

Award No. 10972

Docket No. MW-10659

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Preston J. Moore, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

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

(1) The Carrier violated the effective Agreement on March 25, 26, 27, 28, and 29, 1957, when it assigned other than Maintenance of Way welders and track forces to construct 1600 feet of track in the North Yard at Tucson, Arizona.

(2) That each of the following named employees be allowed pay at their respective straight-time rates for an equal proportionate share of the total number of man hours consumed by other forces in performing the work referred to in Part (1) of this claim.

Section Foreman F. M. Rojas

Asst. Section Foreman S. J. Cox

Truck Driver Car Meinke

Welder Cecil M. Halverson

Track Laborer Frank Torres

Track Laborer Andres Valenzuela

Track Laborer Pablo Escobar

Track Laborer Aurelio Rosalez

Track Laborer Juan H. Molina

Track Laborer Juan Mendoza

Track Laborer Jose Cupis

Track Laborer Solomon Mendoza

Track Laborer Marcelino Humo

EMPLOYEES' STATEMENT OF FACTS: Claimant F. M. Rojas holds seniority and is assigned as a Section Foreman on the Tucson Division with seniority date of April 27, 1925 and is assigned to and has jurisdiction over Section No. 34 at Tucson, Arizona. Claimant S. J. Cox holds seniority and is Assistant Foreman on Section No. 34, Tucson, Arizona and holds seniority as such from May 16, 1941. All Section Laborers named in Part (2) hold seniority as Section Laborers and are assigned to Section No. 34 at Tucson, working under the supervision and direction of Claimants Rojas and Cox. Claimant Halverson holds seniority as a welder and is assigned to the Tucson Division.

On March 25, 26, 27, 28, and 29, 1957, Carrier constructed approximately 1600 feet of Wheel Storage Track in the Tucson Yard. In the per-

Scope Rule and Rule 4 of the current Agreement in support of the claim. An examination of those rules will readily reveal that there is no mention whatever in either of them concerning work allocated exclusively to the employees subject to the current Agreement; and there is nothing in either of them which suggests that Maintenance of Way employees instead of Motive Power and Car Department employees should have done the work involved in this claim.

Both past practice and the logic of the case indicate that the work involved in constructing said wheel racks was properly assigned to Motive Power and Car Department employees who were to use the racks as part of their equipment.

Attached as Carrier's Exhibit "D" is copy of statement from Car Foreman J. E. Regeser, who has been employed in the Motive Power and Car Department of this Carrier at Tucson for approximately 45 years. It will be noted that in that time, to his knowledge, Motive Power and Car Department employees have always constructed wheel racks of the nature here involved.

CONCLUSION

Carrier requests that if not dismissed for lack of proper notice to other interested parties, claim be denied.

All data herein have been presented to the duly authorized representative of the employees and are made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a dispute between the Brotherhood of Maintenance of Way Employees and the Southern Pacific Company.

The Carrier assigned work to the Motive Power Department of constructing wheel tracks or racks for the storage of railroad car wheels in the Tucson Yard. The parties are in agreement on most of the facts. Employees contend that "wheel storage tracks" were constructed and Carrier contends that they are "wheel storage racks".

Whether they are tracks or racks is unimportant. The Employees allege past practice gave them the right to the work. From the record it appears that such work was performed in the past by Maintenance of Way Department. We therefore believe that they were entitled to this work.

For the foregoing reasons we believe 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 THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of December 1962.

**CARRIER MEMBERS' DISSENT TO AWARD 10972,
DOCKET MW-10659**

Award 10972 entails an unfortunate attempt to exceed this Board's powers. The Railway Labor Act clearly limits the Board's jurisdiction to disputes that have been handled by the parties in the usual manner, yet in this Award there is an attempt to allow a claim that was neither handled by the parties nor submitted to the Board.

