NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22400
THIRD DIVISION Docket Number MW-22318

Louis Yagoda, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company
(Texas and Louisiana Lines

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

(1) The Carrier violated the Agreement when it refused to allow the members of System Gangs #58 and #43 meal and lodging expenses and mileage allowance (System File MW-77-8).

(2) The Claimants* and any other employe affected each be allowed $12.00 per day for meal and lodging expense in addition to mileage allowance beginning October 13, 1976 continuing until said violation is corrected.

*D. E. Fletcher
C. Beasley
D. Killiam
J. Glaspy
C. Cervantez
B. E. Fira
T. R. Mikel
T. C. Woods
F. E. Turner

J. E. Jones
L. Jones
B. Roberts
W. J. Blackshire
D. R. Hall
J. W. Blair
M. A. Zhanel
L. R. Lewis
C. M. Morales
J. R. Rejeck
F. J. Roberts
F. Soto

T. R. Calhoun
B. D. Coleman
Q. B. Johnson
W. E. Jones
S. Lincoln
J. T. Luna
C. Evans
A. T. Jackson
A. W. Bates
R. M. Slovak
Q. A. Tankersey
J. H. Turner
R. T. Torres
F. A. Anderson
R. Cervantez
R. G. Cogdill
Q. C. Evans
M. Gonzalez
L. D. Gunn
W. Whaley
C. L. Maxwell
E. R. Mayes
C. R. Coleman

OPINION OF BOARD: As part of an extensive rehabilitation program undertaken by Carrier beginning in the Spring of 1976 on a substantial area around and out of its Fort Worth location for routes headed towards San Antonio, Carrier separated the work involved into successive segments.

For the first phase of this undertaking two separate gangs, one consisting of a foreman and eight men, the other a foreman and 34 men, were separately advertised for, bid into and respectively established at Midlothian, Texas. It is undisputed that the assignments were advertised as "headquartered at Midlothian, Texas" and no mobile trailers or living quarters were either specified in the bid notices or furnished to these gangs. In both cases, the gangs worked from April-May 1976 and completed their projects on October 13, 1976, at which time the gangs were abolished.

However, under the same date, a foreman and seven men were solicited for headquartering at Ennis to work on another project of the same master plan at Ennis and, likewise (through separate bulletin), a foreman and thirty-four men also established as gang with headquarters at Ennis, again with no mobile trailers or living quarters. It is undenied that, accordingly, each gang member was responsible and unrecompensed for obtaining his own meals and lodging and transportation means or costs thereof. Ennis is 25 to 27 miles from Midlothian and approximately 30 miles from Fort Worth.

On November 18, 1976 claims were presented for pay for $12.00 per day expenses, plus mileage each day of work from Midlothian to Ennis and return, beginning October 13 and to continue until headquarters changed from Ennis to Midlothian, for 44 named employes.

In its argument, Organization contends that Claimants' rights to such reimbursement are established by certain provisions of Article 16 of the Schedule Agreement between the parties, cited in the statement of claim as having been violated by the Employer. Said provisions represent an implementation contractually arrived at by them of an Award issued by Arbitration Board No. 298 on September 30, 1976, on a matter submitted to them of a dispute between Carriers Represented by the National Railway Labor Conference and the Southeastern, Eastern and Western Carriers' Conference Committees for Carriers and Employes' National Conference Committee, Five Cooperating Railway Labor Organizations, representing Employes (National Mediation Board Case No. A-7948).

Article 16 of the Agreement states introductorily:

> "In full disposition of Section V of the Award of Arbitration Board No. 298, it is agreed that..."

There then follows word-for-word the "Section I" part of the Award and a part of Section II of the Award (Introductory statement and Section A). Section I of the Article 16 Agreement provision duplicates Section I of the Award of Arbitration Board as follows:

> I. The railroad company shall provide for employees who are employed in a type of service, the nature of which regularly requires them throughout their work week to live away from home in camp cars, camps, highway trailers, hotels or motels as follows:

There follows a duplication of the Award of Arbitration Board No. 298 for this class of employees: Provisions for lodging or for reimbursement in lieu thereof, meals, or for reimbursement in lieu thereof, payment for traveling time, payment from one work point to another, furnishing of transportation for such purpose or mileage reimbursement if personal automobile is used.

