Award No. 11893
Docket No. MW-11186

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Kieran P. O'Gallagher, 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) Roadmaster N. M. Martinson failed to comply with the procedural requirements of Section 1 (a) of Article V of the August 21, 1954 Agreement in his handling of the claim (Carrier's file — Case D-1302) which was presented to him by Section Laborers Ed. C. McCarthy and Clarence A. Boulthouse on March 8, 1958.

(2) Because of the violation referred to in Part (1) of this claim, the Carrier now be required and directed to allow the claim as it was presented on March 8, 1958.

EMPLOYES' STATEMENT OF FACTS: On March 8, 1958, the following claim was delivered to the office of Roadmaster N. M. Martinson at Mitchell, South Dakota.

"Mitchell, S. Dak.

March 8, 1958

Mr. N. M. Martinson
Roadmaster
Mitchell, S. Dak.

On Monday, March 3, 1958 you left Mitchell, S. Dak at 3:10 P. M. on Train No. 167, with Snow Flanger X900279.

You operated said Flanger from Mitchell, S. Dak. to Kadoka, S. Dak. turning at Kadoka, S. Dak. and returning to Murdo, S. Dak. arriving in Murdo at 6 A. M. March 4, 1958.

Inasmuch as roadmasters have been performing this function themselves for all the years, it is clear that sectionmen or other employes represented by the BMWE Organization on this property have neither exclusive right to nor any claim whatever to the work.

The instant claim was submitted for each of the two days by each of the two employes (the claimants herein). Even if the roadmaster had been required to use a sectionman, he would not have used two of them and, in addition, it would not necessarily have been either of the two employes involved, as he could rightfully choose any employe he desired for such service in the absence of any schedule rule or agreement that requires the use of sectionmen on this equipment being handled on a train.

Where the Carrier has not contracted away its right to have the service on the flanger handled as was done in the instant case and as has been done in the past, the Carrier necessarily retains such right. Your Board has held in numerous awards that all inherent rights of Management that the Carrier has not contracted away remain with it and that your Board can only interpret the contract as it is and treat that as reserved to the Carrier which is not granted to the employes by the Agreement. The Carrier under the circumstances involved in this case, not being bound by any agreement with its employes in connection with the work involved, can decide as to the number and class of employes it will use on a flanger, if any. This is a matter of managerial discretion. In this regard, the attention of the Board is directed to what was said in the Opinion of the Board in NRAB, Third Division, Award 8327, reading in part:

> ". . . It is a fundamental principle that whether to have work done or not is in the Carrier's sole discretion. I know of no decision apart from those to be discussed, which have held a carrier obligated to have certain work performed. It is only when a carrier decides to have work performed that the rights of employes to perform that work arises. If the wrong employe performs it, a violation of the Agreement has occurred. That is the extent to which our decisions in general have gone."

For the reasons set forth, it is the position of the Carrier that the claim is lacking in merit, was properly handled by the Carrier in accordance with the time limit on claims rules, and should be denied.

All basic data contained herein has been made known to the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimants seek allowance, under the provisions of Article V of the National Agreement of August 21, 1954, of claim which they filed with Carrier on March 8, 1958. They contend that Carrier's letter disallowing the claim was not written until after May 7, 1958, and was not placed in the company mail box, where these employes normally receive company mail, until after their foreman went off duty on May 9. Carrier contends that the letter disallowing the claim was written and placed in the company mail box on May 7, 1958, but has submitted no evidence to support this contention. There being no evidence to support Carrier's disputed contention that the claim was dis-

allowed within 60 days after it was admittedly filed, the claim must be allowed as presented. Award 10742.

This decision is based entirely on a procedural point and is not addressed to any other issues between the parties arising out of this Claim. In accordance with Article V, it "shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances".

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 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 20th day of November 1963.