Award No. 12398
Docket No. MW-11445

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Benjamin H. Wolf, 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 effective Agreement when it failed and refused to compensate claimants O. A. Sealey, F. Grellheal, Nicholas Rizo and P. W. Johnson at the Carmen's rate of pay for work performed on April 17 and 18, 1958.

(2) Each of the claimants named in Part (1) of this claim now be allowed and paid the difference between what each should have been paid at the Carmen's rate and what each were paid at the secton laborer's rate for the work performed on April 17 and 18, 1958.

EMPLOYES' STATEMENT OF FACTS: The facts are fully set forth in the following quoted correspondence:

Letter from Lead Carman C. A. Pachyla and Carman F. B. Smith to Carmen's Local Chairman.

"Waco, Texas
April 23, 1958

Mr. L. E. Jacobs
Local Chairman

Dear Sir and Brother:

The morning of April 17, at 7:30 A. M., we were called to go with the Mobil Wrecker to rerail four cars at West, Texas. At the derailment there were four section men that worked right along with us, making hitches and handling and using the jacks. On the 18 & 22

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 Employes 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 objects to the jurisdiction of the Board to hear and determine this claim because it was not filed within the time limits of the National Agreement of August 21, 1954. Petitioner did file, within the time limit, a "Notice of Intention" to file an ex parte submission within 30 days of the date thereof.

This Board has held in numerous awards that the timely filing of such a "Notice of Intention" fully complies with the National Agreement. See Awards 12092 and 11665 and awards therein cited. Carrier's plea to bar the claim is, therefore, denied.

The Organization contends that on April 17 and 18, 1958, the named Claimants performed Carmen's work in assisting to rerail several derailed cars, and are entitled to be paid at Carmen's rates for this service, in accordance with Rule 1 of Article 15, which reads as follows:

"ARTICLE 15. COMPOSITE SERVICE

> Rule 1. An employe working on more than one class of work on any day will be allowed the rate applicable to the character of work preponderating for the day, except that when temporarily assigned by the proper officer to lower rated positions, when such assignment is not brought about by a reduction of force or request or fault of such employe, the rate of pay shall not be reduced.
>
> This rule not to permit using regularly assigned employes of a lower rate of pay for less than half of a work day period, to avoid payment of higher rates."

Carrier asks that the claim be dismissed because it is too vague and indefinite. The facts presented at the property in support of the claim identified the place of derailment, the cars derailed and the number of hours worked by the Claimants on the days involved. The attack on the claim is that the Claimants allege that their work consisted of "assisting carmen" and "assisting the wrecking crew," statements which are vague and indefinite as to specific duties performed.

Whatever the merit of this argument, the Carrier did not raise it at the property. The claim was denied not because of vagueness or indefiniteness but because ". . . Section men were called and performed all work of repairing track damage by the derailment, and that work of removing wreckage and debris incident to the derailment is of necessity a preliminary step precedent to making repairs to the damaged track. This work has been traditionally and historically performed by section forces simultaneously and in conjunction with wrecking crews, . . ."

The issue as joined on the property was the question of fact: — what work was done by the Claimants. The Organization asserted they "assisted" carmen or wrecking crew, the Carrier that they repaired track damage and removed wreckage and debris.

The Claimant has the burden of proving that the work performed is of the type to which the Composite Service Rule applies. The mere assertion that the Claimants "assisted" carmen is not proof. It is a conclusion drawn from facts, none of which were presented on the property. The Organization's submission did contain three letters which purported to supply the missing facts. They were letters from carmen to their officials and from the section foreman to his Organization. The Carrier never had an opportunity, prior to receipt of a copy of the submission, to examine the letters or to investigate the facts therein alleged. The introduction of such evidence is barred by the provisions of Circular No. 1 of the Board, which provides:

> "... all data submitted in support of employes' position must show the same to have been presented to the Carrier and made a part of the patricular question in dispute."

In the absence of evidence of the details of the duties performed and in the face of the Carrier's positive assertion that the Claimants performed the work of repairing track damage and removing wreckage and debris incidental to a derailment, we hold that the Petitioner has not sustained its burden of proof.

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 Carrier did not violate Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of April 1964.