Award No. 12820
Docket No. MW-11908

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Louis Yagoda, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CENTRAL OF GEORGIA RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when it abolished the Columbus Division Bridge and Building Gang No. 2 effective with the close of work, Friday, October 31, 1958, and assigned the work of this bridge and building gang to Division Carpenter H. E. Farmer, Tinner L. E. Hayes, First Class Carpenter H. Vaughn and Bridge and Building Laborers J. Huff, J. H. Kinard and A. Munn, all of whom work with and under the supervision and direction of Division Carpenter B. C. Oliver.

(2) Mr. B. C. Oliver be allowed the difference between what he received at the Division Carpenter's rate and what he should have received at the Bridge and Building Foreman's rate for his services as referred to in Part (1) of this claim on and since November 1, 1958.

(3) Bridge and Building Foreman J. W. Edwards be allowed pay at the B&B Foreman's rate for all time lost on and since November 1, 1958, because of the violation referred to in Part (1) of this claim.

(4) Cook Floyd Goodwin be paid for all time lost on and since November 1, 1958, because of the violation referred to in Part (1) of this claim.

(5) The violation referred to in Part (1) of this Statement of Claim be discontinued and the Columbus Division Bridge and Building Gang be re-established in accordance with the Agreement rules.

EMPLOYES' STATEMENT OF FACTS: Prior to October 31, 1958, the Carrier maintained a Bridge and Building gang on its Columbus Division, identified as B&B Gang No. 2, consisting of six B&B employes and a cook, under the supervision of Foreman J. W. Edwards, with headquarters in outfit cars.

'The burden of establishing facts sufficient to require or permit the allowance of a claim is upon him who seeks its allowance.' See Awards 3523, 6018, 5040, 5976."

And many other awards of your Board.

The burden of proof in this dispute rests squarely upon the shoulders of the Employes. See **Third Division** Awards Nos. 8172, 7964, 7908, 7861, 7584, 7226, 7200, 7199, 6964, 6885, 6844, 6824, 6748, 6402, 6379, 6378, 6225, 5941, 5418, 2676, and others. Also see **Second Division** Awards Nos. 2938, 2580, 2569, 2545, 2544, 2042, 1996, and others.

The Board having heretofore recognized the limitations placed upon it by law, and that it does **not** have authority to grant new rules, and will therefore not attempt to further restrict Carrier's rights, there is ample reason for a denial award for this sole reason, if for no other. This is purely an all-to-gain and nothing-to-lose claim brought by the Employes.

CONCLUSION

It having been proven that—

(1) The Carrier did not violate the effective Agreement in having Division Carpenter B. C. Oliver and his men perform work of their class on certain dates in November, 1958; Division Carpenter I. E. Farmer perform work of his class on certain dates in November, 1958; and Division Tinner L. E. Hayes perform work of his class on certain dates in November, 1958; all working independently of the others,

(2) The management has **not** negotiated away its inherent right to determine its supervisory requirements of the particular employes specified in Part (1) of this claim,

(3) Performance of the work in the manner indicated was in conformity with past, accepted and agreed-to practices, all of which is proven by probative evidence,

(4) The Board is without authority to grant the new rule here demanded, and has so recognized in prior awards,

(5) Claimants B. C. Oliver, J. W. Edwards, and Floyd Goodwin have no contractual right whatsoever to the demands, monetary or otherwise, made in Parts (2), (3) and (4) of the Employes' Statement of Claim,

(6) Claim is clearly **not** supported by the contract in evidence, the Board cannot do other than make a denial award.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim alleges that the Carrier violated the effective Agreement between the parties when it abolished the Columbus Division Bridge and Building Gang No. 2, and, thereafter, assigned work described by the Petitioner as that of "this bridge and building gang" to six individuals — a Division Carpenter, Tinner, First Class Carpenter and three Bridge and Building Laborers. As correction and remedy, the Petitioner seeks the difference between the rate paid the Division Carpenter — B. C. Oliver, who is alleged to have acted as foreman and the Bridge and

Building Foreman's rate for the services thus performed; also payment to B&B Foreman Edwards for time allegedly lost "on and since November 1, 1958" (the latter being the first day of replacement of the original gang by the second group); also, payment to Cook Floyd Goodwin for time allegedly lost since November 1, 1958, because of the violation.

The Petitioner further demands that the successor group be ordered discontinued and the Columbus Division Gang No. 2 be re-established.

