Award No. 3453
Docket No. 3405
2-AT&SF-SMW-'60

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Francis B. Murphy when award was rendered.

PARTIES TO DISPUTE:

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

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

That under the current Agreement and the Memorandum of Understanding effective January 1, 1950 others than Sheetmetal Workers assigned to the Carrier's Shop Extension Department were improperly assigned to install sand handling facilities at the Carrier's shop yards at Clovis, New Mexico.

Accordingly, the Carrier be Ordered to:

(a) Cease and desist from using others than Sheetmetal Workers assigned to the Carrier's Shop Extension Department to perform this work.

(b) Additionally compensate Messrs. Chas. Galvin, L. M. Underwood, C. A. Bowen, V. D. Borusheski, C. A. Collins and W. J. Williams at their regular established rates in the amount of time as shown on Carrier's records that it took these improper employes to perform this work.

EMPLOYES' STATEMENT OF FACTS: At a date within sixty (60) days prior to October 21, 1957 the carrier assigned sheetmetal workers assigned to the carrier's Water Service Department to install sand handling facilities at the carrier's Mechanical Department yards at Clovis, New Mexico. This work consisted of installing an underground sand storage tank, a blower system for elevating the sand from the underground tank to a tank placed in a tower approximately thirty five (35) feet above the tracks to serve sand to the various types of diesel locomotives. The agreement effective August 1, 1945 and the memorandum of understanding effective January 1, 1950 is controlling.

special water service gang for many years; that the employes have recognized the handling of this work by the Western Lines' special water service gang by their silence whenever such facilities were constructed in the past.

Carrier contends that the employes' claim is not supported by the cited provision of the Memorandum of Agreement dated December 21, 1949, by any rule of the controlling shop crafts' agreement nor by past practice.

Carrier respectfully requests that the employes' claim be denied in its entirety.

Without prejudice to, or receding from its position as previously stated herein that the claim of the employes in the instant dispute is without support under the agreement rules and should be denied, the carrier further respectfully directs attention to the repeated holding by the Third Division of the Adjustment Board that evidence of prior practice without complaint from the employes and their representatives is sufficient to warrant a denial of claims for penalties, even in the face of a rule which might require a sustaining award on the handling complained of. For instance, the following along those lines is quoted hereunder from opinion of Board in Third Division Award No. 4277:

> "With respect to part "C" it is our view that considering the acquiescence by the Organization in the arrangement over such a long period of time they are estopped from claiming compensation, accordingly that part of the claim is denied."

See also Third Division Award No. 7389 in that connection.

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 were given due notice of hearing thereon.

The carrier installed sand handling facilities at Clovis, New Mexico. Sheet Metal Workers assigned to the water service department performed the work.

The organization contends that the Memorandum of Understanding effective January 1, 1950 is controlling and that the work should have been assigned to the Shop Extension Forces (claimants) under Paragraph (a) of the Memorandum of Agreement.

The carrier has four (4) groups of Sheet Metal Workers assigned to perform sheet metal workers' work on the Western Lines position of its property. The two (2) groups involved in the dispute are namely "The Western Lines' Special Water Service Gang" and "Shop Extension Department Forces". In the carrier's submission they list eight other instances wherein sand handling facilities, such as the Clovis facility here in dispute, which are mechanical department facilities and were constructed by the Western Lines Special Water Service Gang. Five of these locations were

erected prior to January 1, 1950 and the other three were built subsequent to that date, without protest or claim from the Shop Extension Forces. Carrier also states that the Western Water Service Gang has been in existence for more than thirty (30) years and has performed identical major construction and/or repair work to that now in dispute in this case.

The organization bases its claim on the Memorandum of Understanding effective January 1, 1950, and contends that it amended the agreement effective August 1, 1945.

The claim is in two parts; (a) asks that the carrier be required to "Cease and desist . . .". This Board lacks authority to direct a carrier as to how it shall conduct its operation; we only have authority to interpret and apply the agreements of these employes of which the Railway Labor Act gives us jurisdiction.

Regarding part (b) of this claim: Item 23 of appendix B of the Agreement effective August 1, 1945 was amended by the parties effective January 1, 1950. Paragraph (a) explicitly provided that "Shop Extension Forces (claimants) will continue to handle such work as assembling, erecting . . . Sand Handling Facilities". Paragraph (b) states that "Shop Extension Forces shall install . . . for Mechanical Department . . .".

This Memorandum of Understanding is clear and unambiguous and regardless of past practice as stated by the carrier, it is binding upon the parties. This Division properly held in Award 2140 in part "It is only when a rule is ambiguous that accepted practice thereunder by the parties is controlling". The carrier insists that the use of the word "continue" in paragraph (a) expresses the intention of the parties and that the Water Service Gang who has done this work in the past should continue to do so, as the Shop Extension Forces are unable to continue work that they have not previously done.

We are unable to agree with this contention as the memorandum amending the August 1, 1945 agreement further classifies this work as Shop Extension Forces' work for the Mechanical Department in section (b):

> "Shop Extension Forces shall install, renew . . . all air, gas, oil and water lines for Mechanical Department equipment and facilities."

It is our opinion that there has been a violation of the agreement and we therefore order the carrier to compensate the claimants as provided under Rule 33 (e) of the shop craft agreement, beginning on August 22, 1957 at their regular established rates in the amount of time as shown on carrier's records until this work was completed.

AWARD

Claim (a) denied. Claim (b) sustained in accordance with above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 21st day of April, 1960.

DISSENT OF CARRIER MEMBERS TO AWARD NO. 3453

The claimants in this case at all times material to their claim were under pay and paid for work performed by them under the Agreement covering their work — a fact known to all participating in the award.

Item (e) of the Memorandum of Understanding effective January 1, 1950 to the controlling agreement, on which the Employes rely, takes care of a situation of this kind. That item is as follows:

> "(e) Employes of any of these classes may perform any of the above work when exigency of the service makes that **necessary or desirable**, it being recognized there must of necessity be sufficient latitude in allocating the work to avoid the imposition of an uneconomical condition or incurring serious delays in getting the work done." (Emphasis ours)

The Carrier found it **necessary** and **desirable** to act as it did in this case. The claimants were under **full employment** and in this circumstance the carrier availed itself of contractual means to avoid an uneconomical condition which, if not avoided, would have incurred serious delays in getting the work done. The rule quoted above certainly contemplated such a situation. The Carrier has been denied a proper application of its agreement with its employes, all of which was brought to the attention of those (Referee) making this award who, by design or not, did not fit facts confronting the parties to the rule controlling this particular situation. The claim should have been denied. We dissent.

D. S. Dugan

D. H. Hicks

M. E. Somerlott

P. C. Carter

R. P. Johnson