# Award No. 12821
# Docket No. MW-11928

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

Louis Yagoda, Referee

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## PARTIES TO DISPUTE:

## BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

## LOUISVILLE AND NASHVILLE RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when it assigned other than its Bridge and Building Sub-department employes to construct a motor car set-off platform in front of tool houses in the vicinity of Cedar Street at Nashville, Tennessee, on April 24, 1959.

(2) Lead Carpenter John Davis, Carpenter L. M. McElvea and Carpenter Helper F. Lemay each be allowed five hours' pay at his respective straight time rate because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On April 24, 1959, the work of constructing a motor car set-off platform, approximately thirty-three feet in length, between the rails of the southbound main track in front of the tool houses in the vicinity of Cedar Street at Nashville, Tennessee, was assigned to and performed by Track Sub-department employes.

The work consisted of placing and securing wooden shim material of the proper height and at the proper intervals on the existing track ties, the placing and securing of planking immediately inside and parallel with each rail, with two other rows of planking, properly spaced and secured, running parallel with the rails, and the installation thereon of one-fourth inch sheet metal to form a solid surfaced motor car set-off platform of the approximate height of the rails. Fifteen man-hours were consumed by the Track Sub-department employes in the performance of this work.

The Employes have contended and continue to contend that the construction of this motor car set-off platform should have been assigned to and performed by Bridge and Building Sub-department employes.

The claim was declined as well as all subsequent appeals.

The Agreement in effect between the two parties to this dispute dated September 1, 1947, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

**POSITION OF CARRIER:** The action taken by the carrier in building this motor car set-off constitutes no violation of the maintenance of way agreement. It has been common practice over the entire L&N system for track department employes to build their own motor car set-offs out of ties, scrap timber or other available material. Carrier is of the opinion that the work performed in this instance is not — as past practice indicates — of such a nature as to be covered by Rule 41 of the applicable maintenance of way agreement. The claim is, therefore, without merit and should be denied.

**OPINION OF BOARD:** The facts from which the instant claim arises are not in dispute as to the claimed work performed. On April 24, 1959, Carrier's track forces repaired and renewed an area of plank construction set between tracks, in the vicinity of Cedar Street at Nashville, Tennessee. This structure as restored, with sheet metal top layer forms a solid surface, level with the rails, and is used for turning about motor cars in order to move them between the track beds and the motor car storage stalls nearby.

The Employes protest the performance of said work by section forces and claim compensation therefor for the available Bridge and Building Subdepartment employes.

The Employes put their basic reliance for their position on Rule 41 (a) of the Agreement between the parties. They contend that the work in issue is comprehended within the statement therein that employes of the bridge and building sub-department shall perform "construction, maintenance, repair, or dismantling of . . . platforms . . . and other structures, built of . . . wood or steel . . ."

The Carrier denies that the structure worked on can be properly described as a "platform." It states that this word, as ordinarily used in railroad parlance, refers to station platforms, freight loading docks and similar structures.

The parties also make conflicting assertions concerning past practice, but both positions focus on the meaning of Rule 41 (a). From this Board's point of view, if the governing rule is clear and unambiguous, our response must be to said rule, without regard to history of practices.

**As to the Meaning of Rule 41 (a)**

Neither Rule 41 (a) nor any other Agreement provision cited by the parties explicitly includes by name or description, the work here in issue for reservation to the Claimant Employes. We hold to our interpretation, expressed in Awards 12726–12730 that a structure of this kind is not ordinarily and conventionally described as a "platform."

But it is obvious from a reading of Rule 41 (a) that the parties did not intend or pretend to list by name every article of construction or repair which would be reserved for the covered employes. This is clearly shown by their use of the words, "platforms, walks, **and other structures,** built of brick, tile, concrete, wood, or steel", in their description of work jurisdiction. (Emphasis ours.)

The foregoing wording is not the same as that which we encountered in the cases for which Awards 12726–12730 were issued. The applicable Rule in the earlier cases used the words "and similar structures." The phrase here "and other structures" is a much wider one. Its presence makes the meaning of the proviso less certain as to application to the work in issue. A "set-off"

of this kind (to use the Carrier's words for the structure) is not in its exact meaning a platform or walk, but it has some significant elements of relation to both. When these words are conjoined to the blanket phrase "and other structures" (made of the same materials) we cannot dismiss out-of-hand the possibility of intended inclusion of such a structure. But the phrase is also far too general and inexact in this context of contract provisions and work realties to enable us to declare the work covered on the basis of the phraseology alone.

The rule, therefore, that our first duty is to the Agreement terms and that our attention must be confined to them when their meaning is clear, is met in the instant matter by a necessary finding that the applicable proviso does not give us a clear and unequivocal meaning for disposition of this claim. We must, then, turn to the examination of past practices to find out how the parties expressed by action their mutual intent.

**Past Practice**

Both sides made opposite assertions concerning past practices. In their Ex Parte Submission the Employes made no mention of past practice, contending that the work is expressly covered by and subject to Rule 41 (a). The Carrier stated in its Ex Parte Submission that it has been "common practice" over the entire system for track department employes to do this work. In their responding "Oral Argument," the Employes denied the existence of such practice and contended that the burden of proof to show it existed is on the "asserting party," the Carrier.

Our well established principle is that "the one affirmatively charging a violation is the moving party, and, therefore, should be in possession of the essential facts to support the charge before making it. . . ." (Award 7350.) Also Awards 11525, 11598, 11645, 11658, among others. Nor do mere assertions constitute proof. Awards 11118, 11525, among others. We find no proof in the record to support the Employes' position on past practice.

The petitioning party has in the instant matter failed to meet its burden of supporting its assertions concerning past practices. Its claim must, therefore, fall.

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 not violated.

AWARD

Claim denied.

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.