Award No. 6046
Docket No. 5878
2-N&W-SM-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Gene T. Ritter when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L.—C. I. O. (Sheet Metal Workers)

NORFOLK AND WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the terms of the current Agreement, other than employes of the Sheet Metal Workers Craft, (B&B Carpenters) were improperly assigned to perform pipe work consisting of installation of new Sewer line and necessary fittings to floor level for toilet facilities, for new wash and locker room Erecting Shop, Roanoke Shops, Roanoke, Virginia, beginning on March 21, 1968 through April 2, 1968.

2. That accordingly the Carrier be ordered to additionally compensate the following employes of the Sheet Metal Workers' craft in the amount of two hundred and fifty six (256) hours at the straight time rate for this violation, to be equally divided among them.

Claimants: T. A. Garrison
G. A. Updike
C. R. Shifflett
E. H. Goad
E. M. Hairfield, Jr
D. H. Hendricks

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 shop, 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 shop since the building of the shop. Maintenance renewals and repairs to these facilities having been performed by the sheet metal workers' repair gang, Roanoke shops. Beginning on March 21, 1968, through April 2, 1968, the carrier in a modernization of

In conclusion, the carrier respectfully submits that the claim is not supported by the facts and evidence presented in carrier's submission and hereinafter shown as a summary. Accordingly, the claim should be denied.

CARRIER'S SUMMARY

1. Sheet metal workers do not **by rule** have the exclusive rights to the work claimed and no evidence was offered that Rule 84 does grant exclusive rights to sheet metal workers to perform the work involved herein.

2. MofW forces have been assigned to such projects in the many shops, offices and warehouses of this carrier continuously from the year prior to the craft agreement to the present claim.

3. Many prior Awards of the Second Division have held:

(a) The shop craft scope rule separates the work of each shop craft and does not give any craft the exclusive rights to all such work. See Third Division Award 615 and Second Division Awards 3871, 4875 and 5019.

(b) Past practice ante-dating the agreement supports carrier's right to assign work. See Second Division Awards 3277, 3300 and 4130.

(c) Management has certain rights and prerogatives to manage its affairs when not restricted by the agreement. See Second Division Award 3862.

(d) The Claimants all held regular assignments and suffered no loss. See Special Board 570 Awards (#3 dissent) and 5, 6, 8, 36, 37, 44, 53, 61, 97, 104 and 105. See also many Second Division Awards.

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.

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.

This dispute involves the question of exclusivity. The Organization relies on Rule 84, Classification of Work, of the current Agreement to establish their contention that Sheet Metal Workers had the exclusive right to install the sewer drain lines and necessary fittings in the wash rooms and

toilet facilities at the Roanoke Shop. Carrier authorized and permitted Maintenance of Way Craft employes to install these facilities over the protest of the local committee. Carrier contends that this work required breaking up a concrete floor with an air hammer, digging ditches, laying cast iron pipe, making certain connections and re-cementing the floor. In defense of this claim, Carrier states that there is third party interest, Maintenance of Way employes, and that notice should be given these parties prior to resolving this dispute; that the claim is vague as to work and hours claimed; that Rule 84 does not support the employes; that past practice supports the Carrier; and that the involved work did not come under the Mechanical Department and rightfully belonged to the Maintenance of Way Craft.

The Board finds that third party notice has been served on Maintenance of Way employes and that this Board has jurisdiction to consider and determine this dispute.

The Board finds that Sheet Metal workers performed work in the building, but that Maintenance of Way employes performed the involved work outside and under the building. This Board further finds that the pipe involved in this work was cast iron pipe which is not mentioned in Rule 84 (Classification of Work Rule). It has long been established by proper contract interpretation that when certain items are specified, none others will be implied. Therefore, for the reason that parts made of sheet copper, brass, tin, zinc, etc., are specifically set out in said Rule 84 and that cast iron is excluded, cast iron will not be implied. Also, no reference in said Rule 84 is made to sewer work.

The involved work was performed outside and under the building. Award 2316 (Wenke) distinguishes work performed in the building from work performed on, under or around the building.

Award 5831 and 5830 cited by the Organization involve installation of a steam line, not a sewer line. The steam line is specifically covered in the Classification of Work Rule. The Organization also cites Awards 5832 and 5763 which are distinguished as follows: Award 5832 involves the installation of toilets and wash basins in the building and Award 5763 covers propane gas which is referred to in the Classification of Work Rule.

Award 5951 has been carefully reviewed and found not to be in palpable error. This award involves the same parties and is found to be controlling in this instance.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

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

LABOR MEMBERS' DISSENT TO AWARD NO. 6046, DOCKET NO. 5878

This case involves a dispute between the Sheet Metal Workers' Union of System Federation No. 16 and the Norfolk & Western Railway Company as to whether the Union members, under the Collective Bargaining Agreement with the Carrier, were entitled to certain jobs (or compensatory pay) for time which the Carrier had unilaterally alloted to members of another union not covered by the Shop Craft Agreement.

