is vital to the proper handling of the dispute on the property and before the Board. It is a material fact which should not be "left to inference, conjecture, and surmise." **First Division Award 14796,** EF v. B&O, Referee Robertson; but should be precisely stated since " * * * we cannot indulge in conjecture and speculation * * * ". **Fourth Division Award 573,** System Fed. No. 18 v. V&M, Referee Munro. Furthermore, Section 3, First, of the Railway Labor Act, as amended, requires that all disputes be referred to the "Adjustment Board with a full statement of the facts and all supporting data." A "full statement of facts" must include the most important fact of all —the name of the employe involved in an alleged violation of his working agreement. Neither Article V of the August 12, 1954 and August 21, 1954 National Agreement nor Section 17 (a) of the August 11, 1948 National Agreement amend the Rules of Procedure of this Board or the Railway Labor Act. What the Act, the Rules of Procedure of the Board, and Article V of the August 12, 1954 and August 21, 1954 Agreements and Section 17 (a) of the August 11, 1948 Agreement require is that any claim or grievance brought to the Board must contain a "full statement of the facts".

A dispute which fails to identify the employe involved disregards the plain and explicit provisions of the Railway Labor Act, as amended, and forecloses the "effective participation in the statutory procedures by the aggrieved employe". Identifying the employe involved, as contemplated by Article V, would be one "legally sufficient way" to guarantee such participation. **Burley Case**, supra. Such identification insures findings which are precise, definite, and certain, and an award which is legally enforcible. **RYNA** v. **I.H.B.**, supra. It would supply one of the "relevant matters", the name of the real party in interest, which is the responsibility of the initiator of the claim to disclose. **Awards 19907, 19913, 19966** (First Division); **3576** (Second Division), and **1502** (Fourth Division).

We, therefore, respectfully submit that under Article V of the August 12, 1954 and August 21, 1954 National Agreements any claim or grievance which does not identify the employe involved is not properly before the Board and should be dismissed by an award reading substantially as follows:

"Due to the fact that the unnamed claimants

1. 'could be readily identified' (9205)
2. were 'easily and clearly identifiable' (9248)
3. were 'readily ascertainable' (9333)
4. are 'readily identifiable' (9553) or
5. 'can be readily ascertained and identified' (9566)

there is no justification for the failure of the Petitioner, as the initiator of this claim, to meet its responsibility to disclse all relevant facts, including the name of the employe involved in this dispute, and to comply with the mandatory requirement of Article V of the National Agreements that 'All claims * * * must be presented * * * by or on behalf of the employe involved * * *. Therefore, we have no recourse but to dismiss the claim."

We dissent.

**G. L. Naylor**

**O. B. Sayers**

**R. E. Black**

**R. A. DeRossett**

**W. F. Euker**