Award No. 1945
Docket No. 1783
2-GM&O-EW-'55

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Mortimer Stone when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 29, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (ELECTRICAL WORKERS)

GULF, MOBILE & OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That the Carrier improperly assigned work, at the Louisville, Mississippi, Shop, coming within the scope of the current agreement to others than its electrical workers and that accordingly the Carrier be ordered to discontinue such practice.

2. That the following electrical workers and electrical worker helpers be compensated for this electrical workers' work which they were entitled to perform under the applicable rules of the current agreement:

Electrician W. G. Parkes, eight (8) hours at the time and one-half rate, a total of 12 hours.

Electrician E. C. Stringfellow, eight (8) hours at the time and one-half rate, a total of 12 hours.

Elec. Helper J. T. White, two eight (8) hour days at the time and one-half rate, a total of 24 hours.

Elec. Helper D. A. Barham, two eight hour days at the time and one-half rate, a total of 24 hours.

Electrician W. E. Carroll, two eight (8) hour days at the time and one-half rate, a total of 24 hours.

EMPLOYES' STATEMENT OF FACTS: The carrier assigned its bridge and building department forces to construct an office building in the shop yard adjacent to the shop building at Louisville, Mississippi.

Water heating and plumbing service was installed in the office building by employes of the carrier classified as sheet metal workers.

The carrier contracted the installation of the electrical wiring and lighting facilities of the office building to an electrical contractor. This work consisted of installing six (6) fluorescent light fixtures and two (2) switches

to create highly unsatisfactory relations when one or the other of the affected departments would be temporarily short-handed by its operation. Furthermore, wiring and other electrical work done in connection with buildings is frequently regulated by requirements of communities and while maintenance of way department electrical workers would be expected to be familiar with such requirements such familiarity would not necessarily be expected of maintenance of equipment department electrical workers.

The general chairman also made an effort to support these claims by contending that Rule 604 gave this particular work to maintenance of equipment department electrical workers and their helpers, when, in describing "Classification of Work," it used this language, "All outside and inside wiring including that in shops, yards, steam and electric locomotives, passenger train cars, gasoline motor cars and axle device equipment."

This contention of the general chairman is without merit because the language used in Rule 604 was selected to make very clear the fact that **ALL** the work of "outside and inside wiring" was to be recognized as work of electrical workers wherever it might be performed, and it was not intended to affect the division of work between the electrical workers of the different departments as that division had already been made by the provisions of Rule 32. Interpretation of the agreeemnt as here described has been applied for a great many years and never before has it been the subject of a dispute that was not disposed of on the property.

The master mechanic's office is in close proximity to our shops at Louisville but is a separate and independent office-building with wiring which has no direct relationship whatsoever with our shop operations. Differently expressed, it may be said that it is in precisely the same status as is the local station-building.

Throughout the years there have been many occasions when the maintenance of way department has had electrical work to be performed and was without an electrical worker. In such cases, when practicable, an effort was usually made to "borrow" a qualified electrical worker from the maintenance of equipment department, sometimes with and sometimes without success. This procedure was never followed because of any contractual obligation but was the result of carrier's desire to give employment to its own people. From time to time there was no available mechanical electrician because all of them were working regularly, or, if available, either qualification or desire for the work was lacking.

In the instant case, each of the claimants was regularly employed, and this is substantiated by the fact that the claims are made upon the basis of overtime work at penalty rates. Certainly, the great good-will of this carrier could not be expected with reason to cause it to favor these individuals with this work under the described conditions when the service of others was available.

The carrier prays that your Honorable Board deny the instant claims because claimants had no contractual right to the work, which, when performed by others, led to this dispute.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

It is admitted by carrier that electrical work coming within the scope of the agreement was contracted out, and no attempt is made to show that it was exceptional work which properly might be so contracted.

Carrier asserts and relies on the fact that the work contracted out was electrical work required of the Maintenance of Way Department and coming wholly within its jurisdiction, while the seniority rights of claimants are confined to the electrical work of the Maintenance of Equipment Department.

This is not denied by employes who assert that there cannot be any dispute between the electricians of the two departments since none are employed in the Maintenance of Way Department and that "any reference as to which employes of the carrier entitled to perform such work, is irrelevant and immaterial." While that contention is not sound as to claimants who do not belong to or have any right to work in a seniority district which is entitled to perform the work, we think it applies in the situation before us. Carrier does not deny that it contracted out work which belonged to its own electricians, but it says it could properly deprive all of them of that work for the reason that no existing seniority group had a preferential right to it. At the same time carrier admits that in the past "in such cases, when practicable, an effort was usually made to 'borrow' a qualified electrical worker from the Maintenance of Equipment Department, sometimes with and sometimes without success."

