

Award No. 10834

Docket No. MW-9882

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Eugene Russell, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**CHICAGO, ROCK ISLAND AND
PACIFIC RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the effective Agreement when, on February 6, 7, 8 and 9, 1950, it assigned other than its B&B employes to construct a building at Silvis, Illinois to house a hose cart at Carbon Cliff Stockyards.

(2) B&B Foreman Phil Carlsten, First Class Carpenters Emil Plavak and Wm. T. Brooks, Second Class Carpenter M. C. Cederstrom and B&B Helper E. W. Richards each be allowed 32 hours' pay at their respective straight time rates account of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On February 6, 7, 8 and 9, 1950, Employees from the Carrier's reclamation shop at Silvis, Illinois, who hold no seniority rights under the subject Agreement, were assigned or otherwise permitted to construct a building which was to be used to house a hose cart at Carbon Cliff Stockyards.

The building was 9'5¼" long by 6'4½" wide and approximately 160 hours were consumed in its construction by employes of the Reclamation Shop who are represented by the Brotherhood of Railway and Steamship Clerks.

The employes holding seniority in the Bridge and Building Department and within the scope of the subject Agreement were available, competent and capable to have performed this work of constructing this building.

The instant claim was filed and, except for dilatory handling by the Carrier's representatives, it was handled in the usual and customary manner on the property. The Carrier has declined the claim.

"In the absence of clear and unmistakable language requiring it, this Board cannot interpret an agreement to mean the contrary of what the parties by their past conduct have attributed to it."

In Award 4585, Referee Carter said:

"There is no evidence that all of such work is properly recognized as the exclusive work of Maintenance of Way employes. It has been partly performed by employes of other crafts in the past. This Board is not authorized to make a rule where one is lacking. We are obliged to say that Claimants have failed to establish their exclusive right to this type of work."

To support our position that there is a jurisdictional dispute involved in the instant case, we wish to call the Board's attention to the fact that this claim was handled as a jurisdictional dispute with President Carroll of the Brotherhood of Maintenance of Way Employes and President Harrison of the Brotherhood of Railway and Steamship Clerks.

It has also been reliably reported to the Carrier that following the above handling between Messrs. Carroll and Harrison, the matter was referred back to their respective General Chairmen with instructions to make an attempt to settle the issue on the property. However, the Carrier has no record of any such handling.

It is the position of the Carrier that this Board, like the Carrier, is without authority to say that all such work as is involved here should be delegated to Maintenance of Way Employes. Your Board is without authority to do so because that would in effect, mean the addition of a rule to the present negotiated agreement between the Carrier and the Brotherhood of Maintenance of Way Employes. The Carrier is without authority to say that the Maintenance of Way employes have the exclusive right to perform such work. In this connection, we refer your Board to Award 2478, Docket 2350. in a similar claim where Boilermakers claimed work performed by fabricators at Silvis Stores Department under the Clerks' Agreement.

For the above reasons, we respectfully request your Honorable Board to deny the claim of the employes.

It is hereby affirmed that all of the foregoing is, in substance, known to the Organization's representatives and by this reference is made a part hereof.

(Exhibits not reproduced.)

OPINION OF BOARD: The issue involved in this dispute is that the Brotherhood of Maintenance of Way Employes is contending on behalf of the named Claimants, holding seniority in the B&B Department, that the Carrier was in violation of the applicable provisions of the effective Agreement between the parties when, on February 6, 7, 8 and 9, 1950, it assigned Employes of the Reclamation Shop, who are represented by the Brotherhood of Railway Clerks, to construct a building 9'5¼" long by 6'4¼" wide. The building was subsequently shipped to the Carrier's Carbon Cliff Stock Yard and used to house a hose cart at that location.

The Carrier contends that the work in question is not covered by the Scope Rule of the effective Agreement of May 1, 1938 with the Brotherhood of Maintenance of Way Employees. That the B&B Employees have never performed work of the character involved in this claim, that such work has always been performed by the Stores Department Employees of the Brotherhood of Railway and Steamship Clerks. That by reason of the jurisdictional question involved this Board is without authority to pass upon the merits of the claim.

We do not find from this record that a Jurisdiction Dispute exists. The record contains a letter over the signature of the President of the Brotherhood of Railway and Steamship Clerks to the effect that neither involved in this dispute and declines participation herein. Your Board will therefore proceed to determine the issue presented in this claim on its merits.

The factual background in this case goes back a number of years prior to the Agreement of May 1, 1938 and from a careful study of this entire record, the briefs filed by the respective parties and thorough review of prior awards we find this claim to be without merit.

The record discloses that a period extending back several years prior to the effective Agreement of May 1, 1938, steel fabricated hose cart houses have been fabricated from scrap materials by the Stores Department Employees and that such work has never been performed by B&B Employees. There is no record that prior to this claim the Petitioners have questioned specific work of this type and from this record it must be concluded that this has become a standard practice.

We find that a practice extending over this long period of years, through negotiation of subsequent Agreement, is an established practice showing the intent of the parties as to the application of the rules involved. With respect to the matter of established practice see the principal enunciated in Award 6063, Award 6929 and other awards cited therein.

We view this case as one governed by established practice and find no violation of the Agreement.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of October 1962.