Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8000
SECOND DIVISION Docket No. 7769-T
2-BNI-EW-'79

The Second Division consisted of the regular members and in addition Referee Abraham Weiss when award was rendered.

Parties to Dispute: (System Federation No. 7, Railway Employes' Department, A. F. of L. - C. I. O. (Electrical Workers)
(Burlington Northern Inc.

Dispute: Claim of Employes:

1. That in violation of the current agreement, the Burlington Northern Inc., arbitrarily, and on a continuing basis, assigned work rightly to System Electricians (Wiremen) M. G. Miller, A. O. Antrim, S. R. Martin, L. L. Wells, J. D. Lawson, C. D. Willcoxon, G. W. Youngquist and M. J. Voecks headquartered at Lincoln, Nebraska, to employees of the Burlington Northern Signal Department, Crew number 485-367.

2. That accordingly, Burlington Northern Inc., be ordered to compensate System Electricians (Wiremen) M. G. Miller, A. O. Antrim, S. R. Martin, L. L. Wells, J. D. Lawson, C. D. Willcoxon, G. W. Youngquist and M. J. Voecks at punitive rate for all such hours worked by Signal Department employees, in the instant dispute, in violation of the Electricians Agreement. Claimants to share equally in the award.

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.

On October 19, 1976, Carrier began the installation of electric switch heaters on its coal route between Lincoln and Milford, Nebraska -- former CB&Q territory. It assigned the work to Signal Department employees "in keeping with the preexisting practice on the CB and Q".

A claim was filed in behalf of eight electricians contending that the work should have been performed by them.

In support of its claim, Petitioner cites the following:

1. A Memorandum of Agreement dated December 18, 1975, paragraph 2, amended paragraph (d) of Rule 50 to include "electric switch heaters". Rule 50 is the electricians' Scope Rule and paragraph (d) thereof describes the work of electricians.

2. Paragraph 4 of the December 18, 1975 Memorandum provides that:

> "In the application of Rule 63 of the agreement covering Communications and Electrical Department employes and Rule 98 of the agreement covering Mechanical Department employes, these amendments shall be treated as though they were included in the rules as of the dates of the respective agreements."

Rule 63, Effective Date and Changes, states that the Agreement "shall be effective April 1, 1970". Paragraph (c) thereof reads:

> "(c) It is the intent of this Agreement to preserve pre-existing rights accruing to employees covered by the Agreements as they existed under similar rules in effect on the CB&Q, NP, GN and SP&S Railroads prior to the date of merger; and shall not operate to extend jurisdiction or Scope Rule coverage to agreements between another organization and one or more of the merging Carriers which were in effect prior to the date of merger."

3. The Signalmen's Scope Rule on the former CB&Q makes no mention of electric switch heaters, which are not signals or crossing protection devices nor appurtenances thereto. In this regard, Petitioner cites Second Division Award 4613 (Williams) which sustained a claim by Electricians for the installation of "electrically operated Rail Switch Heaters" on the finding that "We are not convinced that the heaters are such an integral part of the signal system that they can be classed as appurtenances to it".

Carrier defends its assignment of the disputed work on the grounds that "Electric switch heaters are an integral part of the Carrier's Centralized Train Control System (CTC)" and that "when electric switch heaters were installed on or near switches on the former CB&Q, they were installed and maintained by employees represented by the Brotherhood of Railroad Signalmen".

Carrier states that neither the Signalmen's nor Electrician's Scope Rules on the CB&Q listed switch heaters per se, but that Signalmen performed the work on them. It asserts that electricians did not install and maintain electric switch heaters on the former CB&Q.

With respect to the amendment to Rule 50(d) of the Agreement, cited by Petitioner. Carrier asserts that the amendment was added to the agreement in recognition that work on switch heaters on the former Great Northern Railroad was done by electricians. Carrier adds that the amendment did not give electricians the exclusive right to work on switch heaters but covered only work done by past practice by electricians and that the amendment did not extend the scope of that rule to include work previously performed by another craft. It refers to the Signalmen's Scope Rule on the Burlington Northern which covers, among other work:

> "D. Blower, gas, electric or other types of automatic snow removing systems permanently located at switches."

Carrier construes paragraph 4 of the 1975 Memorandum to mean that Rule 63(c), the preservation of work rule, is applicable to the amendments in the December 18, 1975 Memorandum; that paragraph 4 continued to preserve the application of Rule 63(c) to the jurisdiction of work between the crafts; and, accordingly, the Signalmen's pre-existing rights to the work in question are preserved.

