Award No. 13517
Docket No. M-W-13432

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Preston J. Moore, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY
(System Lines)

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

(1) The Carrier violated the Agreement when, on June 13 and 14, 1961, it assigned or otherwise permitted a store department employe to operate Crane X-40 which was being used in the performance of Bridge and Building department work at the roundhouse at Vancouver, Washington.

(2) A. F. Watts be paid the difference between what he was paid at the Machine Operator Helper's rate and what he should have been paid at the Machine Operator's rate if he had been properly assigned to operate Crane X-40 on June 13 and 14, 1961.

EMPLOYES' STATEMENT OF FACTS: **On June 13 and 14, 1961, Bridge and Building and Water Service employes were performing their usual and customary work of cleaning oil sumps and separators located at the Vancouver, Washington Roundhouse. A crane, equipped with a clam shell bucket, was used to assiat in the removal of the accumulated sludge and debris therefrom. This was designated as Store Department Crane X-40. The Carrier assigned or otherwise permitted a Store Department employe, who holds no seniority as a Maintenance of Way machine operator, to operate same.**

The Claimant, who holds seniority in the Roadway Equipment Repair and Operation department, was available, willing and qualified to operate Crane X-40, had he been called upon to do SO.

The Agreement in effect between the two parties to this dispute dated June 1, 1956, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Article 1 reads:

"The Organization has failed to prove that the work . . . here involved belongs to masons to the exclusion of all other classes or crafts."

See also Award 6914 (BMWE vs EJE) in which Referee Jasper found that:

"The practice on the Carrier property shows that the work involved in this claim was not work given exclusively to the B&B Department although they did most of it. This work has partly been done by men in other crafts. The claimants have failed to establish their exclusive right to this work. If they desire the exclusive right they must negotiate a rule with the Carrier."

Referee Bailer in Award 8001 (BRSA vs PRR) stated the proposition this way:

"Since the subject agreement does not expressly confer jurisdiction over the disputed work to T&S employes and in view of the practice as here found, it follows that the Petitioning Organization does not have exclusive jurisdiction over said work. A denial award is warranted."

Respondent submits that the Third Division is committed to the doctrine that Petitioner has the burden of proving that his contract has been violated. So held by Referee Coffey in Award 7350 (Clerks vs Midland Valley):

"The Statement. of Claim amounts to no more than the allegation that the contract has been or is being violated. It is not evidence. The charge as laid, must be supported by fact. On the theory that the one affirmatively charging a violation is the moving party, and therefore, should be in possession of the essential facts to support the charge before making it, this Division of the Board is committed to the so-called 'burden of proof' doctrine. See Awards 8469, 6346, 6962, 6829, 6839."

Referee Coffey's Findings were cited with approval in recent Award 9783 (Clerks vs PRR).

Respondent further submits that Petitioner has failed in his burden of proof in the instant docket, and therefore requests your Honorable Board to deny in its entirety the claim herein presented.

OPINION OF BOARD: On the dates in question, Bridge and Building and Water Service employea were cleaning oil sumps and separators located in the shop area. The Carrier assigned a Store Department crane to assist in the work. A Store Department employe operated the crane. The petitioner contends that the crane should have been operated by the claimant.

The petitioner alleges that the work of cleaning the sump is work belonging exclusively to their craft. The Carrier does not deny this, but contends that, the crane work has been done by different crafts and in support thereof cites 18 examples where the crane work (in connection witb cleaning the sumps and separators) was performed 14 times by Store Department employes and 4 times by M&W employes. The Carrier takes the position that by past practice the crane work does not belong exclusively to any craft.

Second Dividon Award 1829 holds that the operation of a crane is not the exclusive work of any craft. In the same opinion it continues to say that:

> "It ordinarily belongs to the craft whose work it performs. It is the character of the work performed by the crane that ordinarily determines the craft from which its operator will be drawn."

We concur with the opinion expressed therein. The work of operating the crane in thia dispute was a part of the work of cleaning the sumps and separators. It would logically follow that if the work* belonged exclusively to the Petitioner, then the Claimant was entitled to the work.

*(Of cleaning the sumps and separators)

There is no way to tell from the record whether the allegation of past practice by the Petitioner is correct, i.e., "the work of cleaning the sumps and separators has been traditionally and historically performed by employes covered by the Maintenance of Way Agreement". This becomes of course the controlling issue. Since the Carrier did not deny this allegation, we can only assume the allegation to be true.

It therefore follows that if the work of cleaning the sumps and separators belong to the Petitioner, the crane work (a part thereof) also belongs to them.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April 1965.

CARRIER MEMBERS DISSENT TO AWARD 13517,
DOCKET MW-13422
(Referee Moore)

The award is expressly based on the erroneous finding that "Carrier does not deny" the Employes' allegation that "cleaning the sump is work belonging

exclusively to their craft." As we nave indicated in our memoranda to the Referee, Carrier has not only denied that the work belonged to Claimant'8 craft, but has also supported its denial with proof that was not challenged on the property.

On the record before us, the award is palpably wrong; it should be treated as null and void if the facts are actually as asserted by Carrier in the record.

We dissent.

G. L. Naylor
R. A. DeRossett
W. F. Euker
C. H. Manoogian
W. M. Roberts