Award No. 14732
Docket No. MW-15388

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Murray M. Rohman, Referee

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 Agreement when it assigned or otherwise permitted two (2) Welding Subdepartment employes to perform Track Subdepartment work while Track Subdepartment Laborers Wilbert E. White and John Richardson were cut off (furloughed). (Carrier's File E-304-14; E-304).

(2) Wilbert E. White and John Richardson each be allowed eight (8) hours' pay at the section laborer's straight time rate for each work day and holiday within the period beginning with March 7, 1964 and extending throughout the continuance of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Beginning on or about January 2, 1964, the Carrier assigned or otherwise permitted Welder Todd and Welder Helper Morgan, who hold regularly assigned positions in the welding subdepartment, to assist Track Subdepartment Machine Operator Haskell in the handling of a bolt tightening machine and to perform the work of replacing broken or damaged splices (angle bars), track bolts and other related track parts and the tightening of bolts.

Claimants White and Richardson have established and hold seniority as laborers in Rank 6 of the track subdepartment as of July 6 and 7, 1942, respectively. During the period involved in this claim, they were furloughed. They had protected their seniority by filing their addresses with the Carrier. They were available and willing to perform the subject work.

Claim was presented in letter dated May 6, 1964, and made retroactive for a period of sixty (60) days therefrom. Claim was timely and properly handled at all stages of appeal up to and including the Carrier's highest appellate officer.

OPINION OF BOARD: The Claimants herein are both furloughed Track Department employes who allege that the Carrier violated the effective Agreement by assigning a welder and his helper to perform track subdepartment work. In conjunction with a power wrench operator, the welder and helper replaced track bolts, splices or angle bars and tightened track bolts. In addition, the wrenching machine operated herein weighed approximately 450 lbs. and hence, it required two employes to place it on the track and to remove it from the tracks for the flow of traffic. Thus, the Organization argues that the work of replacing the bolts and assisting the wrench machine operator, as well as removing the machine from the track and replacing it thereon, was work within the Claimants' scope.

The Carrier refutes these allegations by contending that only the machine operator was required to operate the power wrench machine which was of light weight construction and, in addition, there were no trains operating on the Myrtlewood Branch. Therefore, it was unnecessary to remove and replace the machine on the tracks.

It appears to us that the disorganized presentation of the facts has contributed to the confusion. Nevertheless, there emerges a number of belated admissions by the Carrier which tend to give credence to the Organization's attack. In particular, that although the welder and his helper did not assist in the operation of the machine, they did aid in placing the machine on and off track.

We also find the following statement by the Carrier:

> "Another member of the gang **of his own volition** may assist in placing the machine on and off the track. Welder Todd and Welder Helper Morgan did not assist in the operation of the wrench machine but only **assisted** the machine operator in handling the machine on and off the tracks." (Emphasis added.)

Furthermore, despite its contention, at one point, of an absence of traffic, the Carrier, thereafter, conceded that it was necessary to remove the machine from the track for the passage of trains between Flomaton and Chattahoochee; and while working at Wallace and Selma, Alabama, "the machine would not have been removed from the track for the passage of more than two trains per day, and in many instances it was not necessary to remove the machine at all for the passage of trains."

Subsequently, the Carrier asserted that "the handling in this case was the accepted practice on this property." Such practice was vigorously disputed by the Organization, as evidenced by the following:

> "The building up of rail points does **not** require the use of a bolt machine because, under ordinary circumstances, there is absolutely no reason to remove the splice bars in order for the rail ends to be rebuilt. Consequently, it has never been a 'practice' for bolt machine operators to work with welding subdepartment employes who are assigned to build up rail ends. By the same token, it has never been the practice for welding subdepartment employes to work with and assist machine operators engaged in the work of tightening bolts. The reason for this is that the work of the employes of these two subdepartments is sufficiently incompatible to preclude such a mixed force."

Innumerable awards of this Board have stated that the burden of proving a customary practice is upon the party asserting same. (See Awards 11645, 11658, etc.). The mere assertion of such practice is not proof thereof. (Awards 11128 and 11129, etc.).

Thus, in the context of the instant dispute, we find a violation was committed.

The Carrier next argues that this claim involves a penalty. It couched this in the following language:

> "There is no reason to even suspect that any employe was deprived of employment. Certainly Messrs. White and Richardson would not have been recalled. It is, therefore, obvious that this is nothing more than a penalty claim . . ."

The facts, as alleged, reveal that the Claimants were furloughed employes. Hence, we disagree with the rationale of the Carrier in adamantly proclaiming that we are limited to awarding only nominal damages herein, pursuant to judgment of the 10th Circuit Court in **Brotherhood of Railroad Trainmen v. The Denver and Rio Grande Western Railroad Company.** In the instant dispute, the Claimants were damaged by the Carrier's action in failing to recall them to perform work properly falling within the Agreement. It is, therefore, the opinion of this Board that these Claimants are entitled to be made whole and to be compensated for wages they would have earned. This is clearly distinguishable from a penalty. However, on the entire record, we find that compensation for loss of wages would be justified only for the senior Claimant.

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

That the Agreement was violated to the extent indicated in opinion.

AWARD

Claim sustained only for the senior Claimant.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of August 1966.

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