

Award No. 11075

Docket No. MW-9137

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**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 Carrier violated the Agreement when it established a B&B unit at Emporia, Kansas, from September 29, 1955 to October 19, 1955 to work under the direction and supervision of a Lead Mechanic instead of under direction and supervision of a B&B Foreman;

(2) The Carrier further violated the Agreement when it failed to bulletin the positions necessary to that B&B unit;

(3) B&B Foreman J. L. Davis, who was working in a lower classification during the period involved because of force reductions, be allowed the difference between what he was paid at the Lead Mechanic's rate and what he would have been paid at the B&B Foreman's rate for the same number of hours that Lead Mechanic Cunningham supervised and directed the work of the B&B unit mentioned in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Prior to September 29, 1955, B&B Foreman J. L. Davis, claimant, was required to exercise his seniority rights to a lower classification account of reduction in force.

Beginning on September 29, 1955, the Carrier established a B&B unit at Emporia, Kansas, consisting of a Lead Mechanic, who was in charge of this unit and three (3) B&B Mechanics. This B&B unit, in charge of Lead Mechanic Ralph Cunningham, was instructed to tear out and renew incline ramps to the Carrier's freight docks and to pour some eighty (80) yards of ready-mix concrete for the purpose of laying side-walks in front of the Carrier's Freight Station. Forms had to be built for the concrete side-walks and the new incline ramps. This work was completed on October 18, 1955. The outfit cars assigned to this newly created unit consisted of a bunk car, a tool car and a water car, such as are usually assigned to small forces.

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them deny each and every, all and singular, the allegations of the Organization and Employees in alleged unadjusted dispute, claim or grievance.

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

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier has stationed at Parsons, Kansas, on the Northern Division of the Railroad, a regularly assigned B&B gang, with outfit cars, under the supervision of B&B Foreman C. H. Watson. It assigned to this gang a job at Emporia, Kansas, a station on the Northern Division. The job was to lay concrete sidewalk in front of the freight station, and tearing out and renewing an inclined ramp to the freight docks.

Outfit cars were sent from Parsons to Emporia—a distance of 125 miles—on September 28, 1955, and Lead B&B Mechanic Ralph Cunningham and three B&B Mechanics, of the Parsons gang, were instructed to report for work at Emporia the morning of September 29, 1955. They did so, reporting to B&B Foreman Watson who spent September 29 and 30 at Emporia, laying out the work, supervising and directing the job. Foreman Watson also was at the job site on October 6, 7, 12 and 13, supervising the project.

Petitioner contends that: (1) Lead Mechanic Cunningham performed the duties of a B&B Foreman on the Emporia job; (2) the jobs at Emporia should have been bulletined; and (3) Claimant having greater seniority than Cunningham should have been placed on the job as foreman. Carrier responds that: (1) the Emporia job was properly assigned to Foreman Watson's gang; (2) Foreman Watson supervised the job and fulfilled all the duties of foreman; (3) Mechanic Cunningham did not perform the duties of foreman but only the duties usually performed by a Lead Mechanic; (4) managements prerogative to determine the degree of supervision which it deemed necessary on the Emporia job is not encumbered by the Agreement between it and Petitioner; and (5) bulletining the jobs was not required by the Agreement since no new jobs were created.

For Petitioner to prevail it must prove either: (1) Mechanic Cunningham did perform the duties of a B&B Foreman on the job; or, (2) the Agreement required Carrier to assign a full-time B&B Foreman, in addition to Foreman Watson, to supervise the job. It is undisputed that if either of these ultimate facts is proven that Claimant, by virtue of his seniority, would have rated the assignment.

It is controverted as to whether B&B Lead Mechanic Cunningham acted as foreman on the job.

On October 29, 1955, Cunningham filed a claim with Carrier alleging that he acted as foreman on the job and seeking payment by Carrier to him of an amount equal to the difference between foreman and lead mechanic wages for the period he was on the job. This, Carrier declined on December 5, 1955. No appeal was taken. Other than Cunningham's allegation, in his claim, that he acted as foreman there is no evidence in the record to prove he did

in fact perform the duties of a B&B Foreman. The Carrier, on the other hand, has detailed in the record the duties of a B&B Foreman and avers, without contradiction, that these duties pertaining to the job were executed by Foreman Watson. We, find, therefore, that Mechanic Cunningham did not perform the duties of a B&B Foreman on the job.

Claimant first filed his claim with Carrier on November 15, 1955. It is predicated on the proposition that Lead Mechanic Cunningham had acted as foreman on the Emporia job and the position should have been assigned, by right of seniority, to Claimant.

We now come to the issue as to whether the Agreement required Carrier to assign a full-time B&B Foreman to a group such as that sent to Emporia. We find no provision in the Agreement which prescribes under what circumstances Carrier will be required to assign a full-time B&B Foreman to a B&B unit. In the absence of such a prescription Carrier retains the right to unilaterally determine what supervision is necessary. Consequently, we find that the Agreement did not require Carrier to assign a full-time B&B Foreman to the Emporia job.

As to bulletining the positions of the Emporia assignment we find no provision of the Agreement which would require such action under the facts of this case.

Upon the basis of the foregoing findings and conclusions we will deny the claim.

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of January 1963.