Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7583
SECOND DIVISION Docket No. 7138-T
2-BNI-MA-'78

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

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(Burlington Northern Inc.

Dispute: Claim of Employes:

1. Carrier violated Rules 27, 50 and 51 and 98 of the Shop Crafts Agreement effective April 1, 1970, when it assigned Firemen Hostlers at Daytons Bluff Roundhouse (St. Paul) to make up and break up diesel locomotives operated in multiple unit consists and to perform related work on August 4, 5, 6, 7 and 8, 1975.

2. John P. Deshler, Machinist, Minneapolis Junction Roundhouse, be paid eight (8) hours computed at time and one-half rate on August 4 and 5, 1975; that Ray Pratt, Machinist, Minneapolis Junction Roundhouse, be paid eight (8) hours computed at time and one-half rate on August 6, 1975; and that J. A. Zorn, Machinist, Minneapolis Junction Roundhouse, be paid eight (8) hours at time and one-half rate on August 7 and 8, 1975.

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.

This claim relates to work at Daytons Bluff Roundhouse (St. Paul) to make and break up diesel locomotives operated in multiple unit consists and to perform related work on August 4, 5, 6, 7 and 8, 1975. The Machinists base their claim to this work on several grounds and essentially they rely on two contentions: first, they claim contractual provisions provide them exclusively rights to the work; secondly, they maintain by history and practice they have performed such work exclusively at all points where Machinists are employed on the former C.B. & Q. Railroad.

The claim has progressed on the property by exchanges of letters between the General Chairman and Carrier's Vice President. According to the Machinists they performed the work at all times at Daytons Bluff Roundhouse prior to July, 1970. At that time the Roundhouse was abandoned and from that date until July 1, 1975 Machinists who were employed in the Mississippi Street Diesel Shop (St. Paul) were transported by highway truck to Daytons Bluff Roundhouse and they performed such work. After July 1, 1975, Carrier began using hostlers for this work.

This Board has previously held that a carrier should be free to change its operations and effect economies so long as such actions do not run counter to its contractual obligations to its employes. The Machinists support their claim by citing Rules 27, 50, 51 and 98(c) of the agreement. We have reviewed these provisions carefully. Rule 51 describes the work of Machinists in general terms and it cannot be said it describes the work in question here with a degree of specificity sufficient to establish that Machinists with this Carrier have rights to such work to the exclusion of all other crafts. In addition, we are not inclined to view the awards cited by claimant as controlling precedents.

Under these circumstances it is up to the Machinists to establish that the work in question has historically and exclusively been performed by their craft system-wide. Award 6867 (Twomey). The Machinists produced an impressive number of exhibits in an effort to meet its burden of proof. These exhibits are arranged in three groupings of signed statements by Machinists. The first grouping, Exhibit A, involved three separate statements indicating Machinists had historically and exclusively hooked up and broke up diesel locomotives operated in multiple unit consists at Daytons Bluff. Exhibit B included six individual statements from Machinists who had been employed at Mississippi Street Diesel Shop and performed the work of making up and breaking up diesel locomotives operated in multiple unit consists at Daytons Bluff. It should be pointed out that these statements do not indicate that such work was performed exclusively by Machinists out of the Mississippi Street Diesel Shop during the period involved. The Carrier maintains this is a defect in proof. We have carefully reviewed the correspondence on the property and the Carrier considered these statements as efforts to demonstrate exclusivity. No effort was made to point up such defect on the property and we believe it is too late to raise it before this Board for the first time.

The third grouping, Exhibit C. include form statements from twenty locations, signed by individual Machinists stating the Machinists' Craft had exclusively performed the mechanical work and related duties when making up or breaking up multiple diesel unit consists at the designated locations on the former C.B. & Q. Railroad. The individual statements indicated the number of years the signer had been employed on the former C.B. & Q. Railroad and the Burlington Northern (the successor). Each

statement is signed and dated. The twenty-first statement (Exhibit C-18) provides different language to similar effect concerning Alliance, Nebraska and is wholly handwritten.

The Carrier's letter of November 17, 1975 from its Vice President acknowledged receipt of these exhibits in the following terms:

> "The statements attached to your letter of October 29 have also been reviewed but there is nothing in them except declarations, unsupported as they are, that demonstrates the exclusivity being sought."

The proceedings before the divisions of the Adjustment Board are not so technical that exacting and precise forms of proof are required. However, there are limitations as to the nature of the proof that can be accepted. The parties may not rely upon mere assertions. Some form of proof is required to sustain a position advanced. See Third Division Award 9609 (Rose). While on the property the Machinists submitted statements from employes who claim direct and personal knowledge of work practices covering substantial time periods. We find such proof is persuasive unless controverted by the Carrier on the property. The Carrier's initial response, in effect, made a general denial regarding these statements. The Carrier did not submit any contradictory evidence on the property until its letter of December 5, 1975 from Carrier's Vice President DeButts to General Chairman which states in pertinent part:

> "In further response to your letter I must advise you that I too have made a survey of past, as well as prevailing practices on the former C.B.& Q. portion of Burlington Northern regarding the making up and breaking up of diesels operating in multiple. This survey covers former C.B.& Q. installations in the Twin Cities Region, points on Alliance Division and Chicago Division, among others. The result of this sampling supports my previously stated position; i.e.,that machinists do not have an exclusive right to this coupling and uncoupling function on this particular portion of Burlington Northern (See attached statements)."

