



Award No. 14769
Docket No. MW-15677

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**THE DENVER AND RIO GRANDE WESTERN
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 section forces to flag for and protect B & B forces and equipment being used at Tunnel No. 45.

(2) Each of the following named B & B employes now be allowed pay at his respective time and one-half rate for the number of hours indicated after his respective name because of the violation referred to in Part (1) of this claim.

Name	Classification	Number of Hours
L. O. Blake	Carpenter	48
J. K. Kirby	Carpenter	36
L. L. Wilson	Carpenter Helper	77
L. G. Bertrock	Carpenter Helper	36
L. E. Laman	Carpenter	52

(Carrier's Files MW-11-64, MW-12-64, MW-13-64, MW-14-64, and MW-15-64).

EMPLOYEES' STATEMENT OF FACTS: Claimants Carpenter L. E. Laman and Carpenter Helper L. G. Bertrock were regularly assigned to their respective positions with a B & B gang supervised by Foreman L. H. Stice. Claimants Carpenter L. O. Blake and Carpenter Helpers L. L. Wilson and J. K. Kirby were regularly assigned to their respective positions with a B & B gang supervised by Foreman Wass. Both gangs were regularly assigned to a Monday through Friday work week.

On March 11, 1964, a fire occurred at Tunnel No. 45, located near Mile Post 140 on the Carrier's Colorado Division, which burned out the lining and caused portions of the tunnel to cave in. This resulted in the Carrier's main line tracks at that location being out of service. For the purpose of clearing and repairing the tunnel as expeditiously as possible so as to permit the early

that he is the proper claimant."

In denying the Bertrock claim it was stated:

"Further, the Statement of Claim does not allege that claimant was available for this work and, he was not in fact available for it. On March 26, 1964, his regular assignment as a B & B carpenter helper on Foreman Stice's B & B gang commenced 11:30 A.M. and the time of the claimed assignment overlapped his regular assignment of that date. If claimant had been assigned the claimed work he would not have been available for his regular assigned position on that date. It is important to note in this regard, incidentally, that claimant carpenter helper worked his regular assignment 55:30 hours in the 40 hour work week here involved even though he laid off after only working five hours on his regular assignment March 27, 1964, the last day of his assigned work week, and that for the semi-monthly pay period covering this week he earned \$490.81. His earnings for March, 1964, were \$899.28.

Concerning the claim for March 28 and 29, 1964, rest days for claimant and B & B forces, by this time claimant had worked already 55:30 hours in his work week. Under Rule 11½, work required on a day not a part of any assignment may be performed by an available, extra or unassigned employee who will otherwise not have 40 hours of work that week; in all other cases by the regular employee. I find no allegation in the Statement of Claim or elsewhere that there were no such available, extra or unassigned employees or that claimant was the 'regular' employee involved. Claimant, therefore, has not established that he is the proper claimant."

Thereafter, Carrier received copy of letter dated April 22, 1965, from the President of the Brotherhood of Maintenance of Way Employees to Mr. S. H. Schulty, Executive Secretary, Third Division, National Railroad Adjustment Board, that the Employees intended to appeal the claim set forth in that letter and which is set forth above, this submission, in Carrier's "Statement of Claim." And on April 23, 1965, Executive Secretary Schulty advised the Carrier the Board had received notice from Employees of intent to file a submission on that claim.

The Agreement between this Carrier and the employees represented by the Brotherhood of Maintenance of Way Employees, effective February 1, 1941, Including Changes and Interpretations to Date of Reissue March 1, 1952, and subsequent Memorandum of Agreements up to and including the date of this claim are incorporated herein as a part hereof by reference.

OPINION OF BOARD: On the night of March 11, 1964, a fire occurred in Tunnel No. 45, located near Mile Post 140 on carrier's Colorado Division.

The tunnel burned out and caved in, disrupting main line service Denver to Orestod to Craig.

To restore train service through the tunnel as quickly as possible, carrier used B & B gangs, track gangs, rock gang and work equipment operators to work 24 hours during the emergency until the tunnel was restored to service on March 27, 1964.

Two B & B gangs were temporarily assigned 12 hours each, one gang from noon to midnight and the other, midnight to noon.

On May 22, 1964, separate claims were filed on behalf of three claimants

in the B & B gang working 12 midnight to 12 noon and for two claimants in the other B & B gang, each for 12 hours overtime on dates during period March 23 to March 29, each claiming that track forces performed B & B work of flagging and tunnel watching on these dates.

No claims were filed covering the period March 11 to March 22.

Claimants contend that it has always been and still is the practice for flag protection work to be assigned to and performed by employes of the class for which such service is being performed. But in this case the flagging and tunnel watching was done by track or section men.

Carrier contends that such service does not belong exclusively to B & B or Track Department employes, and in this case the flagging was done not solely for B & B gangs but for all gangs, track men, rock gang men, and equipment operators working within, and in and out of the tunnel.

B & B claimants do not deny that other classes of employes were working in the tunnel until train service was restored.

It is also a fact that track forces, equipment operators and claimants worked 24 hours during the emergency.

No rule in the Agreement gives flagging or tunnel watching to B & B employes. Rule 1—Scope includes Crossing, bridge and tunnel, track and roadway machine watchmen, and these men are listed in Rule 2—Seniority under Track Department.

Whatever the past practice may be as to each Department providing its own flagging service in regular operations, there is no evidence such service belongs exclusively to any one class of employes during periods when employes of both B & B and Track Department are working at the same location.

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 under the conditions existing at Tunnel No. 45 during March 1964, we must hold that Carrier did not violate the Agreement in using track forces to perform the work claimed.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of September 1966.

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