Award No. 11128
Docket No. MW-10402

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert O. Boyd, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

GEORGIA SOUTHERN AND FLORIDA RAILWAY COMPANY

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

(1) The Carrier violated the Agreement on January 7, 8, and 9, 1957, when it assigned or otherwise permitted other than employes holding seniority within the scope of the Carrier's Agreement with the Brotherhood of Maintenance of Way Employes to install twenty-four (24) insulated rail joints between Mile Posts 151-G and 152-G in Valdosta, Georgia.

(2) Track Laborer Furman Gilmore be allowed twenty-four (24) hours' traight time pay because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On January 7, 8 and 9, 1957 the Carrier assigned or otherwise permitted its Signal Department employes to perform the work of removing twenty-four non-insulated rail joints and the installation of a like number of insulated rail joints between Mile Posts 151-G and 152-G in Valdosta, Georgia. The Signal Department employes consumed a total of twenty-four (24) man-hours in the performance of the above referred to Maintenance of Way Department work.

The claimant, who was in furloughed status, was available, fully qualified and could have performed the above referred to Maintenance of Way Department work.

The Agreement violation was protested and a suitable claim filed in behalf of the claimant.

The Agreement in effect between the two parties of this dispute dated August 1, 1947, together with supplements, amendments and interpretations thereto are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rule 1, captioned Scope, reads as follows:

"These rules govern the hours of service and working conditions of the following employes as represented by Brotherhood of Maintenance of Way Employes:

Bridges, Track and Tunnel Watchmen

It is also clear that there is no basis for the monetary demand here made on behalf of Furman Gilmore. Claim, being without any basis and unsupported by the plain language of the Agreement, should, therefore, be denied.

CONCLUSION

Carrier has shown that:

(a) As a prerequisite to the exercise of the statutory power conferred upon it by the Railway Labor Act, the Board has to give notice to signal employes of all hearings in connection with the instant dispute and afford them an opportunity to be heard before taking jurisdiction of or passing upon the merits of the claim here presented.

(b) The effective Maintenance of Way Agreement has not been violated as alleged; in fact, it has been complied with to the letter. The involved work was properly performed under the terms of the two Agreements in evidence.

If, after due notice has been given signal employes and they have been given the opportunity of being heard, claim is considered on the merits, the Board cannot do other than make a denial award, for to do otherwise would be contrary to the terms of the Agreements in evidence.

All evidence submitted in support of Carrier's position is known to employe representatives.

Carrier, not having seen the Brotherhood's submission, reserves the right after doing so to make response thereto.

OPINION OF BOARD: In connection with the installation of electrically operated automatic highway crossing gates it was necessary to install track circuits which, in turn, required the installation of insulated joints in the main track and adjacent sidings. The work was performed by employes in the Signal Department who have no seniority rights under the Agreement with the Brotherhood of Maintenance of Way Employes. It is contended by the Brotherhood that the work of replacing uninsulated track joints with insulated joints is work covered by the scope rule (Rule 1) of their Agreement and claim has been made in behalf of a furloughed Track laborer for compensation because of the alleged branch of the Agreement.

It is well established that work falling within the limits of the Scope of the Agreement belongs to the employes holding seniority thereunder. In the Agreement now before the Board the scope rule does not describe the work but lists positions covered. In such cases, as a general principle, the work reserved to the employes covered by the Agreement is that which is historically and customarily performed by such group. In claiming the exclusive right to the work so covered, the burden is on the one making the claim. In the dispute now before the Board the Brotherhood contends that the work of replacing Track joints with insulated joints is work belonging exclusively to the Maintenance of Way Employes.

There can be no question but that such work generally is performed by Maintenance of Way Employes. The specific question, however, before the Board is whether or not the installation of insulated Track joints when directly connected with the installation of signal apparatus is exclusively reserved by the Scope Rule of the Agreement. As this Rule only lists positions covered and does not describe the work thereof we must resort to past practice and custom. In determining such fact we are limited to the record and the facts stated therein as are properly before us.

It is asserted by the Organization the work described herein is exclusively that of the Track Department. In support thereof the Organization has included in its submission a number of statements from employes of the Signal Department. The Carrier contends that such statements were not submitted to the Carrier when the dispute was being handled on the property and therefore are not admissible here. In Circular No. 1 the Board has adopted the following rule with respect to the form of Submissions:

> ". . . and all data submitted in support of employes' position must affirmatively show the same to have been presented to the Carrier and made a part of the particular question in dispute."

The Organization states that all data was submitted to the Carrier, but the Carrier denies this. The rule of the Board requires that the Submission **affirmatively** show that the data had been presented to the Carrier. In light of the impasse between the general assertion that the data was submitted and the denial, we have searched the record for any other evidence that the data had been submitted. We found none. We have concluded therefore that the Organization has not met the burden of affirmatively showing that the statements in question had been submitted to the Carrier when the dispute was being handled on the property, and, therfore, we must exclude them from our consideration.

This leaves the record before us on the question of custom and practice with only the assertion by the Organization that the work here described belongs to the Track Department and the assertion by the Carrier that such work has not, historically, been exclusively performed by Track employes. We have many times said that burden is on the Organization to establish its claim, and on the basis of the record before us we must find that the Organization has not established the essential fact that by past practice the work of installing insulated track joints in connection with the installation of crossing signals has been exclusively reserved to employes of the Track Department by the Scope Rule of the Agreement. We must, therefore, conclude that the claim is without merit.

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 Employes involved in this dispute are respectively Carrier and Employes 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 12th day of February 1963