Carrier denied the claim on the grounds that Rule 63(c) preserved the pre-existing rights of the signal employees on the former CB&Q to perform this work since they had done so prior to the merger.

Carrier concludes its argument on this point by stating, in its Ex Parte Submission:

> "Had the parties intended that the inclusion of the words 'electric switch heaters' in paragraph 2 gave exclusive system-wide right to work on them to the electricians, they would not have specified that Rule 63 was applicable to the Memorandum."

The Brotherhood of Railroad Signalmen, as an interested party, was notified of the pendency of the instant case and was afforded an opportunity to appear.

We are confronted with several inconsistencies, contradictions, and conflicts in the positions and submissions of the parties, not only as to whether, in fact, electric switch heaters were used on the CB&Q prior to the merger but also as to which craft, if any, installed such heaters on the CB&Q, and whether switch heaters were included in the scope rule of the contending organizations.

The Organization's Rebuttal to Carrier's Ex Parte Submission and to the Signalmen's Response is that prior to the merger switch heaters on the former CB&Q property were operated by gas and propane and even then electricians installed the igniters for that equipment. It argues that the changeover from gas to electric after the merger squarely placed the installation and

maintenance of electric switch heaters under the scope of the Electrician's agreement by virtue of the December 18, 1975 Memorandum of Agreement which added "electric switch heaters" to the Scope Rule 50(d). Given this assertion that there were no electric switch heaters on the former CB&Q prior to the merger, Petitioner's failure to assert that its members installed electric switch heaters on that property is understandable.

But we are also confronted by a statement of Carrier's top official with authority to handle claims on the property, denying the claim, that official stated:

> "When electric switch heaters were installed on or near switches on the former CB&Q, they were installed and maintained by employees represented by the Brotherhood of Railroad Signalmen."

He added:

> "... employees represented by the International Brotherhood of Electrical Workers did not install and maintain electric switch heaters on the former CB&Q."

Petitioner categorizes this latter statement as "unsupported by facts and completely untrue and misleading", but offers no supporting evidence.

The Brotherhood of Railroad Signalmen, as interested Thirty Party, stated to this Board that:

> "Signal employes on the former CB&Q performed work on electric switch heaters to the exclusion of all others."

Petitioner calls this Signalmen's statement "an unsubstantiated contention", without further amplification or evidence.

In its Ex Parte Submission Carrier states that "neither the Signalmen's or Electricians' scope rules on the CB&Q listed switch heaters but signalmen performed the work on them". In the very next paragraph on that page, Carrier states "Installation of switch heaters was covered by the signal employees' agreement on the CB&Q ...". And in the following paragraph we find the statement "The signalmen's scope rule on the CB&Q did not specifically list switch heaters...". On page 9 of the Submission Carrier states: "Since installation of switch heaters was covered by the signal employees' agreement on the CB&Q, ...". We find it difficult to reconcile these apparently conflicting statements.

The Carrier, in stating its position, maintains that electric switch heaters are an integral part of the Company's Centralized Train Control System (CTC). If that be so, and other Awards of this Board have found this not to be the case, it could be argued that the Carrier abandoned its

position by including electric switch heaters in the Scope of Work of the electricians' craft in the 1975 Memorandum.

Based on the record, it would appear that neither Organization's Scope Rule on the former CB&Q made reference to switch heaters, and that neither Organization had an exclusive right to the work claimed; that if, in fact, there were no electric switch heaters on the former CB&Q property prior to the merger, neither Organization could have done the work; and, in effect, no "past practice" existed.

This recitation of the conflicting statements submitted by the various parties highlights the problems facing this Board in making its decision. As in many other cases before this Board, we are called upon here to make a decision on the right of a particular craft to perform certain work in the absence of demonstrable facts and citations (time, place, names of individuals) of specific installations or performance of the work in dispute. No party in this case has submitted any concrete or probative evidence of practice on the former CB&Q relating to the installation or maintenance of electric switch heaters, other than bare statements or mere assertions, which in some instances have been denied, but without countervailing substantiation or evidence.

In a word, we can only guess at the pre-merger situation on the CB&Q as to which craft installed electric switch heaters, if in fact, electric switch heaters were in use on that property prior to the merger which culminated in the BN.