We must point out again that this Board has the responsibility to review the record developed and facts and arguments that were not advanced on the property cannot be raised before this Board for the first time. Such matters are outside the ambit of our consideration under numerous and well established decisions of this Board. When we relate this to the case at hand we must conclude the Carrier's defense must stand or fall based upon the evidence included in its sampling survey referred to

above. Our first question relates to the precise statements that were submitted on the property. The Machinists make reference to the letter from Vice President DeButts in their submission as Exhibit D-6 (Page 1). In addition they include an undated statement signed by Superintendent G. W Saylor which has a significant portion blocked out. This is designated Exhibit D-6 (Page 2). A second sheet is included which is headed Cicero, Illinois and dated November 25, 1975 and signed by Division Superintendent W J. Condotta and similarly has a significant portion blocked out. This is designated Exhibit D-6 (Page 3). We also note that the Machinists' submission to this Board makes reference to these documents in the following terms at record page 34:

> "The limited evidence presented by the Carrier in the form of two statements accompanying Mr. DeButts' letter of December 5, 1975 sustains the position of the Employes."

The Carrier's submission to this Board makes corresponding reference to the exchange of letters on the property. The December 5, 1975 letter is designated Carrier Exhibit No. 8. The Division Superintendent W. J. Condotta's statement dated November 25, 1975 is designated Carrier Exhibit No. 8a. We note that this version appears to be complete and no portion is blocked out. Superintendent G. W. Saylor's statement is designated Carrier Exhibit No. 8c and here we similarly note this version appears to be complete and no position is blocked out. In addition, the Carrier's exhibits include Exhibit No. 8b which purports to be a communication from Superintendent E. L. Phillips, Minneapolis, Minnesota, dated November 19, 1975 to T. C. DeButts and relates to work performed by Machinists and other crafts at Daytons Bluff Roundhouse before and after the merger and since July 1, 1975. Carrier's Exhibit 8c is not included in the Machinists' exhibits. The point we make here does not relate to the substance of Carrier's Exhibit No. 8b. Our concern is a matter of procedure and we are attempting to determine the state of the record while this matter was on the property. The question we raise is whether or not this sheet was an enclosure to the DeButts letter of December 5, 1975 on the property or was it an after-thought submitted as an additional exhibit in the submission to this Board. In this connection we note the DeButts' letter does not specifically refer to this document. Moreover, the Machinists' submission does not include it and their reference to "two statements" indicates it was not part of the record on the property. If it was merely a matter of excluding Carrier's Exhibit No. 8b from our consideration we would do so but we view this in a different sense.

Further, we are unable to determine whether these exhibits when submitted on the property have portions blocked out and, if so, by whom was this done. Neither side has made a point of this. The Machinists, for

their part, have argued that the Carrier had not produced the complete results of its survey. We must agree. This Board has found it necessary, on occasion, to reject arguments or evidence that is unclear and undeveloped on the grounds the Board should not be forced to speculate or presume.

The Carrier's sampling survey, even when viewed in its best light, involves ambiguities in that we are not clear as to the work and the time period covered. In addition, the two statements by Carrier's superintendents arguably are not proof. They are assertions by high level Carrier officials. It follows, based upon the view we take of this record that the Carrier's statements purporting to be a sampling survey are incomplete, unclear and undeveloped and are not acceptable as proof. It follows that the Machinists' proof stands unrefuted. Insofar as it appears to be complete and comprehensive we must sustain their position that the work claimed here has been performed historically and exclusively by Machinists system-wide on the former C.B. & Q. Railroad at points where Machinists are employed including Daytons Bluff Roundhouse until July 1, 1975.

There are additional questions to be considered. Other crafts have been noticed and provided an opportunity to make submissions concerning the work considered in this docket. Only the electricians saw fit to respond with a submission. Although their position calls for a dismissal of the Machinists' claim we view the thrust of their arguments as primarily protective of the work of their craft which could be affected by an overly broad finding as to work of Machinists in this decision. We rely upon the Machinists' position before this Board which maintains unequivocably it makes no claim to electricians' work. With respect to the Carmen's submission we believe their concern relates to work other than that which is involved here and it follows their position and arguments are not relevant. In addition, the work was assigned to hostlers at Daytons Bluff Roundhouse subsequent to July 1, 1975 and this record includes a letter from the head of the UTU clearly stating that craft makes no claim to this work.

Based upon these conclusions we find the Machinists have satisfied the burden of proof imposed upon them and have established that assignment of the work of making up and breaking up diesel locomotives operated in multiple unit consists and related mechanical work at Daytons Bluff Roundhouse should have been made to Machinists on August 4, 5, 6, 7 and 8, 1975.