The claim and the controlling issue submitted to the Board are clearly framed in the record. While the record does not disclose the position taken by Claimants in presenting their claim to the roadmaster nor the position taken by the roadmaster in denying the claim, it does indicate with perfect clarity that when the claim was handled on appeal by the Local Chairman and the Superintendent, the issue presented was a simple question of fact; namely, did the Car Department Employees construct tracks, laying 1600 feet of rail? The Local Chairman's appeal letter asserted that Claimants should be compensated because Carmen had allegedly laid 1600 feet of rail in constructing tracks. The Superintendent did not deny that Claimants' rights would have been violated if the Carmen had constructed tracks, but he emphatically denied that any rail was laid or any tracks constructed. He contended that the Carmen had made some portable equipment which he referred to as wheel racks, equipment that was no longer than the length of a single rail, was not connected with Carrier's tracks in any way, and was built so that it could be towed by truck or tractor from place to place in the shop area for use by the Carmen in their work. The record further discloses that neither the Local Chairman nor any other representative of Petitioner at any time in the subsequent handling of the case asserted that the rights of Claimants would be violated by allowing Carmen to make this type of portable equipment. Thus, the issue submitted to us is crystal clear. It is a simple issue of fact; namely, did the Carmen lay 1600 feet of track as described by Petitioner in the claim, or did they merely make some equipment that could be dragged about the shop area by a tractor for the use of Carmen in their work? If the Carmen laid track, as described by Petitioner in the claim, Claimants' rights were admittedly violated; and if the Carmen made portable equipment, as described by Carrier, Claimants' rights were admittedly not violated.

Statements made by both parties, at both stages of appeal on the property and in the parties' initial and rebuttal statements to the Board, clearly establish the correctness of the foregoing statements of the issue submitted to the Board. Let us consider some of these statements in juxtaposition:

APPEAL TO SUPERINTENDENT

Local Chairman described the work as follows:

" . . . lay 1600 feet of rail constructing wheel tracks in the North Yard . . ."

" * * *

"The welding of rail and guage bars in tracks has in the past been done by welders covered by Maintenance of Way agreement."

Superintendent's Denial stated:

"There was no track laid at the Tucson Car Shop. Rails were laid on little strips and welded together for storing wheels. None of them were connected with angle bars nor laid on ties. They were strictly portable and can be moved from one location to another as required. . . ."

APPEAL TO HIGHEST APPEAL OFFICER

General Chairman's description of the equipment built by Carmen in letter of appeal:

"On the above mentioned dates the Carrier used five employes of the Motive Power Department to lay approximately 1600 feet of rail in constructing wheel tracks in the Tucson Yard. . . ."

Carrier denied the equipment was as described by the General Chairman, and described it in denial letter as:

" . . . portable wheel racks of double rail steel, welded to guage by strap iron. . . ."

General Chairman's description of work in Conference or other handling on the property (page 3 of Employes' initial submission):

"A photograph of the Wheel Storage tracks in question is attached hereto and identified as Employes' Exhibit 'A'. Although the Carrier has contended that said tracks are portable, normal intelligence and an examination of Employes' Exhibit 'A' should readily reveal the fallacy of the Carrier's contention in that respect. Two lengths of rail in a track 1600 feet long consisting of 80 pound rail, would weigh in excess of 40,000 pounds. When we add the weight of the fastenings to that weight, we could expect the entire structure to weigh at least 50,000 pounds, which clearly takes it out of the category of being a portable structure."

Carrier's description of the work in Conference or other handling on the property (page 2 of Carrier's initial submission):

*Emphasis ours unless otherwise indicated.

"Wheel racks involved are of double rail style and welded to proper gauge by strap iron. They are one rail length long (approximately 33 feet) and no angle bars, bolts, spikes or ties are involved in their construction or use. **The racks are portable** and by the simple expedient of hooking a chain or cable thereto can be dragged by truck, tractor, or other available power to any part of the shop area desired. These racks are in no way connected with tracks or maintenance of way work."

INITIAL SUBMISSIONS TO THE BOARD

Precisely same as on appeal to Highest Appeal Officer of Carrier.

