Award Number 5952
Docket Number 5774
2-AT&SF-SM-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Nicholas H. Zumas when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 97, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Sheetmetal Workers)

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY — COAST LINES —

DISPUTE: CLAIM OF EMPLOYES:

That the following named employes of the Sheetmetal Workers' Craft, assigned to Carriers' Shop Extensions Department, at San Bernardino, California, be additionally compensated at their individual established rates in the amount of time the Carrier's own records indicate was used by Carriers' Maintenance of Way Employes in performing work coming under the scope of the Claimants Contract with the Carrier.

M. W. McKinly
R. C. Cramer
A. Bubnay
M. C. Watt
E. L. Rose
R. P. Bubnay
M. L. Quiroz
P. W. Swart
W. L. Sullivan
L. Smith
F. J. Del Mar
J. R. Taylor

EMPLOYES' STATEMENT OF FACTS: At time claim was filed claimants were employed in the carrier's shop extension department, headquartered at San Bernardino, California.

On or about February 15, 1967, in keeping with the modernization of the car blasting and painting facilities, and in compliance with the laws and request of the San Bernardino County Air Pollution Control Board, the Santa Fe Railway Company, hereinafter referred to as the carrier, purchased and installed a Grit Blasting Facility, at its San Bernardino Car Department. Included in this facility, was a pre-fabricated metal housing, approximately one hundred (100) feet long, twenty (20) feet wide and twenty (20) feet high.

The purpose of the Grit Blasting Facility was to remove dirt, old paint, grease and grime from freight cars prior to being repainted, and to comply with the laws and request of the city relative to smog and dust control, and to confine the Grit substance so it could be reclaimed for further use.

This is the sole use of this housing, which has not been denied by the carrier. Further, the Grit Blasting equipment is a tool and the housing thus becomes an integral part of such tool.

The majority in denying the compensation sought by the employes in Claim 2 of Second Division Award No. 3967 stated:

> "The Carrier admittedly violated Rule 2(b) in starting the second shift three hours later than 8:00 P.M. on December 9, 1958, without first attempting to reach an agreement with the Local Committee. When the Claim was filed the Carrier called the Local Committee on January 6, 1959, and conceded the violation, and at a conference on that day an agreement was reached for the new starting time.
>
> This claim is on behalf of the four employes affected, for time and one-half pay for the three hours worked after the regular assigned shift of 8:00 P.M. to 4:30 A.M., from December 9 to January 6, when the change was agreed to.
>
> No pecuniary loss or damage to Claimants is shown, and the Agreement does not provide for any arbitrary or penalty for this violation.
>
> It is a well settled rule of statutory construction that a penalty is not to be readily implied, and that a person or corporation is not to be subjected to a penalty unless the words of a statute plainly impose it. Tiffany v. National Bank of Missouri, 85 U.S. 409; Keppel v. Tiffin Savings Bank, 197 U.S. 356.
>
> The rule is equally applicable to the construction of contracts; for the parties can readily agree upon penalty provisions if they so intend, and the absence of such provisions negatives that intent.
>
> The Supreme Court of the United States said in L. P. Steuart & Bro. v. Bowles, 322 U.S. 398, that to construe a statute as imposing a penalty where none is expressed would be to amend the **Act and create a penalty by judicial action**; that it would further necessitate judicial legislation to prescribe the nature and size of the penalty to be imposed.
>
> Similarly, for this Board to construe an agreement as imposing a penalty where none is expressed, would be to amend the contract, first, by authorizing a penalty, and second, by deciding how severe it shall be. Not only are the parties in better position than the Board to decide those matters; they "are the only ones entitled to decide them. Consequently there have been many awards refusing to impose penalties not provided in the agreements. Among them are: Awards 1638, 2722 and 3672 of this Division; Awards 6758, 8251 and 15865 of the First Division; and 7212 and 8527 of the Third Division."

Please also see Second Division Awards Nos. 4086, 4254, 4819 and 4926.

The carrier is uninformed as to the arguments petitioner will advance in its ex parte submission and accordingly reserves the right to submit such additional facts, evidence and argument as it may conclude are required to reply to petitioner's ex parte submission.

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.

Carrier purchased a metal prefabricated building of 3/16" steel plating. Its size was 20"x20"x100", and was commonly referred to as a "Grit Blast Building." It consists of air blasting equipment, dust collecting system and motors, with weatherproof construction on the sides and ceiling of the building.

The building was erected and placed on a concrete foundation, with a pit and standard gauge track long enough to accommodate a freight car and room for six carmen to work.

The Grit Blast Building was erected and placed by Bridge and Building Department employes, and the Organization contends that this work was properly that of Claimants under Rule 83, the Classification of Work provision. Rule 83 provides:

"CLASSIFICATION OF WORK
Rule 83

"Sheet metal workers' work shall consist of tinning, coppersmithing and pipefitting in shops, yards, buildings and on passenger coaches and engines of all kinds; the building, erecting, assembling, installing, dismanteling for repairs and maintaining parts made of sheet copper, brass, tin, zinc, white metal, lead, black, planished, pickled and galvanized iron of 10 gauge and lighter, including brazing, soldering, tinning, leading, and babbitting, the bending fitting, cutting, threading, brazing, connecting and disconnecting of air, water, gas, oil and steampipes; pouring of brass.; oxyacetylene, thermit and electric welding on work generally recognized as sheet metal workers' work; and all other work generally recognized as sheet metal workers' work."

The Organization bases its contention on the last portion of the rule which reads: "and all other work generally recognized as sheet metal workers' work."

Rule 83 as well as the Memorandum of Understanding are unclear as to whether this work belonged to the Claimants. The question, therefore, is whether the erection and placement of the Grit Blast Building was "work generally recognized as sheet metal workers' work." The record fails to disclose that the erection of a structure which would normally be considered a "building" and big enough to allow a freight car and six employes to work in was that which was "generally recognized as sheet metal workers' work."

Claimants' burden of proof is not met with their reliance on Awards 3939 (building a scaffold) and 3952 (building a Diesel Repair Platform). See Award 1154.

AWARD

Claim is dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 25th day of June, 1970.

Central Publishing Co., Indianapolis, Ind. 46206 Printed in U.S.A.