Award No. 4664

Docket No. 4496

2-SOU-CM-'65

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Bernard J. Seff when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION No. 21, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Carmen)

SOUTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier violated the controlling Agreement, when on February 19, 1962, Carrier contracted, instructed and/or authorized employees of Rosenthal Metal Company to make and install safety rails to Automobile Device Car No. RTTX-100708 at Chevrolet Plant, Atlanta, Georgia.

2. That the Carrier be ordered to discontinue these violations and pay Carman N. E. Bryan, Atlanta, Georgia, 8 hours at rate of time and one-half for February 19, 1962.

EMPLOYES' STATEMENT OF FACTS: The Southern Railway Co., hereinafter referred to as the carrier, maintains at Atlanta, Ga., modern facilities for the inspection, repairing and servicing of freight cars.

On February 19, 1962, employes of Rosenthal Metal Company, Atlanta, Ga., made and installed safety rails to carrier's (Southern Railway System) Automobile Device Car No. RTTX-100708 at Chevrolet Plant, McDonald Blvd., Atlanta, Ga.

Carman E. N. Bryan, hereinafter referred to as the claimant, is regularly employed by the carrier as a carman in its facilities at Atlanta, Ga., and was available to perform the work here involved in the Atlanta territory.

This dispute has been handled with all officers of the carrier designated to handle such disputes, including the highest designated officer of the carrier, all of whom have declined to make satisfactory adjustment.

The agreement effective March 1, 1926, as subsequently amended is controlling.

Factually the claimant did not then, nor does he now, have any contract right to perform the work here claimed. There was not, therefore, any violation of the controlling agreement and under it the claim which the Brotherhood here attempts to assert is without basis and should accordingly 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 Organization claims that the Carrier violated the Agreement when it allegedly "contracted, instructed and/or authorized employes of Rosenthal Metal Company to make and install safety rails to automobile device car RTTX 100708 at the Chevrolet plant located in Athens, Georgia. The Organization claims time and one half pay for Carman Bryan for 8 hours on the day the work in question was performed.

Carrier takes the position that Rule 149 of the current Agreement specifies what carmen's work shall consist of but does not confer exclusive rights upon carmen to the performance of all work of the type identified in the instant claim. Carrier argues that the only part of Rule 149 which could lend support to the claim is the language "all other work generally recognized as carmen's work". The Carrier interprets this language to mean that for work to fit into this category it must require the skill of a carman and it must be shown that carmen have performed such work exclusively throughout the years.

The Organization replies by stating that its Agreement was effective on March 1, 1926, and the Carrier allegedly has owned or leased and operated automobile cars equipped with auto carrying racks as far back as the 1930's; further that Carrier's Carmen removed, repaired, modified and installed these auto racks along with other craft work of maintaining, repairing or rebuilding the automobile cars. The Organization contends that the Carrier has only had the present type of automobile cars and racks for about two years but changing the type of car or rack should not be permitted to alter or change the current working Agreement.

The record supports the conclusion that the Carrier violated its Agreement. There does not appear to be any basis for concluding that the work, which should have been performed by the Claimant, needed to be done during overtime hours. The compensation will therefore be at the applicable pro-rata rate for the actual work time involved.

AWARD

Claim 1: Sustained.

Claim 2: Sustained in accordance with findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: William B. Jones
Chairman

E. J. McDermott
Vice-Chairman

Dated at Chicago, Illinois, this 26th day of February, 1965.

DISSENT OF CARRIER MEMBERS TO AWARD 4664

The principle is firmly established that under a general scope rule the Organization must prove exclusive performance by historical custom, tradition, and past practice. Such proof was not made.

The Agreement scope rule before us concerns itself solely with only such work as the Carrier has to offer.

The Organization erroneously contended that the scope and seniority rules prohibited the Carrier from allowing other than its own employes to make repairs to its equipment. These rules allocate work among the employes of the Carrier. They do not prohibit other than Carrier's employes from performing work.

The Agreement does not include all work required to be performed nor does the Agreement grant exclusive rights to all work as the Organization would have us believe.

The majority's findings in this dispute follow a prior award, which is, and was shown to be, palpably wrong. This Division has frequently held in many instances that an award cited as a precedent is no better than the reasoning contained within it.

Third Division Award 6094 held:

> "The organization relies upon our Award No. 5717 which sustained a similar claim involving the same parties and the same rules. Whether a prior award constitutes a controlling precedent is dependent upon the soundness of the reasoning upon which it is based or upon its being one of a long and consistent line of decisions. Award No. 5717 is not the latter because it is the only award cited involving rules similar to those confronting us here.
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> * * * It appears that the result reached in Award No. 5717 * * * is contrary to the clear and unambiguous language of the rules agreed upon by these parties, as set forth above. Hence we decline to be governed thereby."

See Awards 4516, 4770, 6973, 8687, 10288, 10815, 10830 — Third Division; 12228, 14234, 15719, 16021-16038, 16813, 17780, 20125 — First Division; 3043-3060, 3216-19 — Second Division.

Third Division Award 10063 (Daly) held in part:

> "However, it must be noted that precedent is not gospel — and relying entirely on precedent can result in compounding mistakes and perpetuating error."

It is regrettable that the majority in reaching its conclusion in this dispute has allowed an earlier erroneous interpretation to be controlling, which simply compounds the error committed by the earlier award. Certainly this Board should not be bound by the doctrine of stare decisis when it can be shown that an earlier award was based on false premises.

The monetary claims were based on the call rule of the Agreement. This is not a penalty rule. It applies only when an employe is called or notified to return to work outside of his bulletined hours. None of the claimants were so used nor did they suffer any loss of wages.

In addition, by reference we desire that the reasons previously set forth in our dissent to Award 4515 be a part of this dissent.

This award is contrary to the Agreement and other evidence of record, and we, therefore, dissent.

P. R. Humphreys

A. M. Braidwood

F. P. Butler

H. W. Hagerman

W. B. Jones