We have carefully reviewed the many awards cited and furnished us. We find them not germane.

Petitioner relies heavily on Second Division Award 4613, which sustained a claim by electricians. That Award is distinguishable on several grounds, however, from the fact situation herein. The case decided in Award 4613 involved a claim by electricians over "switches fired by Propane Gas", not electric switch heaters. In addition, no preservation of work rule similar to Rule 63(c) was involved and electricians had been assigned to the installation of the switch heaters originally. In the instant case, electricians, insofar as can be determined, did not perform the work of installing switch heaters on the former CB&Q prior to the merger.

Award 4613 also stated, in response to the Carrier's argument that switch heaters are part of the CTC System and hence within the duties of Signal employees, that "We are not convinced that the heaters are such an integral part of the Signal System that they can be classed as appurtenances to it".

A subsequent Award by the Third Division on the same property (Award 20320) found that switch heaters are an integral part of the Signal System and that the work rightfully belonged to Signalmen.

Other Awards cited or supplied are not helpful in that the work in dispute in those cases involved gas heaters, kerosene hot air heaters, gas lines connected to switch heaters, installation of power feed to TFM Carrier equipment located in signal houses and used exclusively for the transmission of signals received from "Hot Box" detectors, circulating hot water type operated from an automatic oil-fired boiler, etc.

Carrier relies on Second Division Awards 6867 and 7083, on this property, which involve the relationship between the Scope Rules and the "preservation of work" Rule 63(c).

In Award 6867 the Board denied a claim by the Sheet Metal Workers on the grounds that their Classification of Work Rule on the prior carrier was general in nature which did not confer exclusive jurisdiction to the disputed work to the Sheet Metal Workers and that the Sheet Metal Workers had not demonstrated that the work in question had historically and exclusively been performed by Sheet Metal Worker employees system-wide.

In Award 7083, the Board sustained a Sheet Metal Workers' claim on the grounds that the agreement on the carrier before the merger "granted the work in question to SMWIA employes with the requisite clear, definite and unambiguous language", that the rule "did specifically grant the SMWIA employes the exclusive contractual right prior to merger"; and, therefore, the SMWIA was entitled, subsequent to the merger, to the work to which they were contractually entitled prior to merger under language identical to Rule 63(c) in the instant case, even though evidence was furnished that employees of another Organization had actually done the work prior to merger.

A close reading of these two Awards indicates that they are distinguishable from the instant case. In the case at bar, neither Organization had "clear, definite and unambiguous language" in its pre-merger agreement which granted it exclusive jurisdiction over the work in question. In addition, neither Organization has clearly demonstrated that it had been performing the disputed work on the CB&Q prior to the merger.

What weight, then, are we to give to the fact that the Electricians and Carrier agreed in the 1975 Memorandum of Agreement to add "electric switch heaters" to the electricians' Classification of Work Rule? Carrier states that "the amendment to Rule 50(d) was added to the agreement in recognition that work on switch heaters on the Great Northern Railroad was done by electricians". We find no refutation of this statement made by Petitioner.

Neither Organization has demonstrated an exclusive right to the work.

Both Carrier and the Signalmen's Organization have stated in the record that the work in question -- installation of electric switch heaters -- was, in practice, performed by signal employees. Petitioner has not, in the record before us, shown by demonstrable evidence that such was not the

case. Nor can we find in the record any probative evidence that electric switch heaters were not in use on the former CB&Q prior to the merger.

Petitioner has not refuted Carrier's assertions as to the reasons for adding "electric switch heaters" to the Electricians' Scope Rule, Rule 50(d), in the 1975 Memorandum of Agreement. Petitioner's contention that paragraph 4 of the 1975 Memorandum of Agreement did not nullify the preservation of work Rule 63(c) was not effectively rebutted by Petitioner. Both the Electricians' and Signalmen's agreements contain a preservation of work rule which preserves pre-existing rights on predecessor railroads prior to their merger into the present BN. Accordingly, the pre-existing practices on the CB&Q -- the performance of the work in dispute by Signal employees -- are preserved by paragraph 4 of the December 18, 1975 Memorandum of Agreement as applied to Rule 63(c). Rule 63(c) preserves the work for Signalmen, who, insofar as can be determined, performed the work on the CB&Q. Therefore, we will deny the claim.

A W A R D

Claim denied.

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 18th day of July, 1979.