

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12265
Docket No. 11854-T
92-2-89-2-155

The Second Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

PARTIES TO DISPUTE: (Sheet Metal Workers' International Association
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

1. The Chicago and Northwestern Transportation Company violated the provisions of the current and controlling agreement, in particular Rules 29, 53 and 103, when they improperly assigned other than Sheet Metal Workers to perform the Sheet Metal Workers work involved in the changing, cleaning and repairing of the locomotive carbody filters, air compressor filters, intake filters, carbon traps and spark arrestors. The violation began on or about June 22, 1988.

2. That accordingly, the Carrier be required to compensate Sheet Metal Workers Pollack, Tinsley, Rocha, Lomeli, Ford, Ellis, Sundblom, Dominquez and Nguyens at the pro rata rate, equally divided amongst the claimants, for the amount of hours that the Machinist perform the work in dispute since June 22, 1988. It is further requested that, because the claim was submitted as a continuing claim, the Claimants be compensated for equal time that the violation occurred subsequent to the original date of claim, and that a check of the records be made to determine the actual time involved on the subsequent dates.

FINDINGS:

The Second Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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.

The Organization contends that Carrier violated the Controlling Agreement, particularly Rules 29, 53 and 103 when Carrier assigned employees of the Machinist craft to change, clean, and repair locomotive carbody filters, air compressor filters, intake filters, carbon traps and spark arrestors. Said assertedly improper assignments began on or after June 22, 1988. It was the Organization's position that Sheet Metal Workers have exclusively performed this work at the Proviso Diesel Shop, and thus consistent with the Sheet Metal Workers Classification of Work Rule (Rule 103), specifically that portion reading, "and all other work generally recognized as sheet metal workers work," the disputed work accrues to members of its craft. The Organization further maintains that signed supportive confirmatory statements by thirty-five Machinist employed at this location clearly establishes the bona fides of its position. It particularly points out that it is not seeking systemwide exclusivity, but rather point exclusivity, based upon the actual practices observed at this situs. It cited several Second Division Awards as supportive authority, including Awards 8004, 10049, 10925 and 8542.

Carrier contends that the Organization has not established either by specific Rule citation or systemwide past practice, that said work accrues exclusively to Sheet Metal Workers. It notes that a Boilermaker as far back as 1978 had performed the work of cleaning spark arrestors at this location and then Machinists when the Boilermaker was occupied with other work or more pointedly when said Boilermaker retired in 1983. In effect, the work reverted to the Machinist Craft, including air filter changeouts and both carbody and engineer intake maintenance. It also notes that the 1985 position bulletin referenced by the Organization refers to filter changing in coach cars and not to locomotive assembly parts.

The Machinist Organization, as a Third Party in Interest, submitted a detailed brief, wherein it descriptively analyzed the physical characteristics of the disputed work, emphasizing in particular that the changing of disposable filters inserted in the appropriate housing on the locomotive's carbody, engines and air compressors has always been performed by Machinists throughout Carrier's system. It pointed out more specifically that Machinists employed at the Proviso Diesel Shop did nothing more than dispose of dirty filter elements constructed of either fiberglass or paper which is work that is routinely performed on a systemwide basis by Machinists. It referenced the May 27, 1947 jurisdictional Award involving the Machinist and Boilermakers craft as further evidence that the work accrued to Machinists. It noted that as less work became available to Boilermakers, the work both crafts shared was assigned to Machinists. That is, Machinists were assigned all of the work on the engine exhaust manifolds, including the cleaning of carbon traps. Attestation statements were submitted by Machinists employed at various locomotive shops.

In considering this case, the Board concurs, in part, with Carrier's basic position. The Organization has not established via specific Rule citation or systemwide past practice that the disputed work exclusively accrues to Sheet Metal Workers. Conversely, and importantly, the Board cannot disregard the clear non self-serving statements signed by thirty-five Machinists who work at the Proviso Diesel Shop that they never performed such work. The July 12, 1988 statement signed by these Machinists reads:

"This statement is a record signed by Machinists acceding to the fact that up till the morning of June 22, 1988, it was never part of their job to change out carboid filters and engine filters. Also, it was never part of their job to clean out carbon traps and spark arrestor manifolds, and change (sic) air compressor filters at the Provisio Diesel Shop. This is a true statement of facts."

Many of these signatories had long years of service at this situs and so, presumptively were able to determine accurately what work was not performed by Machinists. When this broad based explicit affirmation is counterbalanced against the opposing data, the Board finds the on-situs affirmation more persuasive and indicative of a point exclusivity assignment. Accordingly, consistent with our decisional holdings in Second Division Awards 8004, 10049, 10925 and 8542, we find Carrier violated the Controlling Agreement, particularly Rule 103. These Awards are on point with the dispute herein. On the other hand, we have no basis for awarding make whole compensation since Claimants were under pay during the period June 22 through July 24, 1988 and the record is bereft of hard substantive data indicating when said work was later performed.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1992.

