Award No. 4075
Docket No. 3848
2-MP-MA-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Carroll R. Daugherty when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (MACHINISTS)

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Missouri Pacific Railroad Company violated the current agreement when other than machinists were assigned to pack a water pump in the car department boiler room on Thursday, December 3, 1959.

2. That accordingly, Machinist B. B. Herron be compensated in the amount of two hours and forty minutes (2' 40") at the overtime rate.

EMPLOYES' STATEMENT OF FACTS: At the Neff Yard, Car Department facilities, Kansas City, Missouri, the Missouri Pacific Railroad Company, hereinafter referred to as the carrier, employs a maintenance machinist with hours of 7:30 A. M. to 11:30 A. M. - 12:00 Noon to 4:00 P. M., assigned to maintenance shop machinery and tools car department.

On Thursday, December 3, 1959, two water service employes were assigned by their supervisor to pack the circulating hot water pump in the car department boiler room.

Machinist Everett McGaugh, regularly assigned in the Maintenance Shop Machinery and Tools Car Department, with work week Monday through Friday, rest days Saturday and Sunday, was assigned to this job by Bulletin #136. Mr. McCaugh has performed this work since the assignment and the employes herewith submit his statement to substantiate this fact.

POSITION OF EMPLOYES: It is respectfully submitted that the clear and concise provisions of Rule 26 (a) and Rule 52 (a), reading in pertinent part:

"ASSIGNMENT OF WORK

Rule 26(a).

None but mechanics or apprentices regularly employed as such shall do mechanic's work as per special rules of each craft, . . ."

singled out this one pump as basis for their claim, but there is no reason for distinguishing it from the other pumps in the terminal which the Water Service employes maintain without objection. For the reasons stated, the claim must be declined.

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.

Here carrier assigned to a water service (Maintenance of Way) employe rather than to a machinist the routine, preventive repacking of a pump in a room used to heat and circulate water to and from the radiators in the office space at a new car repair facility in carrier's Kansas City yard. A machinist had been and was on claim date assigned to general repair and maintenance work at said facility.

Petitioner contends that said pump-replacing should have been given to a machinist because of the provisions of (1) Classification of Work Rule 52 (a), which include work on pumps; (2) Rule 26(a) and (b), which closely limits and specifies exceptions to Rule 52(a); and (3) the tripartite Memorandum of Agreement dated May 2 and 7, 1940, which (a) says in the May 2 part that, except for certain specified items of work, all pump repair work belongs to shop employes; and (b) in the May 7 part makes an unrelated and somewhat contradictory line of demarcation between pump repair work belonging to machinists and that belonging to water service employes.

As to Rule 52(a), the Division must hold that in general it does indeed give pump repair and maintenance work to machinists. But it cannot properly be found that said Rule makes an exclusive grant of this sort. This is because in Rule 26(a) and in the above-mentioned 1940 Memorandum the parties themselves have recognized certain exceptions, or tried to. Then the issue here must be resolved by determining whether the work complained of comes within the exceptions.

The exceptions set forth in Rule 26(a) are not involved here. This conclusion leaves to the Division the 1940 Memorandum. The language thereof, especially when the May 7 part is considered in relation to the May 2 part, leaves a great deal to be desired. As to the May 2 portion, the first paragraph says that all pump repair work is to be done by shop men, and the pump removal and repair exceptions are not applicable here. Then by itself the May 2 portion of said Memorandum might be said to support the claim herein (at least if pump replacing, which is maintenance, is as seems proper, considered broadly to be repair).

But the bilateral May 2 part does not stand alone. It must be considered in relation to the tripartite portion of May 7. The latter purports to affirm the May 2 agreement but then, after using the word "whereby," which can only mean that what follows is either an elaboration or a summary or an explanation of the May 2 agreement, runs off into an entirely different line of division

between pump repair work belonging to machinists and that belonging to water service employes. In other words, the "whereby" is not a proper "whereby" and what follows said word leaves nothing but confusion when considered in relation to the May 2 part. In fact, the substance of the language following "whereby" may be said to cast much doubt on whether in the May 7 portion the parties really meant to affirm the May 2 agreement.

It is, of course, easy to surmise what the parties had in mind when they wrote the May 7 language following the word "whereby." But the record of the instant case has no evidence thereon, as well as no evidence on whether the May 7 part of the 1940 Memorandum really was meant to affirm or replace the May 2 part.

In the light of all the above, the Division is required to conclude that, in respect to the particular work here at issue, the rules are at best ambiguous. Accordingly, the record must be searched for evidence on past practice.

But here too confusion reigns. Petitioner's submission contains a statement, signed by the machinist regularly assigned to the car repair facility, which says that he has been maintaining all mechanical work in the (car repair) boiler room and the instant water pump is in said room, thus implying that he has been maintaining said pump. Carrier counters by saying that (1) said machinist did not install the pump and never repacked or maintained it because the instant repacking was the first one done to the pump, and (2) carrier's Maintenance of Way Department, including water service employes, have been maintaining all buildings, including the car repair office facility, and have been repacking all pumps in the heating units of said buildings. Petitioner attempts to rebut by saying that carrier has thus now admitted numerous violations heretofore unknown to petitioner. But, it is significant to note, neither party has submitted real probative evidence in support of their assertions.

Faced with rules ambiguity and conflicting, unbuttressed statements on past practice, the Division has no alternative but to find that petitioner, who fairly must be said to have had the burden of presenting affirmative evidence, has failed here to support his contentions. Accordingly, a denial award must issue.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 15th day of November 1962.

DISSENT OF LABOR MEMBERS TO AWARD NO. 4075

Rule 52 (a) includes pump repair as machinists' work and the majority so concedes. They also concede that there are no exceptions in Rule 26 insofar as this claim is concerned.

It does, however, place erroneous importance on the May 7, 1940 Conference relative to the carrier's letter of May 2, 1940. It does not spell out exclusions to the specific language of Rule 52 of the controlling agreement.

The best evidence in support of the employes is the agreement between the Missouri Pacific Railroad and System Federation No. 2 and thus this award should have been in the affirmative.

The majority being in error compels us to dissent.

C. E. Bagwell

T. E. Losey

E. J. McDermott

R. E. Stenzinger

James B. Zink