Award No. 11372
Docket No. MW-9918

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when, on or about September 15, 1956, it assigned employes of a General Contractor to perform the traditional duties of a crane and a bull-dozer operator in connection with a line change at South Minneapolis.

(2) Each employe holding seniority in Group 1 of the Roadway Equipment & Machine Sub-department on the lines East of Mobridge be allowed pay at their respective straight time rates for an equal proportionate share of the total man hours consumed by the contractor's forces in performing the crane operator's work referred to in Part (1) of this claim.

(3) Each employe holding seniority in Group 4 of the Roadway Equipment & Machine Sub-department on the lines East of Mobridge be allowed pay at their respective straight time rates for an equal proportionate share of the total man hours consumed by the contractor's forces in performing the bull-dozer operator's work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Beginning on or about September 15, 1956, the Carrier assigned or otherwise permitted forces of a general contractor, who hold no seniority rights under the subject agreement, to operate a front end loader and a crane in connection with picking up, loading, moving and piling scrap track material at South Minneapolis in connection with a line change in which Maintenance of Way forces had been and were engaged in.

The instant claim was presented and handled in the usual and customary manner; the Carrier declining claim at all stages of progress.

25 eight hour days in behalf of MofW Roadway Equipment and Machine Operator Stuver. Claim declined by Carrier. Carrier's declination accepted by the Employes.

1955 — Contractor forces and equipment engaged in construction of new depot building at Ottumwa, Iowa. Claim in amount of 456 man hours filed in behalf of MofW B&B Sub-Department employes on Carrier's Dubuque & Illinois Division for work of building forms, pouring concrete, setting rails in concrete around water pipes, cleaning up in general etc. Claim declined by the Carrier. Carrier's declination accepted by the Employes.

Carrier has cited earlier in this submission, its use of contractor forces and equipment in connection with its Council Bluffs train yard project which was performed without claim or complaint by the Employes and has also shown that in each year since 1947 inclusive of the year 1957 Carrier has had a General Equipment rental contract in effect in the Minneapolis — St. Paul area with Contractor Carl Bolander and Sons Company, the work performed by them year after year not having been a subject of protest or claim by the Employes prior to the filing of the instant claim.

In view of the foregoing we respectfully submit that:

1. The instant claim as presented and appealed by the Employes is vague and indefinte, lacking sufficient facts essential to a proper determination of the case and should therefore be dismissed.

2. The claim having been presented and appealed in behalf of unnamed claimants is not in compliance with Section 1(a) of Article V of the August 21, 1954 Agreement and should therefore be barred.

3. The claim is not supported by the Scope or other Agreement rules nor practice thereunder and Carrier respectfully requests that it be denied.

All data contained herein has been made known to the Employes.

OPINION OF BOARD: Carrier, timely, denied the claim asserting, **inter alia**, that the claim as presented fails to satisfy the requirements of Article V, 1. (a) of the National Agreement of August 21, 1954. If the Carrier's denial, in this respect, is well taken, this Board must deny the claim without consideration of the merits.

That part of Article V, 1. (a) of the National Agreement which is pertinent to the issue presented, reads:

"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 employee 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 . . ." (Emphasis supplied.)

The contention of Carrier is that:

"The Employees have not identified the specific date or dates of claim, their only reference thereto being that Contractor Carl Bolander and Sons with a crane and bulldozer **began** working at the South Minneapolis Yard **on or about September 15, 1956.** Neither have they identified the employees involved in whose behalf claim has been filed, nor have they even remotely attempted to identify the separate amounts of time or the total amount of time for which claim in behalf of un-named claimants has been made. They give no description of the work for which claim has been made other than that a contractor machine operator moved along slowly with a front end loader while five or six section laborers picked up scrap and threw it into the bucket. The burden to come forward with and to sustain that which it claims and intends to prove rests solely on the Employees."

Carrier, by letter, informed Petitioner that the claim "is much too vague and indefinite to enable me to determine just what the claim is for or to make proper investigation based upon presentation of specific facts . . .. Further, there are no claimants named in your letter . . .."

It is the position of Petitioner "that the identity of the Claimant employes and the total number of hours involved are readily determinable from the Carrier's records. The Contractor's equipment and forces were used on a cost-plus daily basis.

Let us once and for all put to bed the oft presented argument that Article V, 1. (a) in the provision quoted, **supra,** requires that "the employe involved" be named. The language of the provision cannot be so construed. Had the draftsmen of the provision so intended they could easily have included such a specification. Instead, they used the language "on behalf of the employe involved." These chosen words, of the parties to the Agreement, cannot be qualified by this Board, on its own motion, amending the phrase by inserting the word "named", as a prefix, to the word "employe".