The Carrier Members of this Division, voting with the referee, constituted the majority in making this erroneous award. We contend the referee erred when he ignored, or misconstrued, the specific language of Rule 84 — Classification of Work — Sheet Metal Workers:

> "Sheet metal workers' work shall consist of tinning, coppersmithing and pipe fitting in shops, yards, buildings, * * *"

and then proceeded to draw his own hypothetical line of jurisdictional or contract right to perform when he stated in pertinent part:

> "The Board finds that Sheet Metal Workers performed work in the building, but that Maintenance of Way employes performed the involved work outside and under the building. * * * The involved work was performed outside and under the building. Award 2316 (Wenke) distinguishes work performed in the building from work performed on, under or around the building."

The referee, in his desperate attempt to wrest from this craft what is rightfully theirs by agreement, twists and tortures the sustaining Award 2316 which dealt with an entirely different kind of work (flashing on a roof and metal cabinets) which the referee recognized as sheet metal workers' work. Here the Division transcends its authority of deciding a dispute on the unambiguous language and, in a sense, writes new rules which is not ours to deal with but is reserved for the unions and the carriers under Section 6 and others of the Railway Labor Act.

The referee also states in pertinent part:

> "It has long been established by proper contract interpretation that when certain items are specified, none others will be implied. Therefore, for the reason that parts made of sheet copper, brass, tin, zinc, etc., are specifically set out in said Rule 84 and that cast iron is excluded, cast iron will not be implied."

This type of reasoning has been rejected by this Division on many occasions and also rejected by the Supreme Court in Whitehouse v. Illinois Central R. Co., 349 U. S. 366 (1955).

> "* * * this Court cautioned against analogies drawn from other industries to railroad problems: 'Both its history and the interests it governs show the Railroad Labor Act to be unique. The railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making.' Garrison, The National Railroad Adjustment Board:

A Unique Administrative Agency, 46 Yale L. J. 567, 568-569. 349 U. S. at 371."

Further, the Supreme Court in an even more recent case dealing with the proper interpretation of a railroad contract rule in the settlement of a jurisdictional assignment, held:

"SUPREME COURT OF THE UNITED STATES

Transportation-Communication
Employees Union, Petitioner,
v.
Union Pacific Railroad Co.

(December 5, 1966)

* * * * *

"Petitioner contends that it is entirely appropriate for the Adjustment Board to resolve disputes over work assignments in a proceeding in which only one union participates and in which only that union's contract with the employer is considered. This contention rests on the premise that collective bargaining agreements are to be governed by the same common-law principles which control private contracts between two private parties. On this basis it is quite naturally assumed that a dispute over work assignments is a dispute between an employer and only one union. Thus, it is argued that each collective bargaining agreement is a thing apart from all others and each dispute over work assignments must be decided on the language of a single such agreement considered in isolation from all others.

"We reject this line of reasoning. A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts."

The referee's absurd interpretation of the unambiguous language found in Rule 84 does violence to the historic reasoning and agreement language which has been in existence and interpreted properly as far back as 1919 under the old United States National Agreement.

Dealing with the statement of the referee wherein he attempts to carve up and rest the pieces of his proverbial jigsaw puzzle by attaching meaning to the plate of metal language, i.e., **sheet, copper, brass, tin, zinc,** etc., being applicable to pipes and pipe fittings is an absolute miscarriage of justice. It is a complete display of his lack of understanding of railroad agreement language as well as the customs and practices within this unique society. There is no excuse for doing such violence to this historical language and creating a situation of composite railroad employe work to the disregard of craft lines, the proposition which the carriers have been unable to accomplish through negotiations under the provisions of the Railway Labor Act on a National basis.

Plate of metal description spelled out in the rule has nothing to do with pipes made, formed, or molded out of any kind of material.

When one considers the specific language, "pipe fitting in shops, yards, buildings," it is absurd to reason that if the pipe is outside of a building or under a building it then escapes the contract language of Rule 84. Logically, how could one work on pipes in the yard if he were not permitted to get out of the building?

The proper application to shops, yards, buildings principle in the industry was cited in numerous awards to this referee and just reaffirmed in a very recent Award 6056, Referee Harold M. Gilden. He states, among other things;

> "The unequivocal pronouncement in Rule 302 (the Sheet Metal Workers Classification of Work Rule) that 'Sheet Metal Workers' work shall consist of tinning, coppersmithing, and pipe-fitting in shops, yards and buildings * * *' refutes the notion that such performance is limited to the confines of the shop areas. Patently, the wording is broad enough to include the work covered therein when performed at the Transportation Yard. Simply stated, there is no support in the Sheet Metal Workers' scope rule for the distinction the Carrier is trying to draw between work allocations in the Transportation Yard and those in the Shop Areas.
>
> "Where, as here, contract language is clear and unambiguous, a conflicting custom or past practice does not serve to alter its plain meaning. Since Rule 302 is applicable to the work in question, it would follow that Sheet Metal Workers should have been assigned to the handling thereof."

For all of the foregoing reasons and awards cited, the principles of stare decisis should have weight enough alone to have sustained the Union in this instant dispute. Further, the referee's familiarity and experience with the Shop Craft rules, as well as the awards of this Division being sound of substance and correct in merit, should have provided the guide lines (Precedent Sub-Silentio) for him to have made a correct evaluation of the dispute and agreement language in this instant case.

We are compelled to dissent.

Robert E. Stenzinger

D. S. Anderson

E. J. McDermott

O. L. Wertz

E. H. Wolfe

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