Award No. 12352
Docket No. MW-11867

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Louis Yagoda, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SEABOARD AIR LINE RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when it established the position of Apprentice Foreman on Maintenance Gangs Nos. 3, 5, 6, 2, 3-A, 4, 8 and 9 to which no Assistant Foreman had been assigned.

(2) Messrs. G. H. Major, P. E. Wood, C. O. Poss, W. D. Bramlett, E. C. Newman, Ottis Nye, C. Willis and W. F. Baker, who were assigned to the improperly established positions of Apprentice Foreman, and who were thereby actually performing the duties and responsibilities of an Assistant Track Foreman, each be allowed:

(a) The difference between what he received at the Apprentice Foreman's rate and what he should have received at the Assistant Track Foreman's rate, beginning as of the date each was assigned and continuing until the violation is corrected.

(b) Each of these employes be allowed an additional twelve dollars ($12.00) per month in lieu of a dwelling house as provided by the Agreement rules.

EMPLOYES' STATEMENT OF FACTS: During 1958 and 1959, the Carrier maintained a number of Track Sub-department gangs, among which were Maintenance Gangs Nos. 3, 5, 6, 2, 3-A, 4, 8 and 9 to which no Assistant Track Foreman had been assigned.

On various dates during 1958 and 1959, the Carrier established and bulletined the position of Apprentice Foreman on each of the above referred to Maintenance Gangs.

Typical of such bulletins is Bulletin No. 108 which reads:

ential specified in Supplement No. 22 of $12.00 per month above the regular rate of Apprentice Foreman account being used as such on maintenance gangs and additionally payment of Assistant Foreman's rate when they worked only as Apprentice Foremen. This would certainly be paying a double penalty, which the National Railroad Adjustment Board has consistently ruled to be prohibited. The sole issue now before the Board is whether or not that principle shall be followed in the instant dispute.

OPINION OF BOARD: At various times during 1958 and 1959, the Carrier established eight gangs to which no Assistant Track Foreman had been assigned. An Apprentice Foreman was, however, assigned to each of these gangs.

The claim which is presented to this Board is that the Carrier acted in violation of the effective Agreement in establishing on each of these gangs the position of Apprentice Foreman while not assigning Assistant Foremen to them. As remedy, it is demanded that the Apprentice Foremen so assigned receive the difference between the rate paid and the then rate of Assistant Track Foreman for all time so worked and also that each of these employes be paid an additional twelve dollars per month for this period "in lieu of a dwelling house".

The Carrier disputes the claim on the merits but contends as a preliminary issue that the claim submitted to this Board differs in consequential extent from the one which was put to the Carrier and was the subject of discussion between the parties prior to its submission to us. It is accordingly demanded that the claim be dismissed as one not properly before us.

Addressing ourselves first to this aspect of the matter, we find from the record that:

1. The circumstances described in the claim made to the Carrier (i.e. those affected, the time of occurrence, the events which took place) are the same in the claim made to the Board.

2. There are, however, significant differences from the initial claim in the nature of the violations alleged, the Agreement provisions involved and the grounds on which argued.

The claim made on the property alleges a violation of Supplement No. 22 of the Agreement and refers to no other provisions of said Agreement. The claim submitted to this Board states that "the Carrier violated the effective Agreement" mentioning no specific provisions. This generalization is not, however, in itself a desertion of the original position in which only a particular Rule was cited.

However, item (2) of the claim submitted to the Board states the violation so as to include an allegation which was not pursued in the discussions between the parties. This is that the employes for whom the claim is made were "actually performing the duties and responsibilities of an Assistant Track Foreman".

One of the two remedies demanded is the same as that which was sought in the discussions between the parties — the difference in pay between the Apprentice Foreman's rate and the Assistant Foreman's rate. But it is quite clear from the Petitioner's supporting statements to this Board that the grounds now include for the first time a contention that the subject employes

were in fact performing the work of Assistant Track Foremen. There is no evidence that such a position was taken with the Carrier or that the latter was given an opportunity to respond to such an argument.

The second set of remedial payments demanded by the Petitioner in the claim submitted to this Board is that the Claimants be given restitution of twelve dollars per month "in lieu of a dwelling house", for the time of their assignment. The amount claimed here is, as in the case of the pay rates, the same which was sought in the discussions on the property, but the reason for the claim is changed in the statement itself and grounds are urged in its behalf in the text which are not shown to have been raised in the discussions or correspondence which preceded the submission of this matter for determination by this Board.

The twelve dollars per month claim was originally put to the Carrier in terms of a demand for a "differential" above the Apprentice Foreman's rate of pay. The word quoted was obviously taken form the language of Supplement No. 22. This is made unmistakably clear by the fact that according to the record, said Supplement containing that word was the only Agreement provision cited by the Petitioner in presenting its claim to the Carrier. In its claim for the twelve dollars per month each, submitted to this Board, wherein the Petitioner now asks for those sums "in lieu of a dwelling house", there are invoked as support for the first time, Rule 9 (a) dealing with "Composite Service" and Rule 17 (a-1) on the subject of allowances for foremen and assistant track foremen in lieu of dwellings.

The citation of additional clauses, does not merely buttress the claim that a proper remedy for violation of Rule 22 is payment of the Assistant Foreman's rate. The earlier structure is broken by the interposition of a new position that these men actually did the work of Assistant Foremen. The Carrier was entitled to see such a claim (and evidence for it) and deal with it, both from the management's own defensive rights and for the possibility that it may then have made a contribution to settlement of the claim on the property.

Nor can the change be justified by a claim (which indeed the Carrier itself seems to make at one point in the earlier discussions) that the $12.00 per month allowance was put into Rule 22 to allow for the absence of dwellings; therefore to characterize this as an allowance "in lieu of dwelling" is synonymous with a reference to it as a "differential." The Petitioner makes it quite clear in its argument in its submission that it has abandoned its earlier position that this "differential" sought is the one referred to in Supplement No. 22, and now urges the payment of these amounts as a requirement of Rule 17 (a-1) which deals explicitly with allowances in lieu of dwellings for foremen and assistant track foremen. The Petitioner's own earlier position is quite explicitly rejected in statements made in Petitioner's oral argument as follows:

> ". . . That differential has absolutely no bearing on this dispute. . . . The instant claim does not contemplate the payment of any differential in pay because of the differential provided for apprentice foreman."

We conclude from the foregoing that the claim presented to this Board does not comply with Section 3, First (i) of the Railway Labor Act, which requires that all disputes "shall be handled in the usual manner up to and including the chief operating officer of the Carrier designated to handle such

disputes". It is also not in compliance with Circular No. 1 of the National Railroad Adjustment Board which requires that "all data submitted in support of employe's position must affirmatively show the same to have been presented to the Carrier and made a part of the particular question in dispute". Consequently, the claim as amended is barred from our consideration. Awards 11346, 11212, 11182, 10416, 5469, 5077 and many others.

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 for the reasons stated in the Opinion, this claim will be dismissed.

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 March 1964.