We interpret the phrase "on behalf of the employe involved" to mean that the employe or employes "involved" must be described in the claim with such particularity as to make his or their identity known to the Carrier under the circumstances prevailing. Carrier in its exhaustive brief captioned "Claims for Unnamed Employees are Invalid" appears to recognize that this interpretation is sound.

"Employes involved" we hold to mean employes adversely affected by an alleged violation of a collective bargaining agreement. It is such employes who must be described so as to satisfy the "particularity" test set forth in the preceding paragraph. A mere assertion by a petitioner that a carrier can ascertain the names of the employes involved from its records has no probative value. When a carrier avers that the claim as presented does not satisfy the test then a petitioner has the burden to prove, by evidence in the record, that identity of the employe(s) involved is known to carrier; conversely, the defense asserted by carrier is sham and frivolous.

In the light of the above principles we analyze the claim in the instant case.

The claimed violation, paragraph (1) of the claim, is an assignment by Carrier to a General Contractor "to perform the traditional duties of a

crane and a bull-dozer operator in connection with a line change at South Minneapolis." Paragraph (2) of the Claim prays that "Each employe holding seniority in Group 1 of the Roadway Equipment & Machine Sub-department on lines East of Mobridge be allowed pay . . .;" and, paragraph (3) makes a like claim for Group 4 of the same Sub-department. Note: The claim is not definitive as to point of time regarding those in positions in Groups 1 and 4.

Rule 4 of the Agreement reads:

"DEPARTMENT LIMITS

"Except as otherwise provided, the seniority rights of employes are confined to the sub-department in which employed. The sub-departments are as follows:

1 — Track Sub-department;

2 — Bridge & Building Sub-department;

3 — Roadway Equipment & Machine Sub-department;

4 — Maintenance of Way Welding Sub-department.

* * * * *

"The Roadway Equipment & Machine Sub-department comprises the following: and the seniority of employes will be confined to the group in which employed:

"GROUP 1 — Operators of:

Steam, Diesel, electric, and gas shovels;
Locomotive cranes;
Top car ditchers;
Crawler cranes;
Locomotive crane steam hammer pile drivers.

* * * * *

"GROUP 4 — Operators of:

Rail laying machines;
Tractor bull-dozers;
Auto dump trucks;
Weed burners;
Track-mounted weed mowers;
Weed killing spray cars;
Full rail oiling machines;
Air rail loading machines with compressor;
Tie tamping machines.

* * * * *"

Rule 5 of the Agreement reads, insofar as here pertinent:

"SENIORITY LIMITS

* * * * *

"(d) The seniority rights of employes in the Roadway Equipment and Machine Sub-department will be confined to:

1 — East of Mobridge;
2 — Mobridge and west;

* * * * *"

It is obvious that all of the Carrier's employe operators listed in Groups 1 and 4 on its lines East of Mobridge — which the record shows to be extensive — would not be adversely affected by Carrier having a General Contractor perform the duties of a crane and a bull-dozer operator in connection with a line change at South Minneapolis. Consequently, all of them cannot be held to be "involved" in the claim within the meaning of the quoted term as used in Article V, 1. (a) of the National Agreement. We hold, therefore, that the claim does not identify "the employe involved" with such particularity as to comply with the requirements of Article V, 1. (a). We will dismiss 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 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 claim, as presented, does not satisfy the requirements of Article V, 1. (a) of the National Agreement of August 21, 1954.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of April 1963.

CONCURRING OPINION OF CARRIER MEMBERS IN DOCKET MW-9918, AWARD 11372

The Award correctly holds that the phrase "employes involved" in Article V, 1(a), means "employes adversely affected by the alleged violation," and that in the instant case the claim was not submitted "on behalf of the employe involved" because no individual employe and no group of employes

are "described in the claim with such particularity as to make his or their identity known to the Carrier"; therefore, the comments in the sixth paragraph of the Opinion go far beyond the issues to be decided. These comments reflect a limited usage of the word "name" that is different from the usage accorded the word in many prior awards. In these circumstances, such comments can hardly be expected to "put to bed" any question concerning the meaning of Article V. To the contrary, they will doubtlessly be quoted out of context many times and thus become a source of confusion.

/s/ G. L. Naylor

/s/ W. M. Roberts

/s/ R. E. Black

/s/ R. A. DeRossett

/s/ W. F. Euker