

Award No. 13021
Docket No. SG-11926

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Louis Yagoda, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

CLINCHFIELD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Clinchfield Railroad Company that:

(a) The Carrier violated the current Signalmen's Agreement, as amended, particularly Rules 3, 4, 5, 6, and 8, when, on March 9, 10, 11, 12, 13, 16, 17, 18, and 19, 1959, maintenance and test employees (Leading SC&E Maintainers Stewart Adkins and Fred Alexander, SC&E Maintainers J. R. Wiggs and Russell Whitson, SC&E Man Kenneth Adkins, and SC&E Helper J. C. Edwards) performed work (stringing line wire and installing locks and cable at Kona, North Carolina) which was not part of their assignment, and which deprived SC&E gang employees of work they should have done.

(b) The Carrier now compensate the following employees of Gang No. 10 for eight hours each day shown, at their respective present rates of pay:

Leading SC&E Man W. R. Patton, Jr., March 9, 10, 11, 12, 13, 16, 17, 18, and 19, 1959, time worked by Mr. Stewart Adkins.

Leading SC&E Man P. E. Booher, Jr., March 9, 10, 11, 17, and 18, 1959, time worked by Mr. Fred Alexander.

SC&E Man J. L. Sifferd, March 9, 10, 11, 12, 13, 16, 17, 18, and 19, 1959, time worked by Mr. Russell Whitson.

SC&E Man Harry B. Sykes, March 17 and 18, 1959, time worked by Mr. Kenneth Adkins.

SC&E Man R. W. Hatcher, March 17, 1959, time worked by Mr. J. R. Wiggs.

SC&E Helper Ray Hughes, March 16, 17, 18, and 19, 1959, time worked by Mr. J. C. Edwards.

to which the gang could be assigned has been completed, and if the gang could not be used to perform certain maintenance work there would be no reason for its existence.

For the reasons outlined herein Carrier submits that the claim of the Employees is entirely without merit and we respectfully request the Board to so find and deny the claim.

(Exhibits not reproduced.)

OPINION OF BOARD: There is no disagreement concerning the general circumstances which gave rise to this claim.

The Claimants are members of Signal Gang No. 10 which was engaged in a construction project at Kona, North Carolina, for a period of time until February 27, 1959. On that date, Carrier moved this gang away from the work. On 9 days during the period March 9th through March 19th, 1959, Carrier assigned various other employees to complete the construction work that had been started by Gang No. 10.

Petitioner charges violation of the Agreement and demands payment of 8 hours additional pay at their respective regular rates of pay to members of Gang No. 10, varying from 9 days to the most senior SC&E Man, to one day for the least senior SC&E Man and four days for SC&E Helper for work performed by two Leading SC&E Maintainers, two SC&E Maintainers, an SC&E Man and SC&E Helper in allegedly improper usurpation of gang members' jobs.

CONSIDERATIONS

1. Carrier does not refute Petitioner's characterization of the work done on the Kona project as "construction" rather than "maintenance" in nature.

2. The Agreement does not distinguish anywhere between "construction" and "maintenance" type of work assignments, either in its Scope section, its seniority rules, its pay rates or in its listing and description of titles in its classification rules, except that in one place — Rule 5 — it describes an SC&E Maintainer as "an employe assigned to a section or plant performing generally recognized maintenance work." Since this is the only classification which is defined in terms of type of project, some significance must be attributed to it. But it must be immediately pointed out that the language here is not expressly restrictive against doing other work or permitting others to do this work, as it is in two places in the Agreement. In Rule 8 SC&E Helper — it is provided: "A helper shall not be permitted to perform work of other classes as named in this agreement" and the last sentence of the Scope section referring to all of the covered classifications together states: "No person other than those classified herein shall be permitted to perform any of the work described herein." (but makes no distinction for classifications).

3. Putting to one side for the moment, the question of whether SC&E Men may properly be denied "construction" type of work, certain other aspects of the claim may be disposed of on the basis of the Agreement language:

(a) Inasmuch as no such language appears in the description of the Leading SC&E Maintainer as that given for SC&E Maintainer (i.e., referring to types of projects) no violation can be supported in having assigned such Lead Maintainers to do construction work, and

the claim on behalf of the two Leading SC&E Men—Patton and Booher cannot be sustained.

(b) There are no qualifications or restrictions put on the SC&E Helper concerning distinctions between construction and maintenance assignments. The claim therefore on behalf of Helper Hughes must be rejected.

(c) One of the employees—Kennith Adkins—who is alleged to have improperly replaced an SC&E Man on the Kona project is himself an SC&E Man. Inasmuch as Petitioner's whole case is based on the contention that said work should have been reserved for SC&E Men, it cannot be upheld in its claim that a violation was entailed in the replacement of SC&E Man Harry B. Sykes by SC&E Man Kennith Adkins. The claim on behalf of Sykes must accordingly be denied.