There is no dispute concerning the essential facts in the circumstances. The Columbus Division Bridge and Building Gang No. 2 was assigned as described in the claim. It was succeeded on November 1, 1958, by the individuals and of the classifications stated in the claim.

The Carrier denies, however, that Division Carpenter Oliver performed foreman's duties, contending instead that the Carpenter and Tinner worked autonomously performing the larger portion of their work separately and that under such circumstances, the Division Carpenter is a lead man rather than a foreman.

There are two central considerations in these claims:

1. Does the Agreement require the presence and payment of a foreman under the circumstances here occurring?

2. Does the Agreement require the establishment or continuation of a gang of mandatory craft composition under these circumstances?

In regard to the first of the foregoing questions, the Agreement states in Paragraph 1 (1957 Agreement): "Work . . . except as provided in Paragraph 5, will be under the supervision of a foreman of their respective class. . . ."

Paragraph 5 (in addition to preserving by reference Rules 26 and 32) provides: "Nothing herein will . . . change the method of keeping time or supervision of . . . classes of employes whose time was carried other than by a foreman as of the effective date of the current Agreement. . . ."

It will be seen that the imposition of a foreman in Paragraph 1 is limited and qualified by two other provisions pertinent to these facts: Paragraph 5, which allows exceptions where supervision was in the past exercised by "other than a foreman" and Rule 26 (Rule 32 is not here pertinent).

As to Paragraph 5

To escape the exemption provided for in Paragraph 5, the Petitioner must show that the employes in question were not among the classes of employes whose time had been carried by other than foremen up to and on January 30, 1957, the date on which this provision was put into effect.

Carrier asserted in its correspondence on the property concerning this claim that "Each Division Carpenter and Tinner carries his own time and the time of any men assigned to them as has been the practice for at least

30 years" and are autonomously responsible to their separate and respective higher supervision, whether working alone or together. This is not effectively refuted by the Petitioner. The latter questions the admissibility for our consideration of documentation submitted to this Board by the Carrier to support the existence of practices earlier alleged by it on the property and reiterated to us. The contention is that the material was not used in discussions on the property and is, therefore, inadmissible to us. We do not find it necessary to consider the evidence which is procedurally challenged. This makes academic the question of whether it is inadmissible as new evidence. It is enough for us to note the position that Carrier took in its response to the claims on the property, i.e., that its practices were and its "payroll records will show" these employes to have worked autonomously. The burden of proof is on him who seeks to establish that his rights have been violated. Awards 4011, 6698, 12415, and others.

The Petitioner has here not met its burden of proving that up to January 30, 1957, the work in question was not supervised by other than a foreman — the exception from Paragraph 1 which is set down in Paragraph 5.

As to Rule 26

But Paragraph 1 of the 1957 Agreement qualifies itself also by a stated preservation of Rule 26 of the 1949 Agreement.

If it is found by us that under the operation of Rule 26 an impermissible action has here taken place, it would constitute a violation, notwithstanding Paragraphs 1 and 5, and regardless of past practices.

Rule 26 stipulates the composition in crafts and numbers of each of said crafts for various sized "Bridge and carpenter gangs" (also of paint gangs not relevant here), including whether there shall be a foreman, assistant foreman or both for various sized gangs. For two locations — Savannah Terminal and Atlanta Terminal, it specifies so-called "small repair gangs" among which listed crafts, there are not included either foremen or assistant foremen or cooks.

There are four other provisions of Rule 26 which are pertinent to our inquiry. One is the statement in three places of the use of an employe in place of a foreman. The first of these follows the consist for three small gangs at Savannah Terminal:

> "The highest ranking man shall be in charge and will be held responsible for the work, making required reports, etc., and will be allowed a differential rate of 4 cents per hour."

And after the consist of a small repair gang at Atlanta Terminal, it is stated:

> "The first-class carpenter will be held responsible for the work, making required reports, etc., and will be allowed a differential rate of Four Cents (4¢) per hour."

Also of pertinence is a paragraph further dealing with abbreviated gang assigned to Atlanta Terminal, viz:

"It is further understood that if, in the judgment of the Management, it is not deemed necessary to work more than one employe in the Atlanta Terminal Gang, such position will be classified as a first-class Carpenter and allowed a differential rate of Four Cents (4¢) per hour."

The fourth of the provisions which are pertinent to the instant issue is the following:

"(c) Cooks will not be furnished Bridge and Carpenter gangs not provided with camp cars."

