Award No. 4220

Docket No. 4147

2-DM&IR-MA-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Harvey Daly when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 71, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Machinists)

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement, the Carrier improperly assigned other than Machinist to:

(a) Install and or apply a new cable to the boom and hook on mobile crane at Proctor Shops on December 15, 1960.

(b) Remove, clean, set gap and reinstall spark plugs on mobile crane at Proctor Shops on December 23, 1960.

2. That accordingly, the Carrier be ordered to additionally compensate:

(a) Machinist John Neault and Machinist Helper Waldemar Erickson in the amount of four (4) hours each at the applicable pro rata rate for the aforesaid violation on December 15, 1960.

(b) Machinist Arthur M. Severtsen for four (4) hours at the applicable pro rata rate for the aforesaid violation on December 23, 1960.

EMPLOYES' STATEMENT OF FACTS: At Proctor, Minnesota the Duluth, Missabe and Iron Range Railway Company, hereinafter referred to as the carrier, maintains shops and an enginehouse within the jurisdiction of its Maintenance of Equipment Department for the repair and servicing of its equipment.

Machinists John Neault and Arthur M. Severtsen and Machinist Helper Waldemar Erickson, hereinafter referred to as claimants, are regularly employed by the carrier in its Proctor shops as machinists and machinist helper respectively.

On or about December 15, 1960, carrier placed a mobile crane in its Proctor shops and assigned B & B Department employes to install and or apply a new cable to the boom and hook of the crane. The assignment of B & B

clusive right. The Agreement provides for a rate when and if the work is performed by Maintenance of Equipment employes. The Agreement does not say all such work will be performed by them. Furthermore, the record indicates that it has been the past practice to generally have these machines repaired by the manufacturers or Maintenance of Way employes. Also, the carrier has some 8 operating geographic regions and in 6 of these regions this work is performed by Maintenance of Way employes. The evidence offered by the Claimants simply does not support the claim that machinists are entitled to perform the work exclusively by practice. For many years part of the work has been partially farmed out to the manufacturers, or performed by employes other than machinists, according to the record in this case. We find from the record that the work involved herein is not under the terms of the Agreement, work belonging exclusively to the Machinists, and that the carrier did not violate the Agreement by assigning the work to others."

Award 3170 (Referee Abrahams) denied claim of machinists that others were improperly used to make repairs to gasoline engines, pneumatic tools and other machinery. Rules involved were similar to those in the present case. The findings read, in part:

"The dispute was raised by the claim of the employes that other than Machinists were used to make repairs to gasoline engines, pneumatic tools, and other machinery used in the Maintenance of Way Department and in other departments."

* * * * *

"The agreement involved does not have a specific scope rule. Rules 19 and 31 do not unequivocally cover the work involved as exclusively machinist work. Therefore, past practice can be shown as to the interpretation and application of the rule cited. By virtue of the past practice, as shown by the record, other than machinists were not improperly used to make said repairs."

CONCLUSION: Carrier submits that:

1. There is no rule or rules to support the claim.

2. Past practice most assuredly does not support the employes' position.
3. The claimants do not have exclusive right to the work in dispute.

4. The claim is in fact a request that the Board grant the machinist a new all-encompassing rule. That under such facts in the past, your Board has correctly held it is without authority to grant new rules.

5. Board awards sustain carrier's position.

Since the claim clearly is not supported by the current contract on this property, carrier respectfully requests that your Honorable Board sustain the position of the carrier in denying the claims of the employes as it has been clearly shown in the foregoing that there is no substance to the claims of the employes in this docket.

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 Claimants, Machinists John Neault, Arthur M. Severtsen, and Machinist's Helper Waldemar Erickson are Shop Craft Members regularly employed in the Carrier's Proctor Shops, Proctor, Minnesota, where the Carrier's equipment is repaired and serviced.

In July 1960 the Maintenance of Way Department purchased for departmental use a 15 ton off-track mobile crane—which was delivered in August 1960. On December 15 and December 23, 1960, repairs were made to the crane by Maintenance of Way Employes.

The Organization contends that the repairs to the mobile crane "were performed within the Carrier's Maintenance of Equipment Department Shops," and "that the work of maintaining engines of all kinds and cranes is reserved to Machinists" in keeping with the Scope Rule and Rules 32(a) and (f), 103 and 105 of the controlling Agreement.

The Carrier, on the other hand, contends that no rule of the controlling Agreement supports the Organization's position; Maintenance of Way employes perform the work of repairing and maintaining Maintenance of Way equipment; and that the Scope Rule of the controlling Agreement applies only to employes "in the Maintenance of Equipment; Marine; Communications Department; Electrical and Signal Departments of the Carrier."

Both the Carrier and the Organization agree that when machines are brought into or delivered to the Maintenance of Equipment Department for repairs and maintenance work that such work belongs to the Machinists of that Department.

First, we will try to determine where the repairs to the mobile crane were made.

There is no doubt that the crane was repaired. There is no doubt as to who repaired it; but there is considerable doubt as to where the repairs took place.