The Carrier alleges that to sustain a monetary award in favor of Machinists on those dates would involve imposition of a penalty which is not authorized by this agreement. If such an award is a penalty payment we would accept Carrier's argument and deny the monetary award. There is no provision for penalty payment in this agreement and we are not presented with a basis for implying such a provision. We do not see this as a

penalty. This claim is presented on behalf of Machinists whose off days corresponded with the dates the work was performed by hostlers. In effect, the improper assignment of this work to a craft other than Machinists deprived these employes of demonstrated opportunities for earnings on their off days at overtime rates. See Rule 4. They have made it clear in this record they were available and this award allows them compensatory damages for this contract violation. In no sense can it be viewed as a penalty.

Accordingly, we conclude the assignment of work on the dates indicated violated the agreement as modified by practices on this Carrier as described in this opinion.

A W A R D

Claim sustained in accordance with the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 12th day of July, 1978.

file - 2nd Div.

CARRIER MEMBERS' DISSENT TO AWARD 7583
(Referee Walter C. Wallace)

This claim involved an asserted right of Machinists to make up and break up locomotives from or into multiple unit consists at Dayton Bluffs Roundhouse at St. Paul, Minnesota. The Petitioner recognized that work of this nature was not explicitly mentioned in the Classification of Work Rule, but contended that it came under the "...all other work generally recognized..." provisions of the Rule. For the following reasons, we register our dissent and will show that the decision is in palpable error:

1. The claim should have been dismissed since the claim involved a work jurisdiction question between more than two crafts properly resolvable under Rule 93 of the agreement.

Rule 93 of the Agreement is a specific rule designed to resolve work jurisdiction issues between various shop craft unions before appealing the dispute to the Adjustment Board. As was noted in the record, there was no attempt to resolve this dispute pursuant to the provisions of Rule 93 prior to its appeal to this Board, and, consequently, the proper procedures for resolution were not followed. The International

Brotherhood of Electrical Workers, a third party to this dispute who submitted evidence establishing that they too had performed this work, were wronged by this decision. They raised the fact that Rule 93 had not been complied with, and plain and simply, it was an error for this Board to make a determination of the merits of this case absent such a showing. This point has been made unmistakably clear in Awards 6962, 7368 and 7471, interpreting Rule 93 between these same parties.

2. Based upon the evidence of custom, practice and tradition, the Machinists did not enjoy the system wide, exclusive right to perform the disputed work on the former Chicago, Burlington and Quincy Railroad (now a part of the Burlington Northern System).

The majority went far afield in its attempt to glean support for finding that the claim should be sustained. In doing so, it ignored the basics of prudent reasoning and fair play.

Initially, the majority seems to attack the blanked out portions of letters from two BN superintendents, as they appeared in the Employes' Exhibit D-6, but nothing at all is noted by the majority that the Carrier's Exhibits 8a and 8c were the same letters from the superintendents and contained no blanked out portions on those letters. They were

the same as attached to the Carrier's letter of December 5, 1975. The Carrier cannot be successfully faulted by failure of the Organization to include in its sheaf of exhibits full copies of the letters from the superintendents which the Carrier very properly furnished to the Organization and which the Carrier very properly made part of its exhibits in its submission and rebuttal.

Moreover, the majority completely disregarded the credibility of the superintendents' letters, the contents of which, says the author of the findings, have no bearing on the case because they are "assertions by high level carrier officials." Those superintendents were simply and very correctly stating the factual situation then and now at locations on the former CB&Q. Each and all shows the practice where machinists, carmen, laborers, foremen, electricians and hostlers perform the functions used as a basis for this claim. The superintendents had nothing to gain except the preservation of pre-existing rights under Rule 98(c) and told it like it is.

The majority correctly recognized that it is necessary, to sustain the Petitioner's burden of proof in cases like this, "...to establish that the work in question has historically and exclusively been performed by their craft

system wide." This principle was established between the parties in Award 6867 (Twomey). Based upon the evidence provided by all of the parties to this dispute, the Petitioner could not have met this burden. In addition to the evidence presented by the Carrier which the majority wrongfully discounted, there were statements from electricians located at various points on Carrier's former CB&Q property which attested to the fact that they had performed this work. In fact, there was even a transcript of a disciplinary hearing where an electrician was being investigated for the alleged improper performance of the duties in question, connecting and disconnecting locomotives in multiple service. Pursuant to the mandate in the Supreme Court's decision in TCEU v. Union Pacific (No. 28, December 1966), this Board was obligated to give the Electrical Workers notice of the pendency of the dispute and to consider their evidence and arguments in reaching a decision on this case. The notice was served, but the evidence and arguments presented by the Electrical Workers quite obviously were ignored.

In conclusion, based upon the foregoing evidence and criteria, it is clear that this Board erroneously concluded

that the Petitioner enjoyed a system wide exclusive right to perform the work in question. In the face of not only Carrier's evidence, but also evidence submitted by the Electricians, such evidence as submitted by Petitioner could not stand. The decision is in error and without foundation in reason, fact or evidence, and we are compelled to register a vigorous dissent.

John W. Gohmann

James E. Mason

Berry K. Tucker

Gilbert H. Vernon