Award No. 3873

Docket No. 3838

2-B&M-SM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 18, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O.
(Sheet Metal Workers)

BOSTON AND MAINE RAILROAD

DISPUTE: CLAIM OF EMPLOYES:

"1. The Carrier violated the effective Agreement by discontinuing to assign Sheet Metal Workers on the Terminal Division roster Boston area to the performance of certain work involving the supplying of steam by the Boston and Maine Railroad to the Boston Garden Corporation at North Station, Boston, Massachusetts, during the period commencing with November 22, 1958 and continuing thereafter.

"2. All roster rated employes starting with position #5 and ending with position #42 as shown on the 1958—Sheet Metal Workers' Roster, Terminal Division, be now compensated for an equal proportion of the time at their own respective rates of pay as claimed.

"3. The Carrier discontinue this violation of Agreement and assign to the employes herein involved the performance of this referred to work."

EMPLOYES' STATEMENT OF FACTS: At North Station, Boston, Mass., the Boston and Maine Railroad has property identified as the North Station and its adjoining area. Within this North Station Building is a room identified as the steam room. At this location a large steam main brings in live steam from the Boston Edison Company, which is then in turn distributed by various valves, regulators and pipe lines to the various installations within this North Station area. Among such referred to properties is the Hotel Madison (formerly the Manger Hotel), the North Station Baggage Building, the area of the waiting room, concourse, Railway Express and other adjacent buildings, as well as the Boston Garden Arena and its locker rooms, offices, and other facilities. This

"The lease of the floor space in the Ocean Terminal Building reserves that work to the owner, Ocean Steamship Company. Necessarily, the Carrier or its employes have no right to perform it."

The lessee in this case had a similar right to insist on performing the work.

In Third Division Award No. 7961, Referee E. A. Lynch cited Third Division Award No. 1610 reading in part:

"If, under the terms of the lease, the lessee covenanted to do such maintenance work as painting, it might well be contended that the job did not come within the purview of the scope rule."

As the lease does not contain any provision that the railroad would perform the work for the lessee "Boston Garden Corporation", there is no support to the claim.

In Third Division Award No. 4783, Referee M. Stone, in his opinion, denied a similar claim, his opinion reading in part as follows:

"The common business of the Carrier and the Organization is railroad operation, and it is to that business and the property employed in that business alone, that their agreements apply. Where property is so used, no lease or other device should exclude the operation of the Agreement thereon, and where a Carrier owns property used not in the operation or maintenance of its railroad, but for other and separate purposes, such property is outside the purview of the Agreement."

The claim is without merit and should be denied.

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.

Parties to said dispute were given due notice of hearing thereon.

The basic question posed by this case is whether the Carrier violated the applicable labor agreement in November, 1958, when it permitted employes of the Boston Garden Corporation to perform certain operations at the steam room in the North Station Building which were previously assigned to the Claimants.

In support of their claim, the Claimants accuse the Carrier of ignoring an accepted practice of long standing. In doing so, they rely on a well-established rule of law generally applied in the interpretation or application of a labor agreement, namely, that custom or past practice may be used to determine the meaning of an agreement which on its face is ambiguous, doubtful or indefinite. This rule is based on the premise that, for the purpose of ascertaining the true intention of the parties to such an agreement, their consistent and long-continued actions or

conduct might be even more important than what they say or do not say in the agreement. See: Awards 1479 of this Division and 2436 of the Third Division. See also: Clarence M. Updegraff and Whitley P. McCoy: "Arbitration of Labor Disputes", 2nd ed., Washington, D. C., BNA Incorporated, 1961, pp. 226-8 and references cited therein.

However, the law is also firmly established that custom or past practice are of no probative value in determining the meaning of a labor agreement if the wording thereof is clear and unambiguous. In such instances, the unequivocal language of the agreement must prevail over contrary custom or past practice. Otherwise, the agreement would not be interpreted or applied in the light of the assumed intention of the parties but modified or re-written by mere conduct. See: Awards 3111, 3405, and 3220 of this Division; 5306 of the Third Division; and 1283 of the Fourth Division.

In applying the above principles to the facts presented by the instant dispute, we have reached the following conclusions:

The record shows that the Boston Garden Corporation has leased part of the second floor of the North Station Building but that the steam room in question is separate from the leased area and substantially used for the Carrier's own purposes of serving the North Station Building, the Baggage Building, the Tractor Garage, etc. The evidence before us reveals, further, that the work performed in said room, including specifically turning the steam valve on and off when the lessee required steam, was assigned to and performed by Sheet Metal Workers from about 1928 or 1929 until November, 1958, or for a period of approximately thirty years.

Based on those undeniable facts, we are of the opinion that, except as otherwise stated hereinafter, the Claimants were and still are rightfully entitled to perform said work in accordance with Rule 88 of the labor agreement which reads, as far as pertinent, as follows:

> "Sheet Metal Workers' work shall consist of tinning . . . in . . . buildings . . . **and all other work generally recognized as sheet metal workers' work . . .**" (Emphasis ours.)

The pivotal issue requiring adjudication centers around the interpretation of the above underscored part of Rule 88. The wording of that part is not clear and unambiguous but so general and indefinite as to permit different interpretations. It is, thus, subject to a reasonable construction on the basis of past practice.

The fact that the work under consideration was consistently performed by Sheet Metal Workers prior to and after the effective date of the labor agreement (April 1, 1937) for a considerable period of time is adequate proof of the existence of a well-established practice under which the parties themselves regarded such work as constituting "work generally recognized as sheet metal workers' work" within the purview of Rule 88. Hence, the practice has become a part of the labor agreement —just the same as if it had been explicitly provided therein. Consequently, the Carrier could not change it unilaterally but only through negotiation with the Organization. See: Award 3338 of the Third Division.

In summary, we hold that the Carrier violated Rule 88 when it permitted employes of the Boston Garden Corporation instead of the Claimants to turn the steam valve on and off when the Corporation required steam. Said work must be returned to the Claimants and they are entitled to be compensated at the pro rata rate for their loss in wages as well as to the minimum call-in time prescribed under Rule 4 (d) of the labor agreement wherever applicable. Their further claim for time and one-half is, however, unjustified and, therefore, hereby denied. See Second Division Award 2956 and other Awards cited therein.

The record shows that, in addition to the above mentioned steam valve work, Sheet Metal Workers presently perform or previously performed the following work at the steam room in question:

1. Changing over of the pipe drainage system in the pump rooms to care for any condensation resulting therefrom;

2. Making notations on meter charts as to when steam was turned on and off; and

3. Adjusting the steam regulator.

The Carrier contends that the work listed under 1 above is presently being performed by Pipers covered by the Sheet Metal Workers' agreement and that the work listed under 2 and 3 above has been eliminated. We have found nothing in the record before us which would contradict the Carrier's contention. In order to avoid misunderstandings, we want, therefore, to make it clear that the Claimants are not entitled to any compensation with respect to work in categories 1, 2, and 3 above.

AWARD

Claim partly sustained and partly denied in accordance with the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 9th day of November, 1961.