NATIONAL RAILROAD ADJUSTMENT BOARD

Form 1 SECOND DIVISION Award No. 12537
Docket No. 12450
93-2-91-2-259

The Second Division consisted of the regular members and in addition Referee Joseph A. Cannavo when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/Division
(TCU
(
(CSX Transportation, Inc. (former Chesapeake and
(Ohio Railway Company)

STATEMENT OF CLAIM:

"1. That the Chesapeake & Ohio Railroad Company (CSX Transportation, Inc.) (hereinafter referred to as "carrier") violated the service rights of Carman E. B. Hall (hereinafter "claimant") and the provisions of Rules 11, 32 and 154 of the controlling Agreement when the carrier allowed employes from Bethlehem Steel to grind car parts at the Raceland Car Shop facility on Saturday, April 28, 1990.

2. Accordingly, the Claimant is entitled to be compensated for eight (8) hours at the applicable time and one-half rate for said violation."

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.

The relevant facts of this case are not in dispute. The Claimant charges that on Saturday, April 28, 1990, the Carrier violated his service rights and the provisions of Rules 11, 32 and 154 of the Agreement when it allowed five employees from Bethlehem Steel to grind the rough edges from car parts (tubs) in preparation for their application on coal-hauling gondola cars that were being rebuilt at the Raceland Car Shop facility. The Organization directs this Board's attention to Agreement Rules 11, 32 and 154, which state in pertinent part:

"Rule 11 - Effective June 1, 1923.

* * *

(c) Record will be kept of overtime worked and men called with the purpose in view of distributing the overtime equally."

"Rule 32 (a) Effective November 1, 1964.

None but mechanics or apprentices regularly employed as such shall do mechanics' work as per the special rules of each craft except foremen at points where no mechanics are employed."

"Rule 154 - Classification of Work

Carmen's work shall consist of building, maintaining, dismantling (except all-wood freight-train cars), painting, upholstering and inspecting all passenger and freight cars, both wood and steel, planing mill, cabinet and bench carpenter work, pattern and flask making and all other carpenter work in shops and yards, except work generally recognized as bridge and building department work; carmen's work in building and repairing motor cars, lever cars, hand cars and station trucks; building, repairing and removing and applying locomotive cabs, pilots, pilot beams, running boards, foot and headlight boards, tender frames and trucks; pipe and inspection work in connection with air brake equipment on freight cars; applying patented metal roofing; operating punches and shears doing shaping and forming; work done with hand forges and heating torches in connection with carmen's work; painting with brushes, varnishing, surfacing, decorating, lettering, cutting of

> stencils and removing paint (not including use of sand blast machine or removing in vats); all other work generally recognized as painters' work under the supervision of the locomotive and car departments, except the application of blacking to fire and smoke boxes of locomotives in engine houses; joint car inspectors, car inspectors, safety appliance and train car repairers; oxyacetylene, thermit and electric welding on work generally recognized as carmen's work; and all other work generally recognized as carmen's work."

It is the position of the Organization that the Carrier allowed five employees from Bethlehem Steel to perform the work in question on a Saturday when the overtime provisions of Rule 11 of the Agreement were in effect and the Claimant was the next available employee to be called out on the established Overtime Call Board. It is also argued that only mechanics shall perform mechanics' work and that the work in question accrued to the Carmen's craft as the Bethlehem Steel employees are not covered by any of the negotiated Agreement Rules. Regarding the Carrier's contention that the sharp edges from material received from the Materials Department was work that should have been performed by Bethlehem Steel prior to it being delivered to the Raceland Car Shop, the Organization contends that: 1) it is an excuse to justify its actions; 2) the material had been received by the Materials Department and placed on racks outside of #1 Track for use by the Carmen, thus indicating that the material in question was fully acceptable to the Carrier. As such, the Organization argues that any additional preparatory work should have been performed by members of the Carmen's craft; and that any rejection of this material should have occurred prior to the Material Department accepting delivery from Bethlehem Steel and prior to the material being placed in the production line. The Organization further notes that the Carrier has not produced any documents to substantiate its contention that the material was not paid for and was still owned by Bethlehem Steel.

The Carrier denies that any violation of Rules 11, 32 and 154 occurred as the Organization contends; that the Rules fail to reveal any language that would reserve to the Carmen craft the grinding performed on parts owned by Bethlehem Steel. Further, the Carrier states that it supplied the Organization with a letter dated October 22, 1991, in which Bethlehem Steel states that the work in question "was done at no cost to CSX Corporation, as a customer service . . . ." The Carrier argues that the Organization

bears the burden of demonstrating that either through contractual mandate or an established past practice, the disputed work is exclusively assigned to its members; and, absent contractual mandate, the Organization must prove exclusivity. In support of this position, the Carrier refers this Board to numerous Second Division Awards that stand for the proposition that the Organization claiming the right to work under the Rule must prove that the work has been performed exclusively by the employees covered by the Agreement. In this regard, the Carrier notes that the Organization did not cite a single instance or a date on which the Claimant or other employees performed this type of grinding.

The Carrier also contends that it did not own the material in question at the time the defects were corrected; as such, the Carrier states that the grinding work was not its work to give to its employees; further, the Carrier contends that the grinding was covered by warranty. In support of its position, the Carrier refers the Board to Second Division Awards 7521, 7495, and 7236 as well as Award 861, Special Board of Adjustment No. 570 that stand for the proposition that a Carrier has the right to seek recourse under a warranty even to the extent that the warrantor performed the work on Carrier property.

The Board has reviewed the entire record and makes the following findings:

There is no question but that the work performed was to correct a defect recognized as such by the manufacturer. This work was not a modification or repair. The work was done at no cost to the Carrier. While it was not clearly established that the work was done pursuant to a written warranty, it was certainly done in furtherance of the origin Agreement to manufacture, which carries with it an implied warranty of merchantability. While the Organization cites as relevant the fact that the grinding was done after the material was accepted by the Materials Department, it offers no contractual guidance that would prohibit the manufacturer from removing the rough edges from the car parts. This work was done in furtherance of an Agreement between the Carrier and Bethlehem Steel. It did not encroach on the duties of the Carman craft. This is evidenced by the fact that there was no showing that the Carman craft either performed this work on an exclusive/ regular basis or that this work was reserved to the Carman craft vis-a-vie Rule 154. Further, this Board finds that Management has the right to seek full value for its purchases. The Carrier, herein, merely sought the benefits of its purchase from Bethlehem Steel. The Board also finds that the work performed by Bethlehem Steel on Carrier's property was not within the scope of the Agreement.

The claim must also be denied because the Organization failed to meet its burden of proof that the Claimant was denied equal access to overtime over a substantial or reasonable period of time. Even if the Claimant was entitled to work in this case, an isolated incident does not substantiate the claim as it was not shown that the Carrier had failed to equalize overtime over a reasonable period of time. Consequently, this Board agrees with Second Division Awards 10256, 9305, 7624 and 5136 as cited by the Carrier.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Secretary to the Board

Dated at Chicago, Illinois, this 16th day of June 1993.