REBUTTAL STATEMENT AT BOARD HEARING

Organization emphatically asserts that the equipment involved is "track" as that term is used in the railway industry and is not "portable" as alleged by Carrier (pages 1 and 2 of Employees' Statement Oral Hearing):

"As **Item 2** of the Carrier's alleged Statement of Fact, it is **contended the Employees of the Carrier's Motive Department constructed wheel racks but such is not the case.** The facts are that **the facility constructed by the Carrier's Motive Power employees were tracks and not wheel racks.**

"The Carrier then contends that the so-called 'wheel racks' are one rail length long, or approximately, thirty-three feet. * * * **The number of hours involved should alone refute the Carrier's contention with respect to what the facility consisted of.**

"On the bottom of Page 2, the Carrier contends that the so-called 'wheel racks' are portable and can be moved to any part of the shop area desired. However, by simple reference to Employees' Exhibit 'A', one should have no difficulty in readily determining that **the trackage involved in this particular case is not in any way portable.**

" * * *

"On Page 12, the Carrier contends that the subject work does not constitute 'construction of track' as that phrase is used in the industry. By reference to Employees' Exhibit 'A', one can readily determine the fallacy of the Carrier's contention in that respect."

Carrier maintains that it correctly described the work in its initial submission (page 2 of Carrier's Statement at Oral Hearing):

"The disputed work consisted of the construction of wheel storage racks precisely as Carrier has described them in paragraph 2 of its Statement of Facts and the construction of 'tracks' as that term is commonly understood and as it could involve Maintenance of Way forces is in no way involved."

These extracts from the statements of the Employees not only indicate that the controlling issue submitted to us is whether the Carmen

laid 1600 feet of track (track of the type generally used and recognized as track in the railroad industry); but they also clearly indicate that the sole evidence introduced by the Employees to prove that the work done by Carmen was as described by Employees and not as described by Carrier is the photograph placed in evidence as Employees' Exhibit "A".

In the background of the photograph appearing as Employees' Exhibit "A" there are two tracks which appear to converge forming a Y. In the foreground are rails sitting on the ground, and on these rails are car wheels. The photograph was taken from such a vantage point that instead of portraying the significant facts (e.g., the length of the rail on which the wheels are standing, any possible connection between this rail and the railroad tracks in the background, and the character or extent of the base under the rail or the "fastenings"), all of these essentials are hidden from view. It is impossible, in carefully examining this photograph, to establish therefrom that the sets of rails there portrayed with wheels standing on them deviate in any particular from the single rail length, lightly fastened, clearly portable type of equipment described by Carrier as the equipment made by Carmen. Neither does this photograph disclose anything that would indicate these rails are tracks.

We cannot speculate on the possibility that either set of rails is connected to the tracks in the background, or the possibility that substantial supports, fastenings, or roadbed exists. If the Employees desired to establish the existence of any of these features which they have mentioned in their effort to convince us that a track was laid, the burden was upon them to submit evidence depicting such features. Claimants obviously had the burden of proving the essential allegation upon which they based their claim; namely, that the Carmen did not simply make portable racks, but were permitted to "construct 1600 feet of track in the North Yard at Tucson", and they obviously failed to submit proof.

Instead of deciding the issue submitted to us on the basis of the evidence in the record, the authors of **Award 10972** exhibit either an astonishing lack of knowledge of the record or an inexcusable disregard for the issue framed by both parties; they make no finding as to whether the Carmen made portable racks, as described by Carrier, or constructed tracks, as described by Petitioners; they simply state:

"... Employees contend that 'wheel storage tracks were constructed and Carrier contends that they are 'wheel storage racks'.

"Whether they are tracks or racks is unimportant. . . ."

Carrier should clearly not make any payment to Claimants under **Award 10972** if the work done by Carmen on the dates involved in the claim merely consisted of making portable racks, as described by Carrier in the record, for Claimants and their representatives have not handled with Carrier, nor have they submitted to this Board, any claim that the right to make such racks had been reserved to the Claimants. It is elementary that the Board's jurisdiction is limited to the adjudication of

claims which the parties have handled in the usual manner and then submitted to the Board.

We dissent.

G. L. Naylor

O. B. Sayers

R. E. Black

R. A. DeRossett

W. F. Euker