Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11642
SECOND DIVISION Docket No. 11276-T
89-2-86-2-93

The Second Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen of the United States and Canada
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

1. That the Burlington Northern Railroad violated the terms of the controlling agreement, specifically Rules 27(a), 83 and 98(c), when they assigned Carmen's class of work freight car repair to Maintenance of Way employes.

2. That accordingly, the Burlington Northern Railroad be ordered to compensate Rocky Mountain Seniority District Carman E. C. Wood eight (8) hours at the punitive rate of time and one-half.

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 employes 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.

On May 22, 1985, a claim was filed on behalf of Claimant who held regular assignment at the Carrier's Laurel, Montana facility. The claim alleged that two Maintenance of Way Employees were observed doing Carmen's work on BN cars 965952 and 961463 on March 29, 1985. The work consisted in "changing rollers and welding roller shafts on both cars." The claim stated that the work should have been "performed by Carmen" in accordance with Rule 83. Relief requested was eight (8) hours at time and one half.

In response the Carrier's Chief Mechanical Officer denied the claim on grounds that the work was historically performed "not only by Carmen, but also by Machinists and ribbon rail plant employees (Maintenance of Way Employees)."

When this claim was docketed before this Board the Brotherhood of Maintenance of Way Employes was notified and did respond. This Organization advised that it would not "make submission or other representation with respect" to the claim.

The Rule cited by the Organization is the following, in pertinent part:

> "Rule 83. Classification of Work
>
> Carmen's work shall consist of:
>
> (a) inspecting, building, repairing fabricating, assembling, maintaining, dismantling for repairs, upgrading of all cars and cabooses, wrecking service at wrecks or derailments subject to Rule 86;
>
> * * *
>
> (g) welding, fusing, brazing, soldering, tinning, leading, bonding, cutting, burning, in connection with carmen's work by use of such processes as oxyactetylene, electric, thermit, heli-arc, tig and any other process;"

In subsequent handling of the claim on property the Organization submitted for the record statements by Carmen with long tenure at the Laurel carshop who stated, among other things, that they did work of the type for "the past twenty years."

A review of the record shows that the Carrier never denies that the disputed work was done by Carmen at Laurel. It simply holds that Carmen were not the only craft who did this type of work.

With respect to prior practice the Board finds the evidence presented by the Organization---which are statements by Carmen working at Laurel---to be less than sufficiently probative to sustain a claim such as the instant one. The statements say that Carmen have done this type of work; one statement adds the sentiment that the Carman writing it feels like the work belongs only to Carmen; another statement says that if others besides Carmen had done this type of work in the past it was not with Carmen "knowledge or consent." The record does not sufficiently support the evidentiary burden in this claim as the Organization must do as moving party (Second Division Awards 5526, 6054; Fourth Division Awards 3379, 3482; PLB 3696, Award 1). The evidence shows that Carmen have often done this work; perhaps most of the time. But it does not show that the work was not shared with others.

The parties also address the question of whether rail rollers on ribbon rail cars are integral to the cars or not, per application of Rule 83. Both sides cite Awards and Dissents thereto dealing with issues such as auto racks on cars, work related to dismantling freight cars for scrap, and so on (See Second Division Awards 4515, 4598, 8542; and more recently, 11157, 11260). The Board need not rule on this issue absent sufficient evidence that Carmen had not shared the specific work at bar with other crafts in the first place.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of January 1989.

LABOR MEMBERS DISSENTING OPINION TO
AWARD NO. 11642, DOCKET NO. 11276T
(Referee Edward Suntrup)

The Majority erred in their decision to deny the Employes claim, in that they failed to properly consider the clear language of the Classification Of Work Rule, but instead relied on the unsupported statement made by the "Carrier's Chief Mechanical Officer" who had "denied the claim on grounds that the work was historically performed "not only by Carmen, but also by Machinists and ribbon rail plant employees (Maintenance of Way Employees)."

The Employes, as pointed out in this Award, submitted three statements from long term Carmen employes that clearly show Carmen have done this work exclusively for at least 20 years on this property.

The Majority erroneously states:

> "With respect to prior practice the Board finds the evidence presented by the Organization--- which are statements by Carmen working at Laurel--- to be less than sufficiently probative to sustain a claim such as the instant one."

Such a statement flies in the face of other Board Awards that recognize statements such as these to be evidence that would support this type of claim. In Third Division Award No. 26162, Referee George Roukis held that:

> "The Organization has established a prima facie case via the written statements of the three long service employees that said work was performed by employees in the Roadway Machine Department, and these affirmations have not been persuasively rebutted by Carrier."

Also of Third Division Award No. 27320, Referee John E. Cloney held:

> "The four statements submitted by the Organization are evidence that the disputed work was assigned to Dispatchers from the origin of the TOMS and CADS program until April 13, 1984. Carrier did not refute these statements on the property. While Carrier does contend the language regarding "other clerical duties as may be assigned" in the 1979 bulletin covers the work, it is clear that this work did not exist in 1979 or in 1981 when Carrier states the Clerk began doing it. Based on the statements of the employees we conclude the work was assigned to Dispatchers when originated in 1983. We further conclude the work falls within the meaning of the term "such work" as used in the January 7, 1983, Agreement. Accordingly, when so assigned, it became work of the Dispatcher craft under terms of that Agreement."

and in Third Division Award No. 27185, Referee Eckehard Muessig held:

> "The employees on the property furnished statements asserting they have performed brush cutting. The Carrier countered by labeling such statements as self-serving, asserting again that the employees had never performed this work exclusively, but did not furnish any specifics as to when and where others may have performed brush cutting in support of an asserted past practice."

As in Award No. 27185, no where in the record on the property has the Carrier submitted statements and/or provided any specific information as to when or where other than Carmen have ever performed this work.

The Majority goes on to use Second Division Awards 5526, 6054; Fourth Division Awards 3379, 3482; P.L.B. 3696, Award No. 1, none of which have statements from Employes' that claim the work to be exclusive to their Craft, unlike this case.

For these reasons Award No. 11642 is erroneous and does not serve as any precedential value, and the Labor Members vigorously dissent:

R. A. Johnson

M. Filipovic

D. A. Hampton

R. E. Kowalski

B. T. Proffitt