

Award No. 13330
Docket No. MW-13374

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
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 Bridge and Building department forces to

(a) construct a track at Dyas, Alabama on November 14, 1960,

(b) assist in the work of unloading ballast and surfacing track on Bridge No. 176 on December 20, 1960,

(c) assist in the work of surfacing and lining track on Bridge No. 176 on December 21, 1960.

(2) Furloughed Section Foreman J. P. Hall and furloughed Section Laborers Buster Lewis, Herman Porterfield, K. C. Karson, T. F. Cheatham, Cazzio McDowell, Albert Gafford, David Sanderson, J. L. Williams and Benny Ewing each be allowed 16-2/5 hours' pay at their respective straight time rates account of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The factual situation involved in this dispute was fully described in the letter of claim presentation which reads:

"January 10, 1961
1-17

Mr. R. W. Pember
Division Engineer
L. & N. Railroad Co.
Mobile 12, Ala.

Dear Sir:

Claim is made on behalf of J. P. Hall, Foreman, and the following Section Laborers:

any time at this. This claim looks entirely unjustified and in the realm of short practice to make such a claim.

R. W. Pember"

Track men and Bridge men have always worked in conjunction with one another in such circumstances, rendering each other assistance when possible. Even if the bridge men had not seen fit in this instance to assist in the small way they did, it would have had no adverse effect on the earnings of the section gang and likewise, the handling given did not deprive section men of any overtime payment as none would have accrued, because the job in question was a normal job for a section gang to perform.

As to the employees' claim relative to work the bridge gang may have performed on the track at the bridge. Carrier can see no basis whatever for such a claim. As a matter of fact, it's surprising that such a claim was filed. The bridge in question is ballast deck constructed and at the time had recently been completed. The same section gang was at the site, along with the same bridge gang. The work on the bridge, whereby it had been shortened, had been completed. The bridge men, as usual, removed the stringers, and as usual the section men proceeded to unload slag. No doubt, the bridge men may have put some of the slag back, in order that they could remove the stringers; and, if they did, it was of their own volition, and they were simply following the practice of long standing in the spirit of cooperation. Then, after the slag was unloaded and the stringers removed, the track men went on and surfaced up the track and placed it in normal operation.

There is no reason to even suspect that any employee was deprived of employment by the assistance rendered the section men by the bridge gang. The only difference is that the section men would have had to work a little harder.

It is carrier's position that while Section Gang No. 7 and Bridge Gang No. 1 found it necessary to work together in progressing the work on the bridge, no provision of the agreement was violated. The organization has not contended that additional men were needed on the section gang to complete the work, but the claim is in behalf of 10 furloughed employees, requesting that each be paid 16-2/5 hours' pay at their respective straight time rate. It is, therefore, obvious that the claim is, in fact, a penalty claim, but there are no provisions in the maintenance of way agreement that provides for such penalty payments. This Division has held in numerous awards that penalties cannot be awarded unless the agreement so provides.

OPINION OF BOARD: There are two incontrovertible principles: (1) Petitioner has the burden of proving its claim; and, (2) conflicting assertions, without a preponderance of corroborative evidence supporting one against the other have no probative value.

In the instant case, Petitioner asserts that Carrier assigned B&B employees to construct a track at Dyas, Alabama, on November 14, 1960. Carrier asserts that the track was constructed by a section gang. We cannot resolve the conflict of assertions. Award No. 9260 (without referee.)

Petitioner avers, without supporting evidence, that on December 20, 1960, the B&B gang was assigned to assist in unloading ballast and surfacing track; and, that on December 21, the B&B gang was assigned to assist in the work of surfacing and lining track. Carrier asserts that at that time

repair to the bridge had been completed, the B&B men removed the stringers, the section men unloaded the slag or ballast, the trackmen surfaced the track and placed it in normal operation, and the work in connection with Bridge No. 176 was handled in exactly the same manner as such work has always been handled. Again, we cannot resolve the conflict of assertions.

We find that Petitioner has not satisfied its burden of proof. We will dismiss the Claim.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Claim must be dismissed for lack of proof.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of February 1965.