

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

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/ A Division of TCU
(
(Duluth, Missabe & Iron Range Railway Company

STATEMENT OF CLAIM:

1. That the Duluth, Missabe, and Iron Range Railroad Company violated the terms of our current Agreement, particularly Rules 29 and 57.

2. That accordingly, the Duluth, Missabe, and Iron Range Railroad Company be ordered to compensate Carman D. J. Wayt in the amount of four (4) hours at the time and one-half (1.5) rate for September 3, 1986 account of supervisors assigned to perform work outside the scope of normal supervisors's duties.

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 employes 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.

As Third Parties in Interest, the Brotherhood of Maintenance of Way Employes and Transportation Communications Union were advised of the pendency of this dispute. The Brotherhood of Maintenance of Way Employes filed a Submission with the Division. Transportation Communications Union did not file a Submission with the Division.

This Claim concerns Carrier Supervisors performing work connected with dumping taconite tailings from air-operated dump cars. During the time-frame of this Claim, Carrier was hauling taconite waste to a location at which it did not have employees on duty. During the day, dumping was accomplished by Track Department employees represented by the BMW. During the afternoon shift, dumping was accomplished by Carmen. This arrangement did not generate objections by either Track Department employees or Carmen.

On September 3, 1986, a Supervisor performed the dumping operation, which resulted in the instant Claim.

Carrier's principle defense is that the work connected with this dumping operation was shared work and as such, Carmen do not have an exclusive right to the work. Additionally, Carrier contends that the Carmen's Classification of Work Rule does not specifically include work of dumping cars; accordingly, it cannot be considered as Carmen's work. Moreover, the Agreement permits the performance of work by Foremen at locations where Carmen are not employed.

The issue under review here and the arguments advanced by the parties are quite similar to those dealt with in Third Division Award 25991. There the Board stated:

"It is necessary to keep in mind precisely what is at issue. This is not a case in which work has been assigned to employees of one craft, classification or Organization as opposed to employees of another craft, classification or Organization nor is it a case in which work has been subcontracted to employees of an employer other than the Carrier. Rather we have a situation in which supervisory personnel of the Carrier performed work claimed by the Organization to be work reserved to its members by the Agreement. In this situation we find applicable Third Division Award 15461 which held:

'The applicable Scope Rule in the instant dispute is general in nature, and would not afford an exclusive claim on behalf of clerks to ticket selling duties and related clerical work if the question before us involved the performance of such work by telegraphers or other employees subject to labor agreements. However, Carrier here assigned such routine clerical work which is normally performed by employees subject to the Clerks Agreement to supervisory employees, who are not covered by any collective bargaining agreement...'"

In accordance with the above the Claim will be sustained, but at straight time rate.

A W A R D

Claim sustained in accordance with the Findings.

Form 1
Page 3

Award No. 11902
Docket No. 11452-T
90-2-87-2-135

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 1st day of August 1990.

CARRIER MEMBERS' DISSENT
TO
AWARD 11902, DOCKET 11452-T
(Referee Fletcher)

The Majority concluded that the issue and arguments advanced by the parties in the instant dispute were quite similar to those dealt with in Third Division Award 25991 and quoted extensively therefrom.

For the record, it is noted that the Brotherhood of Maintenance of Way Employees furnished that Award as part of its Third Party Response. Unfortunately, our Dissent to that Award was not furnished. Our Dissent thereto reads as follows:

"The Majority Opinion does not find that the Scope Rule reserves the work in dispute to the Claimants or that the work was reserved to Claimants by virtue of exclusive systemwide practice. Under consistent and long-standing precedent of this Board, the Organization having failed to carry its burden of proof, the claim should have been denied. Third Division Awards: 24853, 24739, 21586, 20018, to cite just a few.

The Claim was nevertheless sustained, not because Claimants did not perform the work but, rather, because supervisory personnel of the Carrier did. Thus, the Majority concludes that if the work had been performed by employees in another craft subject to a collective bargaining agreement it would have denied the claim. Such conclusion is not supported by reason or law. Nothing in the controlling Agreement or in the Railway Labor Act supports a conclusion that there is a variety of work which can be performed only by employees covered by labor agreements in the absence of such a limiting provision in the Agreement. There is no such limiting Scope Rule provision in the Agreement in this case, a fact which is recognized by the Majority.

The Award is clearly erroneous and we Dissent."

For the same reasons Award 25991 was "clearly erroneous," Award 11902 is clearly erroneous and we dissent.

Michael C. Lesnik

M. C. LESNIK

Robert L Hicks

R. L. HICKS

James E. Yost

J. E. YOST

M. W. Fingerhut

M. W. FINGERHUT

P. V. Varga

P. V. VARGA

August 2, 1990