The part of Section II of the Award of Board No. 298 repeated in Article 16 of the Agreement identifies its subject as follows:

> II. Employees (other than those referred to in Section I above and other than dining car employees) who are required in the course of their employment to be away from their headquarters point as designated by the Carrier, including employees filling relief assignments or performing extra or temporary service, shall be compensated as follows.

The Agreement provision is then followed by this duplication of Section II A of the Award:

> A. The Carrier shall designate a headquarters point for each regular position and each regular assigned relief position. For employees other than those serving in regular positions or in regular assigned relief positions, the Carrier shall designate a

> headquarters point for each employee. No designated headquarters point may be changed more frequently than once each 60 days and only after at least 15 days' written notice to the employee affected.

Then, in substitution of sub-sections B, C, and D of Section II of the Award, the Agreement provision concludes with the statement:

> "Employees having designated headquarters points will be compensated for travel time and expenses under present Agreement rules."

Organization puts its reliance on Section I of this provision of Agreement Article 16. It regards the gangs involved in these two phases as extra System gangs continued on a single roving project. It characterizes the dissolution of these groups at Midlothian and their simultaneous reconstituting at a new "headquarters" at Ennis as evasions and denials of the lodging, meals and travel rights of these individuals, by resort to pretext and subterfuge, causing inconveniences and losses to them, in violation of Article 16 of the Agreement. In its view, Carrier was well aware that the work contemplated would have to be performed between Corsicana, Texas and Garrett, Texas (the area covered by both phases of the work) when the work was planned and executed. As evidence of this, they point to the preliminary letter written to the Organization informing them under date of April 27, 1976 of the work to be done and the areas to be covered.

The Organization contends that by history, custom and practice, System Extra Gangs (such as it characterizes these to have been) when placed in service have been assigned to mobile headquarters and living quarters of camp trailers and/or outfit cars and it includes in the record, vacancy bulletins issued by Carrier for such gangs, each providing for living quarters.

Organization then cites certain interpretations handed down by Arbitration Board No. 298 purporting to show that under the circumstances present here, such accommodations were an entitlement of Claimants.

The central such Interpretation emphasized is Interpretation No. 12 which states that where Carrier practice has over a period of many years been to provide camp cars for gangs but camp rules in effect do not make it mandatory that cars be provided and the employes assigned are recruited from an entire seniority district and work away

from home on the assignment in question, "the Carrier may discontinue providing camp cars but may not escape payments under Section I except in locations where the men report for duty at a fixed point which remains the same point through a period of 12 months or more."

Also cited is Interpretation No. 38 which addresses a question of entitlement to dining and lodging facilities for a gang with a headquarters point at which no such benefits were provided, the gang having been abolished after six weeks. The inquiry is referred to Interpretation No. 12 for answer.

Cited also is the Board's Interpretation No. 52 which asks whether lodging, meals and transportation may be avoided to employes in extra gangs by designating "headquarters" for these gangs and changing such "headquarters" at intervals as the work progresses. The response of the Board is that such payments cannot be avoided and the employes involved are entitled to such reimbursement pursuant to Interpretation No. 12.

Also invoked is Board's Interpretation No. 60 which answers the question similar to that answered in Interpretation No. 52 but which describes the situation as one in which the assigned headquarters point "is changed at intervals as the work progresses under the guise of abolishing the crew at one point and re-establishing it at another point." The answer is that, pursuant to Interpretation No. 12, such benefits may not be avoided.

Interpretation No. 9 deals with a situation wherein the work points are changed while employes are not actually at work and the employes are not required by Carrier to ride in the camp cars but use their own automobiles to travel from the old headquarters to the new. The answer given states that each man is entitled to payment for amount of travel time from one place to another "which the conveyance offered by by the Carrier would take regardless of how any man actually travels from one point to the other."