We do not find in the foregoing that the Carrier must under all circumstances maintain or continue a gang composed as was the one before November 1, 1958. Rule 7 of the Agreement, in fact, gives the Carrier the right to abolish gangs on three days' written notice. But when the work requires the application of certain services of a group of various crafts to a particular place, said work gang must be made up in a stipulated way. The objective evaluation of the work needs of the job is in the first place a management judgment. The management may not, of course, under the pretense of making such a judgment, misrepresent the objective repair and maintenence requirements by subterfuges of one kind or another, but —

"It is well settled the Carrier has the inherent right to abolish positions and to re-arrange work thereof subject only to such limitation, expressed in the Agreement, as may curtail or abridge that right." (Award 12377).

See also Awards 10099, 11067, 11660, 11793, 12106 and 12349.

(We do not find in the record a specific claim by Petitioner that the three days' notice, stipulated in Rule 7, was not given, or any evidence concerning whether or not it was, in fact, given. We, therefore, make no ruling on this subject, one way or the other.)

The record contains a statement by the Carrier of the work done by the various employes assigned immediately after the Columbus gang was abolished. Said statement is not contradicted or refuted by Petitioner. According to this itemization, on various dates from November 3rd through November 14th, Carpenter Oliver and 3 Laborers worked on one repair and maintenance project, while on the same date Carpenter Farmer worked by himself on another, and Tinner Hayes by himself on a third. On five of the eleven dates shown, Carpenter Oliver and his three men as well as Carpenter Farmer worked on the same project at the same location — on November 3rd on Trestle R 11.7, and on November 10, 12, 13 and 14 on Roadway Material House at Columbus, Georgia. On four of these dates, Tinner Hayes worked at the same facility at the same location, as did the five others (i.e., two Carpenters and three Laborers) — November 10th, 12th, 13th and 14th. On those dates he "repaired leaks in Roadway Material House at Columbus, Georgia", while both carpenters and the three laborers "made repairs" on the same facility at the same location.

The focal questions are whether or not, when on these dates all were working at the same location on the same facility, (a) did they constitute a "gang" within Agreement meaning, and (b) if so, was this made up contrary to Agreement requirements.

The Carrier describes the work of both Division Carpenter Oliver and the three Laborers who assisted him, as well as the work of Division Carpenter Farmer on five days, in exactly the same terms: "made repairs to Roadway Material House at Columbus, Georgia" and "worked on Trestle R 11.7".

In the absence of further detail or evidence on the way Carpenters and Laborers worked on days when they are admitted to have been contiguously grouped in making repairs according to their respective craft responsibilities on the same facility at the same location, there is an inescapable appearance of a group operation for at least these five men.

We leave aside from consideration the Tinner, because it is not clear from the record whether he was an integral part of the group or was independently employed in his work of "repairing roof" at Columbus, Georgia.

Rule 26 does not particularize the occupational consists of gangs of every size. It sets up the content of a gang consisting of eight to twelve men and then states that for gangs of more than twelve or less than eight men, "the number of carpenters will increase or decrease proportionately." There then follow "examples." The examples stop at a lower total of six men for which one foreman is stipulated.

It is not clear from the examples how the proportion would operate in the case of a total of five men. We note, however, that when special "small repair gangs" are set up for various locations, no foreman or assistant foreman is provided for one group of seven, for another group of five and for a third group of three. But in every one of these cases, provisions is made for the ranking employe within the group to be "responsible for the work, making required reports, etc., and will be allowed a differential rate of Four Cents (4¢) per hour."

We are persuaded that fidelity to the intentions of Rule 26 requires that for five days that the two Carpenters and three Laborers worked together at Roadway Material House, Columbus, Georgia, and at Trestle R 11.7, they be considered a gang within the meaning of that rule and that Division Carpenter Oliver, who was acknowledged by the Carrier to have acted as "lead man", be paid the differential rate of four cents per hour for all work done on November 3, 10, 12, 13, 14, 1958.

The claim for the Cook is not sustained because of the explicit exception in Rule 26(c) that Cooks will not be furnished when Bridge and Carpenter gangs are not provided with camp cars. No camp cars were used here.

Petitioner's claims are rejected for reconstituting of the gang which existed prior to November 1, 1958, for reasons given above. Also rejected are the claims for Edwards, inasmuch as the latter was not shown to have been adversely affected.

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 to the extent shown in Opinion.

AWARD

Claim sustained to extent shown in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of July 1964.