Award No. 5886
Docket No. 5831
2-N&W-SM-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION No. 16, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (SHEET METAL WORKERS)

NORFOLK AND WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current Agreement, other than employes of the Sheet Metal Workers' Craft (B&B Carpenters) were improperly assigned to perform pipe work of dismantling, relocating and reinstalling of a four (4) inch vent line from sewer line to roof, Roanoke Shop, Roanoke, Virginia, on December 15, 1967.

2. That accordingly, the Carrier be ordered to additionally compensate the following employes of the Sheet Metal Workers' Craft in the amount of sixteen (16) hours at the time and one-half rate, to be equally divided among them for this work:

Claimants: T. A. Garrison
J. E. Minnix
E. H. Goad

EMPLOYES' STATEMENT OF FACTS: At Roanoke, Virginia, the Norfolk and Western Railway Company, hereinafter referred to as the Carrier, maintains a shop known as Roanoke Shops, and Sheet Metal Workers are employed by the Carrier in its Roanoke Shop to perform their work as specified in the current Agreement. The Carrier has maintained numerous wash rooms and toilet facilities at Roanoke Shope since the building of the shop. Maintenance renewals and repairs to these facilities have generally been performed over the years by the Sheet Metal Workers' repair gang, Roanoke Shops. On December 15, 1967, the Carrier, in a modernization of shop program, assigned Maintenance of Way employes to dismantle, relocate and reinstall a four (4) inch vent pipe from the sewer line to roof of shop building in its Roanoke Shops. Immediate protest was made by the Local Committee, but Carrier refused to correct the assignment.

Therefore, claim was filed in writing and has been handled with all officers of the Carrier designated to handle such claims, including Carrier's

4. The organization has not and cannot meet the burden of proof that the work herein involved has been exclusively performed historically, customarily and traditionally by the Sheet Metal Workers. See Second Division Award No. 5740.

5. Payment of the overtime rate is not justified.

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 waived right of appearance at hearing thereon.

When Carrier assigned maintenance of way employes to dismantle, relocate and reinstall a four (4) inch vent pipe from the sewer line to roof of shop building at its Roanoke shops, the sheet metals workers' Organization filed this claim on behalf of the employes involved on the basis (a) that classification of work Rule No. 84 specifically gives them the work; because the installation of pipe as here in question is pipefitting and plumbing; (b) Rule 31 was also violated as a result thereof; and (c) sheet metal workers have in the past performed similar work of this type.

The pertinent parts of said rule 84 provides:

> "Sheet metal workers' work shall consist of * * * * * pipefitting in shops, yards, buildings, * * * * * the building, erecting, assembling, installing, dismantling (for repairs only), and maintaining parts made of sheet copper, brass, tin, zinc, white metal, lead black, planished pickled, and galvanized iron of 10 gauge and lighter * * * * * the blending, fitting, cutting, threading * * * * *, connecting and disconnecting of air, water, gas, oil and steam pipes, * * * * * and all other work generally recognized as sheet metal workers' work."

Carrier asserts that (1) sheet metal workers do not have the exclusive right to work in question and they offered no evidence that Rule 84 gives them exclusive rights to perform all such work; (2) maintenance of way forces have been assigned to such projects in question continuously from the year prior to the Agreement to the present claim; (3) many awards of this Division hold: (a) the shop craft scope rule separates the work of each shop craft and does not give any craft the exclusive right to all such work, (b) past practice ante-dating the Agreement supports Carrier's right to assign such work, (c) Carrier has the right to manage its affairs when not restricted by agreement, (d) Claimants herein all held regular assignments and suffered no loss; (4) the Organization did not in this instance prove that the work herein has been exclusively performed historically, customarily and traditionally by sheet metal workers; (5) that if the claim is sustained, payment of the overtime rate is not justified.

Examination of the Scope Rule of the Maintenance of Way Agreement reveals that said scope rule is a general scope rule inasmuch as said rule lists the positions and not the work, and therefore the work here in question is not given by said Maintenance of Way Agreement to B&B forces.

However, we find the work in question comes specifically within the terms of Rule 84 of the Sheet Metal Workers, namely, the "connecting and disconnecting of air * * * * * pipes". As Carrier, in its ex parte submission to this Board, in referring to the vent pipe in question, at page 6, stated: "It is not used to transport anything. * * * * * but serves as an escape route for sewer fumes. Thus, we find that the "pipe" here in question has the characteristics of and is of the same, scope, order and purpose of an "air pipe" within the intent and meaning of said Rule 84 of the agreement.

There are no exceptions to the rule, which could permit other crafts to perform this work. Inasmuch as the rule is not ambugious, past practice cannot be resorted to in deciding this dispute. Therefore, it is our conclusion that Carrier violated the agreement by assigning others than Sheet Metal Workers to perform the work in question.

As to damages, Carrier raised the defense that none of the Claimants suffered any pecuniary loss inasmuch as they all were regularly employed. We adhere to the principal, in the absence of United States Supreme Court approval, that this Board is not empowered to assess a penalty not so provided for in the agreement. Therefore, we must deny the claim for damages.

A W A R D

Award:
(1) Claim sustained.
(2) Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, on this 17th day of April, 1970.

CARRIER MEMBERS DISSENT TO AWARD NO. 5886

The majority summarily finds "that the pipe here in question has the characteristic of and is of the same scope, order and purpose of an 'air pipe' within the intent and meaning of said Rule 84 of the agreement." But, the question arises how was the "intent and meaning of said Rule 84" determined?

Petitioner's submission does not show any evidence supporting the conclusion of the majority. Lacking such support in the record, the unsupported conclusion appears to be, not a considered conclusion supported by the facts of record. In fact, the Organization brought forth no testimony that "air pipes" embraced "fume pipes."

While it is to be acknowledged that the law leaves to this Board the right to determine the meaning, or significance, of wording, that right must be exercised in consonance with law and principles applicable to contract construction. Thus, in the instant case, the critical point to be resolved, by the record, was whether "air" embraced "fumes." We think not, nor is it established by the record. The term "air" in railroading, (within the "scope, order and purpose" of Rule 84) has a very significant, a particularly specific, connotation —to wit, the type of compressed air utilized so extensively on the railroads— and the majority should have so found.

More basic than all this, however, is Carrier's contention, and Petitioner's recognition, that the vent line was of cast-iron construction. Would it be impertinent to ask the majority whether a cast-iron pipe is made of "sheet copper, brass, tin, zinc, white metal, lead, black, planished, pickled or galvanized iron"?

It is not within the majority's power to amend the agreement or record. They must take the record and agreement as they find them. A more careful study of the record would have shown quite pointly what these parties had accepted as the meaning and intent of Rule 84. The majority should have given the record that type of study.

/s/ P. R. HUMPHREYS
P. R. Humphreys

/s/ H. F. M. BRAIDWOOD
H. F. M. Braidwood

/s/ W. R. HARRIS
W. R. Harris

/s/ J. R. MATHIEU
J. R. Mathieu

/s/ H. S. TANSLEY
H. S. Tansley

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