The work contracted out belonged to carrier's shop craft electrical employes. When there were none employed in the Maintenance of Way Department, the work belonged to those in other departments. Claimants may not have had the exclusive right to the work, but they had at least a right in common with that of other seniority districts and the admitted "borrowing" practice on the property was a recognition of that right. We think it was sufficient to support the claim.

As it appears that the work required only five full days by the contractor and his helper, only that time should be allowed at pro rata rate.

AWARD

Claim 1 allowed.

Claim 2 allowed as per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of June, 1955.

DISSENT OF CARRIER MEMBERS TO AWARD 1945

It was conceded that the electrical work involved in this dispute was within the scope rule of the agreeement with the International Brotherhood of Electrical Workers.

The record shows that the work was under the jurisdiction of the Maintenance of Way Department and that the seniority rights of the claimants are confined to electrical work in the Maintenance of Equipment Department. There is no rule in the applicable agreement which would give the claimants rights to work in any department other than their own. The seniority rule provides for separate seniority limited to each of the following departments: Maintenance of Way, Maintenance of Equipment, Maintenance of Telegraph, and Maintenance of Signals Departments (which, in effect, are four separate agreements, one in each of the named departments). It is agreed that there was no electrical worker employed in the Maintenance of Way Department.

The findings state:

> "The work contracted out belonged to carrier's shop craft electrical employes. When there were none employed in the Maintenance of Way Department, the work belonged to those in other departments."

There is no such provision in the agreement. The rights of Maintenance of Equipment Department electrical workers are limited by the seniority rule. The scope rule is not self-executing or all-inclusive. The parties here involved definitely restricted the application of the scope rule when they wrote Rule 32.

The findings next state:

> "* * * Claimants may not have had the exclusive right to the work, but they had at least a right in common with that of other seniority districts and the admitted 'borrowing' practice on the property was a recogniion of that right."

The only rights claimants could have are those covered by their agreement. The agreement by no stretch of the imagination sets up a common right as between recognized separate seniority rosters. If the claimants did not have the exclusive right to the work, how can it be decided that they were entitled to compensation when not performing such work?

Furthermore, the "borrowing" here referred to did not establish a rule. The most that can be said of the "borrowing", if it existed, is that where practicable the carrier used electricians from the maintenance of equipment department. It did not write a rule.

The claimants in this case were regularly employed in the mechanical department and worked during the period of this claim. They lost no time; they were not available for the work, because they were employed; and they certainly were not damaged by not being permitted to do work to which they had no contractual rights.

The Referee was referred to First Division Awards 16873 and 16878, which denied payment to claimants because (1) there was no rule in the agreement which provided for payment for services not performed and (2) the claimants did not show that they were available for the work in question. Other awards cited bearing on the same subject were ignored without comment. Third Division Award 6949 cited to the Referee very pointedly covers this situation wherein it was stated:

> "* * * We necessarily conclude that Claimant had no seniority right to the work constituting the basis of the present claim. It is very doubtful, also, that Claimant was available to do the work. But the Organization says that we are not concerned with these matters if there was in fact an agreement violation and cites Awards 6019, 6136, 6158. We are in agreement with these awards which hold that one of a group entitled to perform the work may prosecute a claim even if there be others having a preference to it. The question here is whether or not one who has no right at all to perform the work may properly invoke the principle of these awards.
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> We think this question requires a negative answer. A claimant who is not among a class of employes entitled to perform work has no basis for a claim. Clearly an employe making claim for a penalty for work lost must have a right to the work even though there may be employes senior to him who have a right prior to his. The awards holding that it is immaterial as to which employe makes the claim, implies that it is immaterial as between employes of the same class in the same seniority district. No reason exists for saying that one having no right whatever, contingent or otherwise, to perform work can process a claim for its loss."

By sustaining this claim, two new rules are written into the agreement—first, extending the coverage of electricians covered by the Maintenance of

Equipment agreement, and, secondly, by assessing a penalty payment where no penalty rules are provided.

The power of this Division is limited by law to interpreting contracts as they are and treat that as reserved to the carrier which is not granted to the employes by the agreement. "Any change to be made in a contract to meet a condition as here presented is a matter for negotiation between the parties. We can neither legislate nor can we write into the Agreement that which is not there." (Third Division Award 6107.)

The majority in Awards 1908, 1939, 1940, 1941, and 1946, in the present assignment of cases to this Referee, recognized that seniority is the controlling factor in determining who is entitled to work and/or pay in cases similar to this one; yet in Award 1945 the position was completely reversed. If the award in this case is correct, the awards in the four cases just cited are entirely wrong.

An award is only as good as the reasoning behind it, and from the confused reasoning in the findings in this case, there is no basis for a sustaining award, and for that reason the award is invalid and should be ignored.

T. F. Purcell
J. A. Anderson
M. E. Somerlott
D. H. Hicks
R. P. Johnson