According to the Organization, "the mobile crane was placed in the Maintenance of Equipment Shops for repairs."

The Carrier, on the other hand, contends that the mobile crane was never brought in or turned over to the Maintenance of Equipment Department.

Both parties cannot be right. Neither can both parties be wrong. The crane was either repaired in the Maintenance of Equipment Department or it was not repaired in that Department.

However, in the absence of conclusive, or even persuasive, evidence to support either position, the Board is confronted with an enigma in credibility,

and, under such circumstances, it is not the function of this Board to appraise or evaluate the credibility of the testimony.

Because the record fails to establish whether or not the mobile crane was turned over to the Maintenance of Equipment Department for repairs, we must now determine—if the work in question is reserved to the Machinists of the Maintenance of Equipment Department by the rules of the controlling Agreement or by past practice.

The Scope Rule reads as follows:

> "It is understood that this agreement shall apply to those employes who perform the work specified in this agreement in the Maintenance of Equipment Department; Marine; Communications Department; Electrical and Signal Departments of the Carrier."

The above rule establishes the contractual rights of the employes of the five departments listed therein, whereas the previously mentioned rules (32(a) and (f), 103 and 105)—delineate the work contractually reserved to the Machinists.

The Maintenance of Way Department is not a party to the controlling Agreement. Consequently, the Organization must establish its right to the work in question through one of the other recognized and accepted methods of work assignment—namely—1) When work is turned over by one Department to another; and 2) When work is assigned to a department in keeping with an accepted past practice.

As we have previously ruled on the question of—whether or not the work involved had been turned over to the Maintenance of Equipment Department?—further comments are unnecessary.

On the matter of past practice, we find no comfort or support for the Organization's position. Neither on the property nor in its submission did the Organization contend past practice supported its position.

It is true that in its Rebuttal the Organization advanced the claim of past practice and even further supported its claim by citing repairs made by Maintenance of Equipment Department Machinists to two additional self-propelled, on-track Carrier cranes. Such proffered proof, however, is unacceptable to the Board because it is contrary to the relevant provision of Circular No. 1.

Accordingly, we must hold that neither past practice nor the rules of the controlling Agreement support the Organization's poistion.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois this 14th day of June, 1963.

LABOR MEMBERS DISSENT TO AWARD NO. 4220

It appears the majority has failed to pursue the entire record in this case.

Rule 103, Machinists' Classification of Work spells out the exact work in dispute:

> " * * * maintaining, dismantling and installing locomotives and **engines**, pumps, **cranes**, * * * ." (Emphasis ours.)

and Rule 32(a) definitely states that—

> " * * * none but mechanics or apprentices regularly employed as such shall do mechanics' work as per special rules of each **craft**, * * * ."

The only exception which was recognized by those negotiating the agreement was spelled out in paragraph (f) of this rule which certainly leaves no element of doubt that machinists' work does exist on "steam shovels, motor cars, ditchers, pile drivers, wrecking outfits and cranes" and that certain employes not covered by this agreement could make minor repairs to such equipment while on line of road.

Rule 27, Seniority, definitely projects that this carrier does not have point seniority, but division seniority and said employes' rights are confined to the Division and not to the shop point.

There is nothing in the agreement which confines this work to the shops which states that said work must be turned over to any of the crafts signatory to this agreement before they could perform same.

The referee states:

> "On the matter of past practice, we find no comfort or support for the Organization's position. Neither on the property nor in its submission did the Organization contend past practice supported its position."

It is apparent he failed to note Employes' Exhibit A of their submission which is a letter dated January 15, 1946, which certainly reflects a practice in the past and the Carrier's Exhibits E and H which definitely establishes the fact the employes did contend past practice while handling this subject matter on the property and such Exhibits did appear in the original submission.

It is further stated:

> "It is true that in its rebuttal the organization advanced the claim of past practice and even further supported its claim by citing repairs made by Maintenance of Equipment Department machinists to two additional self-propelled, on-track Carrier cranes. Such proffered proof, however, is unacceptable to the Board because it is contrary to the relevant provision of Circular No. 1."

This statement also indicates failure to fully evaluate the record as a whole and certainly strains the intent and purpose of Second Division Resolution of March, 1936 and Circular A of June 1936, as well as of Circular No. 1.

In clearing the way on this point one need only to refer to page 4 of the Carrier's submission where they state:

" * * * This position is fully supported by the practice which has been in effect for many years. It has continued in effect without claim until the instant claim was filed March 22, 1961. Carrier submits as proof of this long practice, affidavits from Maintenance of Way employes who have performed repair and maintenance functions to Maintenance of Way equipment."

The employes were compelled to cite instances and to point up errors in the carrier's incorrect contentions. This certainly should not have been construed as a violation of Circular No. 1. How else can the employes rebut the carrier's submission errors and mis-statements?

The majority did, however, fail to rule on the employes' protest of the Carrier's Exhibit N, certain affidavits as being in violation of the Board's rules.

Such gross error compel our dissent to this decision.

C. E. Bagwell

T. E. Losey

R. E. Stenzinger

E. J. McDermott

James B. Zink