Interpretation No. 17, also cited by Organization, responds to the same effect to a question essentially the same as that raised in Interpretation No. 9.

Carrier contends that neither the Arbitration Award of Arbitration Board 298, nor the implementing Agreement provision between the parties specifies or requires Carrier to place certain types of employes in camp cars, or, as an alternative, place certain employes at headquarters points. In its view "the nature of the service should

and does govern." Thus, if the nature of the work requires employes to work away from the home during the week, Section I applies. Conversely, in the absence of the applicability of Section I, Carrier may, at its discretion, establish a headquarters point for employes pursuant to Section II of the Award in which case they are entitled under this Section to travel time and away-from-headquarters expenses.

Carrier further states that if Carrier elects to have employes covered under Section II of the Award (Article 16 of the Agreement), then it is required to bulletin such assignments with a designated headquarters point. Carrier then goes on to maintain that when the bulletins were issued in the subject instances, employes had the choice of electing to bid or not to bid on these assignments, taking into consideration the fact that inasmuch as the jobs were bulletined with a headquarters point, the bidders would not be subject to Section I of the Award (nor the Agreement provision thereon) and thus not eligible for the benefits provided there. Carrier argues, however, that a job bulletin with an explicit headquarters point is attractive to many employes because they are assured of reporting and ending work each day at the same location, regardless of where their travels might take them during the course of each day's work. Such assignment is particularly suitable and attractive to such employes who find the headquartered point not to be far from their homes and enabling them to be home each night (as an alternative to living in camp cars) and providing them reimbursement of expenses if Carrier fails to return them to headquarters point each day.

In sum, Carrier contends that neither the Award nor the Agreement leaves undisturbed Carrier's prerogatives of making the assignments of a Section I or Section II character, but Carrier is obligated to the provisions of the Award and/or the Agreement covering either one, once it makes its choice. At the same time, the employes have control by bidding or not bidding on the type of assignment offered.

Carrier further contends that the Interpretations rendered by Arbitration Board 298 have consistently recognized the distinctions between Section I and Section II assignments here made by Carrier.

Carrier responds to Organization's invoking of Interpretation No. 12 by pointing out that the question with which that interpretation deals was the discontinuance of providing camp cars in order to escape

payment under I-A-3. In the instant situation, Claimants were never assigned to camp cars; therefore, there was no situation of having discontinued use of them. Claimants here were headquartered from the very start and, accordingly, come under Section II, not Section I, of the Award.

In fact, in Carrier's view, Section I clearly has no application in the instant situation, since it does not involve employes who are in a type of service, the nature of which regularly requires them throughout their work week to live away from home in camp cars, camps, highway trailers, hotels or motels, not the case here.

Carrier sees support for its position in the Interpretations No. 28 and 79 of Arbitration Board No. 298.

The question to which Interpretation No. 28 responds asks whether when existing rules provide for actual expenses away from headquarters, could Carrier properly change an employe's headquarters from camp cars or trailers, and thereafter apply the meal and lodging allowances of Section I for those days and/or nights the employe is away from the new headquarters and then pay meal or lodging allowance for those days the employe leaves from his headquarters point and returns thereto the same day.

The Board answers that: "These employees are not in a type of service contemplated within the coverage of Section I" and goes on to say, in part, that only "if an existing rule provides for actual expenses while away from headquarters and Employees opted to retain such existing rule, then actual expenses would apply under such rule for any day when away from the headquarters point."

Interpretation No. 79 is the Board's response to whether a "gang that has always had a fixed headquarters within a fixed territory and the Employees live at home and commute to the headquarters point daily" are covered by Section I. The Board states that it is not, since the employes are not "employed in a type of service, the nature of which regularly requires them throughout their work week to live away from home in camp cars, camps, highway trailers, hotels or motels."

Section II which Carrier regards as applicable (inasmuch as by definition it covers employes other than those referred to in Section I) states in part (and that part appears in the parties' implementing Agreement):

"No designated headquarters point may be changed more frequently than once each 60 days and only after at least 15 days' written notice to the employees affected..."

