Award No. 2357
Docket No. 2100
2-UP-SM-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO.105, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Sheet Metal Workers)

UNION PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement the Carrier improperly assigned other than Sheet Metal Workers to the erecting and assembling of sheet metal clothes lockers starting on or about March 4, 1954.

2. That accordingly the Carrier be ordered to:

a) Discontinue the use of employes other than employes of the Sheet Metal Workers Craft in performing the work of erecting and assembling sheet metal lockers.

b) Compensate O. A. Maxey and C. C. Simmons each in the amount of 12 hours at their regular rate of pay per hour.

EMPLOYES' STATEMENT OF FACTS: On or about March 4, 1954 in the Union Pacific yards at Los Angeles, California, sheet metal clothes lockers to be used by the Mechanical Department forces in their locker rooms were ordered assembled and set up by the B & B carpenters, who were assigned by the carrier over the protest of local committee.

This dispute has been handled with the carrier up to, and including, the highest officer so designated by the company, with the result that he has declined to adjust it.

The agreement effective September 1, 1949, as it has been subsequently amended, is controlling.

POSITION OF EMPLOYES: It is submitted that the action of the carrier in this dispute is contrary to the provisions of the rules of current agreement when B & B carpenters were assigned to work that is spelled out in sheet metal workers special rules, and especially Rule 109 of the aforementioned agreement.

"The Supreme Court, reviewing the judgment on certiorari, stated that it 'had been urged to resolve the present dispute regarding the requirement of notice to persons not formal parties to a submission to the Board, a dispute which had resulted in numerous conflicting decisions by the Board.' It observed 'This remains a perplexing problem despite the substantial agreement among Courts of Appeals which have considered the question in holding that notice is required to other persons in varying situations.' The cases are referred to in a footnote (3).

"But despite the urging, the Supreme Court chose to stay within 'the wise limitations on our function' and confined itself 'to deciding only what is necessary to the disposition of the immediate case.' It observed that 'Railroad's resort to the Courts has preceded any award and one may be rendered which could occasion no possible injury to it.' By divided Court it simply reversed the decree of injuncttion on the ground that prior to any proceedings brought by Telegraphers before the Board, 'the injuries are too speculative to warrant resort to extraordinary remedies.' The Court declined to adjudicate upon the merits of the controversy."

The District Court's decision that notice should have been given by the Adjustment Board was upheld and **Award 4734** held void and without force and effect.

(2) **The claim presented is without merit.**

The following discussion of the lack of merits to the claim here prosecuted is not a waiver of our position that the Board is without jurisdiction to consider the merits unless and until notice is given to the affected organization as set forth in the preceding discussion.

Claim is here made that certain work should have been performed by employes represented by the sheet metal workers' organization instead of by B&B carpenters. The work involved was the assembling of certain metal lockers at Los Angeles, California. In order that the Board have any basis whatsoever on which to sustain the claim presented, it must be given clear and convincing proof that the sheet metal workers have the exclusive right to perform this work on this carrier's property.

No such proof can be offered because the sheet metal workers do not have such exclusive right. We freely admit that, at times, the sheet metal workers have performed this work, but not on anything approaching an exclusive basis. As we show in the statement of facts, the B&B carpenters have also performed this work for many years. Thus, this work is not such that either can claim it to the exclusion of the other.

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.

The parties to said dispute were given due notice of hearing thereon.

The organization contends the carrier improperly assigned to and had employes, other than Sheet Metal Workers, perform the work of assembling and erecting sheet metal lockers. Based thereon it asks that we order carrier to discontinue the practice and compensate both O. A. Maxey and C. C. Simmons for 12 hours of pay at the regular rate applicable.

The facts on which this claim is based are as follows: On or about Thursday, May 27, 1954, some metal clothes lockers were delivered by carrier's Stores Department to its Bridge and Building Department where they were assembled by Bridge and Building carpenters and then installed in a new building located south of the engine house at Los Angeles, California.

Carrier first contends notice must be given to the Brotherhood of Maintenance of Way Employes, who represent the B & B Carpenters, before this Division would have authority to act, citing Section 3 First (j) of the Railway Labor Act, as amended, in support of that contention. This Division has neither jurisdiction of the class or craft of employes represented by the Brotherhood of Maintenance of Way Employes, which is lodged in the Third Division, nor does it have authority to interpret and apply the provisions of any agreement the organization may have with this carrier. Consequently we can see no useful purpose of serving them with notice of the pendency of this dispute nor do we thing it is necessary to do so. See Awards 1359 and 2316 of this Division to like effect.

The organization relies on Rule 109, "Classification of Work," of their agreement with the carrier as supporting the right of employes covered thereby to perform this work. It provides, insofar as here material, as follows:

> "Sheet metal workers' work shall consist of * * * the building, erecting, assembling, installing, dismantling 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 in connection with sheet metal workers' work. * * *."

We think the first part of the foregoing rule expressly covers the work here performed and, under the agreement, carrier contracted with the organization to have its sheet metal workers perform it. It should be understood we are not here dealing with buildings and other structures, as such.

But carrier contends an investigation developed that it has always been the practice on this carrier, at Los Angeles and other points, for B & B carpenters to assemble metal lockers, although not necessarily on an exclusive basis. Whatever may have been the practice in the past the organization, under a provision of its controlling agreement that is clear and specific in its terms, may, at any time, have it enforced according to its terms.

Carrier states that while Rule 109 does contain the words "assembling" and "installing," which is what was here done, that it is clear from the entire rule that such work is performable by sheet metal workers only when it includes building by brazing, soldering, tinning, leading, and babbitting, that is, fabricating of the parts to be assembled or installed and that it has been so applied by the parties for many years. We find no such words of limitation in Rule 109. In fact the word "including" contained therein would certainly not so limit the work but would have the opposite effect.

The organization, by 2(a) of its claim, asks that we order the carrier to "Discontinue the use of employes other than employes of the Sheet Metal Workers Craft in performing the work of erecting and assembling sheet metal lockers." We have no authority to direct a carrier as to how it shall conduct its operations. We only have authority to interpret and apply the agreements of these employes of which the Railway Labor Act gives this Division jurisdiction. If, in doing so, we come to the conclusion that carrier has given to certain employes the exclusive right to perform certain of its work, and has failed to have them perform it when it has such work performed, it must then pay to those who have lost the right thereto the value thereof which, generally speaking, is the pro rata rate applicable thereto. See Awards 1530, 1771, 1799, and 2316 of this Division.

The record does not disclose how many hours the B & B carpenters worked in assembling and installing these lockers. The claim should be allowed for that period of time at the applicable straight time rate.

AWARD

Claim sustained as per findings. In view thereof it is directed that the claim be returned to the property solely for the purpose of determining the number of hours consumed by the B & B carpenters in performing the work of assembling and installing the lockers.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December, 1956.