4. We deal now with the claims on behalf of the other four SC&E Men who were members of Gang No. 10 and are alleged to have been improperly replaced by two SC&E Maintainers. On this subject we find some Agreement terms which suggest other than the inference which might be drawn from Rule 5 that the parties intended to reserve construction work for SC&E Men only.

These are:

(a) There is no language in the description of the SC&E Man classification restricting the latter from doing maintenance work. Indeed, Petitioner has not contended that an SC&E Man may not do either maintenance or construction work or both. It argues only that the SC&E Maintainer cannot be taken off maintenance work. In view of the fact that both classifications share a single seniority classification and a single pay rate (discussed below) and both are grouped together under Rule 4 as possible assistants to Leading SC&E Maintainer, an inconsistency is suggested which is not shown to have been consciously accepted by the parties by appropriate language thereon.

(b) In the Seniority Rules, SC&E Man—SC&E Maintainer comprise a single seniority class (Class 4). References to retention, recall and assignment rights are to "classes" without distinction as to titles within classes or type of project to which assigned.

(c) Under Rule 49 of the Agreement—Rate of Pay, a single common minimum rate of pay is listed for SC&E Man—SC&E Maintainer.

(d) No restrictions on transfers by type of project are contained in Rule 23 which preserves the higher rate of pay for transfers and is the only place in the Agreement dealing expressly with the subject of transfers.

It will be seen from the foregoing that the Agreement terms do not in other respects unambiguously uphold the interpretation given by Petitioner to Rule 5 as an obligation to reserve construction work for SC&E Men only and more particularly (in terms of the instant claim) that assignment of SC&E Maintainers to construction or installation work creates a violation in injury of SC&E Men who are not associated in the Agreement with non-

maintenance work only (or any other specific type of project) — or are even claimed to have such Agreement assurances. For the claim is not made here on behalf of SC&E Maintainers who have been denied maintenance work, but that SC&E Men have been denied construction work and redress is sought for the latter.

We conclude that the Agreement does not clearly and unambiguously establish the basis for the claim that Petitioner is here asserting for the facts of this record. Practice therefore becomes relevant as a guide to the intentions of the parties as expressed by them in performance.

The record reveals the following in regard to practices:

1. Rule 47 of the Agreement provides for a bulletin form to be used in advertising positions.

The record shows that these forms were used in announcing the openings for the employees who were later assigned as displacements for members of Gang No. 10 and copies are included in the docket. Petitioner points out that the duties described for those who have the SC&E Maintainer title refer to such functions as "repairing . . . testing . . . bonding . . . relocating boot-legs." Carrier on the other hand, points out that every description for a Maintainer concludes with the phrase, ". . . and other duties covered under the heading of Scope" and that the Scope section of the Agreement describes the whole range of construction, installation, testing and maintenance work of all covered employees.

We note also in connection with the foregoing that Bulletin No. 720, advertising for a bid from an SC&E Man (not a Maintainer) uses language generally similar to that which was used in the bulletins for Maintainers, and concludes with the same catch-all phrase: ". . . and other duties covered under the heading of Scope."

It will be seen from the foregoing that (a) the assignments have been made general enough so as to comprehend the possibility of both maintenance and construction type of work, and (b) there has been a mingling of SC&E Maintainers and an SC&E Man under similar general instructions so as to minimize a presumption of distinction between the kinds of work to which each would be sent. (The bulletin for the SC&E Man goes back to September 1954, some four and a half years before the date of the occurrences which are the basis for the instant claim.)

2. In the course of the interchanges on the property between Petitioner and Carrier, the Carrier's representative stated:

"The work was performed in the same manner as jobs of a similar nature throughout the life of the agreement." (Letter of April 8, 1959, File 5281 from W. E. Prince, Jr. to H. B. Sykes.)

In its Ex Parte Submission to this Board, Carrier supports this contention more specifically by reference to 45 instances of construction or installation projects for the period August, 1956 through December, 1959. It states that of these additions, 26 were made entirely by employees not assigned to SC&E Gang No. 10 and that both maintainers and gang members (SC&E Men) performed some work on 14 of these installations prior to the subject one. Job numbers, descriptions of projects, locations and employees doing the work are itemized.

We note that Petitioner regards this record as inadmissible for consideration by us on the grounds that it was not explicitly recited by Carrier to Petitioner prior to submission of the claims to this Board. We disagree with Petitioner. Carrier is shown to have clearly asserted to Petitioner that its position was, in part, based on an allegation by it of such a history of practices. The further support of such a posture by citations from Carrier's records does not constitute an instance of bringing in new grounds such as would constitute an impermissible departure from the way the matter was argued on the property. On the other hand, Petitioner, on whom the burden of proof falls for support of its claims has failed affirmatively to show a record of practices which would support its interpretation and contentions.

CONCLUSION

The Agreement does not expressly support the claims for the given circumstances. Petitioner has not supplied proofs of practice to show demonstration of mutual intent favoring its position. The claim must fall.

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 29th day of October 1964.