The Employer contends that the instant case does not involve the changing of headquarters more frequently than once each 60 days but even if it did, there would be no violation because both gangs remained at Midlothian more than 60 days before they were abolished. Furthermore, it is Carrier's position that the 15 days' notice is to be given only for changes, not in cases of abolishments, as it characterizes the instant situation. Finally, Carrier contends that the issue of the 15 days' notice can not be argued before this Board because it was not raised during the handling of this dispute on the property.

CONCLUSIONS OF BOARD

The central debate between the parties concerns whether Claimants involved were those identified in Section I or Section II of the controlling Agreement provision (both taken, in turn, from the Award of Arbitration Board No. 298). That is, were or were not Claimants "employed in a type of service, the nature of which regularly requires them throughout their work week to live away from home in camp cars, camps, highway trailers, hotels or motels" (Section I) or were they "other than those referred to in Section I..." (Section II)?

Neither Arbitration Board No. 298 nor the Article 16 provisions of the Agreement between the parties give us any explicit guidance concerning how it may be determined: Distance from headquarters of region? Span of travel required each day to and from field headquarters and assignments? Distance from homes? The extent to which the employes involved have been treated in their most recent past or over a long period of time as "mobile" or "headquartered" workers? If so, for how long a period?

Nor do we find definitive guidance for such identification in the Interpretations of the Arbitration Board cited by both parties.

Carrier argues, with convincing effect, that absent any such specifications from the Board or in the Agreement, the choice concerning whether the gangs established are Section I or Section II gangs has been left in the hands of Carrier. The Carrier is obligated to advertise

whether the work is to be done from a headquartered site or a domiciled site. Employes knowing which it is, can then decide whether or not to bid on it, with the probability that those living in the immediate vicinity will bid on the job if it is a headquartered site; those for whom it is too costly or time-consuming to travel to the new headquarters from and to their homes will simply not bid for it.

But some attention is merited also to (1) Organization's argument that in other instances when employes have been assigned to Ennis (as demonstrated by exhibited advertisements), they have been furnished mobile trailers (and, apparently, the ancillary benefits of Section I employes) and (2) its suspicion that Carrier was "circumventing" its Section I obligations by the way it broke up what could have been one long project into one abolished and a second one almost simultaneously established at a site about 27 miles away.

Our own considered conclusions are:

1. It has not been established that the work in question compelled the use of one mobile gang for all of it or constituting a mobile gang for the second part of it.

2. The comparisons with the use of other crews at Ennis as mobile crews does not tell us enough of the nature and length and extent of the work of others or give us other information by which we may conclude that there has been an impermissible inconsistency.

3. There has been no convincing showing (largely, unfortunately, because of a lack of authoritative criteria) that the employes used here were by custom and practice, or by nature of the work involved, the type of employes identified in Section I.

4. As for Section II, also invoked by Organization in its submissions to the Board:

a. It has not been shown that Carrier failed to comply with the conditions of Section II coverage by not headquartering the subject employes without change (if change in headquarters this was) for at least 60 days; they were kept at Midlothian headquarters for more than four months.

b. However, a question is raised concerning whether the other condition laid down in the Agreement clause for preserving Section I was kept: that the change be made "only after at least 15 days written notice to the employees affected..." It is not disputed that the Midlothian assignment was abolished on October 13, 1976. Notice of the new headquarters assignment at Ennis was issued on the same date.

Carrier contends that (1) a "change of headquarters" was not involved here; it merely exercised its right to abolish one job and establish another, and (2) the 15-day notice aspect should not be permitted hearing by this Board because it was not raised on the property.

In keeping with our earlier determination that we find no basis for identifying the subject situation other than as Carrier's right to establish one gang at one place, abolish it at the end of its assignment and then immediately thereafter establish another gang at another site, notwithstanding that they are both phases of a master undertaking or that one or more of the same individuals may bid for both assignments, we must sustain Carrier's position that the situation was not a change in designated headquarters for a static group, but the separate activities we have just described.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 27th day of April 1979.