CARRIER MEMBERS' DISSENT
TO
AWARD 12265, DOCKET 11854-T
(Referee Roukis)

The Majority correctly determined in this case that:

"The Organization has not established via specific Rule violation citation or systemwide past practice that the disputed work exclusively accrues to Sheet Metal Workers."

The Majority also correctly noted that the Third Party, the Machinists, after noting the past history, including a jurisdictional resolution between the Machinists and the Boilermakers, concluded that:

"...Machinists were assigned all of the work on engine exhaust manifolds, including the cleaning of carbon traps. Attestation statements were submitted by Machinists employed at various locomotive shops."

Since the Majority found no rule reservation and that the work was being done on a systemwide basis by the Machinist craft, one would expect a denial award. Instead, the Majority invoked the logically defective and contractually erroneous theory of "point exclusivity" to uphold the Organization's claim. In Second Division Award 11967, involving these same parties, this Board noted:

"The principle of exclusivity and the application of a Rule exactly like Rule 103, in this case, has already been ruled on by the Board on another property and the Board finds such precedent persuasive. In Second Division Award 10751, for example, the Board stated, with respect to such Rule, that:

'...this board has consistently held (that) the burden is on the Organization to prove competent evidence that the work it exclusively claims has been exclusively reserved to the Sheet Metal Workers systemwide...'historically, traditionally, and customarily'."

Second Division Award 11162:

"The burden of proof is on the Organization to prove all the essential elements of its Claim. That burden has not been met in this case. First, there is nothing in the Rules relied upon by the Organization that specifically grants the sander inspection work exclusively to the Sheet Metal Workers. Second, notwithstanding the assertion of a past practice at Boyles Shop and Yard for inspection of the sander by the Sheet Metal Workers craft, it is incumbent upon the Organization to demonstrate that such a practice exists systemwide."

Second Division Award 11246:

"Regarding Organization's reliance upon Second Division Award No. 8004, allegedly establishing the point exclusivity doctrine, Carrier argues that said Award must be viewed as an aberration in light of the many other Second Division Awards which support systemwide exclusivity. According to Carrier, since Organization is the moving party in the instant dispute, and, therefore, must prove systemwide exclusivity, Carrier proffers its own survey which allegedly demonstrates that many other employees of many other crafts have assembled sheet metal lockers at many other points throughout Carrier's system. Therefore, Carrier distinguishes Organization's contention of the precedential value of Award No. 8004..." (Emphasis added)

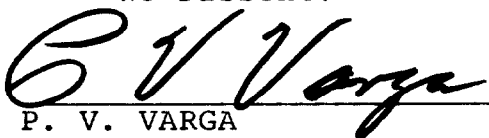
Award 8004, on which the Majority erroneously relied, concluded that:


"...it is at once unnecessary and unwise to make a broad and far-reaching determination as to whether or not the claimed work falls under the umbrella of the exclusivity doctrine...We are in effect saying that the concluding language of Rule 94 - 'and all other work generally recognized as sheet metal workers' work' - is properly applied on a per location basis."

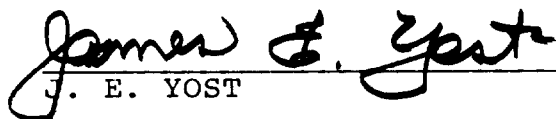
Except for Award 10049, and now 12265, involving the same Majority, the illogical dicta of Award 8004 has not been followed since it was issued in 1979. Award 10049 was strongly dissented to by the Carrier Members and that dissent is incorporated herein.

Award 10925, relied upon in this decision as supporting the principle of "point exclusivity" actually held that the Classification of Work Rule did specifically reserve the work to the Sheet Metal Workers. Award 8542, also relied upon in this decision, concluded that the work was not reserved under the Classification of Work Rule but that its performance at the location was protected by specific language of a merger agreement. Obviously, these decisions do not support "point exclusivity." The Organization filed a claim with this Board that the, "...provisions of the current and controlling agreement..." were violated. The Board determined that no rule violation occurred but has nevertheless found the Carrier liable based on an errant and illogical perception of something other than the contract between the parties.

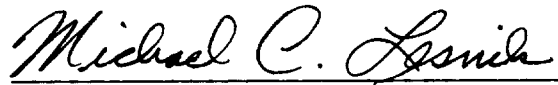
We Dissent.


P. V. VARGA


R. L. HICKS


J. E. YOST


M. W. FINGERHUT


M. C. LESNIK