Award No. 14492
Docket No. MW-15548

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when, on March 31, 1964, it abolished positions of crossing flagmen at College Street, Beaumont, Texas and thereafter permitted the work of such positions to be performed by individuals employed by the City of Beaumont. (Carrier's File 013-293.9)

(2) Crossing Flagmen R. A. Rushing, Dave LeJunie, Guadalupe Galavis and Luis Galavis each be reimbursed for the exact amount of monetary loss suffered because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Prior to April 1, 1964, the claimants were regularly assigned to positions of Crossing Flagmen at College Street, Beaumont, Texas. These positions were assigned for the purpose of providing crossing protection at the aforesaid location for twenty-four (24) hours per day and for seven (7) days per week.

On March 31, 1964, the Carrier "abolished" all of the above mentioned positions. Immediately thereafter, the Carrier, without negotiation with or the concurrence of the undersigned General Chairman, entered into a contract with the City of Beaumont whereby the city agreed to furnish the flagmen required to protect the subject crossing and the Carrier agreed to reimburse the city for the salaries of such flagmen.

On April 1, 1964, the city assigned four of its employes to perform crossing flagman's duties at the College Street crossing. The assignments of these employes were also arranged so that this crossing was protected twenty-four (24) hours per day for seven (7) days per week. The city paid each of these employes $1.56 per hour which is less than the contractual rate set forth within the carrier's contract with this Organization. The Carrier reimbursed the city for the salaries it paid the flagmen.

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

CARRIER'S STATEMENT OF FACTS: For several years prior to April 1, 1964, Carrier was required by the City of Beaumont, Texas, to provide flagging service for protection of grade crossing at the intersection of College Street and Railroad Avenue, in Beaumont. In order to construct an

underpass and eliminate the grade crossing, the City, on March 19, 1964, wrote the Carrier (photocopy attached as Carrier's Exhibit "A"), requesting that certain trackage be removed and relocated and "the City will relieve your Company of the necessity of providing flagging service at this intersection on and after April 1, 1964, and that thereafter the City or its contractor will supply such flagging service as is needed until the grade is separated." Since the Carrier was no longer required to provide flagging service at College Street after March 31, 1964, crossing flagmen positions at that location were discontinued at the close of that date.

Correspondence exchanged by the parties concerning this claim is attached as Exhibits "B" through "H". Dispute was handled as four separate claims until the later stages when it was consolidated. To avoid burdening the record, correspondence reproduced concerning initial handling of the dispute is confined primarily to claim of R. A. Rushing, which is similar in content to the other claims and adequately expresses the positions of the parties.

(Exhibits not reproduced.)

OPINION OF BOARD: It is the Carrier's primary position that the claim presented to this Board is not the same as the claim handled on the property, as required by Section 3, First (i) of the Railway Labor Act and Circular No. 1 of this Board and should be dismissed.

As handled on the property, the Statement of Claim read:

> "1. That Carrier violated the effective agreement when, on March 31, 1964, they abolished R. A. Rushing's job as crossing flagman on College street at Beaumont, Texas.
>
> 2. That crossing flagman, R. A. Rushing, be returned back to his former job as crossing flagman, and be reimbursed for all time lost until he is returned back to his former job as flagman."

Similar Statements of Claim were filed on behalf of the other three Claimants.

It is obvious that the wording of the claim before us is different from that advanced on the property, and if the mere difference in wording is a violation of the Railway Labor Act and Circular No. 1, the claim should be dismissed.

The Railway Labor Act does not require that the claim be the same but merely that the claim be processed in the usual manner. Circular No. 1 requires that the Statement of Claim clearly state the particular question upon which an award is desired. Thus, neither explicitly require that the Statement be the same in terms of identical wording.

A careful review of the awards of this Board show that we have always required the claim to be **substantially** the same, not identically so. Award No. 10537.

The Statement of Claim was changed in the following ways:

1. Four identical claims were consolidated into one.

2. Claim 1 was expanded to include: "and thereafter permitted the work of such positions to be performed by individuals employed by the City of Beaumont."

3. Claim 2 dropped the demand that the employes be reinstated to their former positions.

The consolidation of claims does not change them but merely changes the way in which they are to be handled. This is not a substantial but a procedural change and is not fatal.

During the handling of the claim, the temporary use of city employes, while the grade crossing was being separated, ended by completion of the work. The gist of the claim was that city employes were used instead of the Claimants. The fact that the reparations asked for became no longer appropriate did not change the substance of the claim but related only to the remedy. In Award 5077 we said:

> "It has once been decided, * * * that the fact changes may have occurred from time to time in a claim before it reached this Board is not always fatal. Award 3256. It was there held that the subject matter of the claim — the claimed violation of the Agreement — had been the same throughout all stages of the claim, and the fact that the reparations asked for because of the alleged violation may have been amended from time to time, does not result in a change in the identity of the subject of the claim. We think that rule sound and the opinion well reasoned * * *"

The only serious question is whether the reference to the city employes was a substantial change. While this was not mentioned in the original statement it was at all times the substance of the claim made to the Carrier. The change, therefore, was not in the substance but in the way the Statement of Claim stated the substance. In this respect, it cannot be said to be a substantial change.

In no way was Carrier prejudiced by the changes. Nothing of substance was added to the claim. It was restated to clarify the issue as it was presented to the Carrier on the property. If this objection were permitted, a premium would be placed on mere formalism without regard to the realities involved.

All the precedents cited by the Carrier involved changes in which something new, which was not discussed on the property, was added to the claim. Quite properly, they held such changes to be fatal to the claim. In the instant case, however, the Statement of Claim narrowed and sharpened the issue which had already been discussed on the property. We think the claim should be heard on the merits.

The claim is that Carrier abolished the Crossing Flagman's position and improperly assigned work belonging to its Maintenance of Way employes, to individuals who have no rights under the agreement. In effect, the argument is that Carrier contracted out the work. The assumption is that the work done by the city employes was done for the railroad. The Carrier denied that it had an agreement with the city regarding the manning of the crossing. It informed the Organization that the city requested that the Carrier remove the crossing watchmen and that the city would provide the service.

The Organization has the obligation of proving that the work was being done for the railroad. The only evidence of this was an allegation by the Organization that the railroad was compensating the city for this service. This evidence was based upon statements allegedly made by an unnamed city employe. Carrier denied there was any such agreement. Such conflicts of fact cannot be resolved by this Board.

We must hold that the Organization has not proved that the work done by city employes was railroad work, done for or on behalf of the railroad, an essential element of its claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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

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 2nd day of June 1966.

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