Award No. 19034

Docket No. MW-14407

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Clement P. Cull, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it assigned or otherwise permitted other than B&B employes to perform the work of cleaning and painting the Store Department floor at Greenbay, Wisconsin on May 3, 4 and 7, 1962.

(2) B&B employes H. E. Schrab and W. H. Meyer each be allowed pay at their respective straight-time rates for an equal proportionate share of the total number of man hours consumed by outside forces in performing the work referred to in Part (1) of this claim. (Carrier's file — Case No. D-1424).

EMPLOYES' STATEMENT OF FACTS: On May 3, 4 and 7, 1962, the Carrier's storekeeper at Green Bay, Wisconsin performed the work of cleaning and painting the Store Department floor at that location. He consumed eighteen (18) hours in the performance of said work.

The area of this floor was 2960 square feet.

The subject painting work is of the nature and character that has been customarily and traditionally assigned to and performed by the Carrier's Bridge and Building forces.

The claimants were available, willing and well-qualified to have performed the subject work, had the Carrier so directed.

The Agreement in effect between the two parties to this dispute dated September 1, 1949, together with supplements, amendments and interpretations thereto, is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: The instant claim, for reasons that will be fully explained in "Carrier's Position," has not been properly handled by the Organization in accordance with the provisions of Article V of the Agreement of August 21, 1954, Section 3 First (i) of the Railway Labor Act and/or Circular No. 1 of the Board, therefore, the instant claim is barred.

The instant claim involves the question of "* * * cleaning and painting the Store Department floor at Green Bay, Wisconsin * * *" which, by the claim which they have presented, the employes are contending is work exclusive to Maintenance of Way Employes, but which, in fact, is not work exclusive to employes within the scope and application of the Maintenance of Way Agreement as the Carrier will establish in its "Position."

There is attached as Carrier's Exhibit "A" copy of letter written by Mr. S. W. Amour, Assistant to Vice President, to Mr. J. G. James, General Chairman, under date of November 23, 1962 and as Carrier's Exhibit "B" copy of letter written by Mr. Amour to Mr. James under date of August 16, 1963.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier contends that no conference was held on the property and that Petitioner seeks to prevail on the basis of rules never cited on the property and that claim before the Board is not the same one progressed on the property. Because of these alleged defects Carrier contends that the Claim should be dismissed.

As to the question concerning a conference, the record reveals that a conference was held on August 22, 1963, shortly after the Organization's Notice of Intent was filed with the Board on August 15, 1963. Carrier contends that a conference after the filing of the Notice of Intent is too late. It cites Award 14873 which held in part as follows:

> "* * * a conference must be held on the property prior to submission of a claim to this Board. Otherwise, * * *"

Of the many cases cited by Carrier this is the only one which uses the words "prior to submission of a claim to this Board." A study of that Award reveals that no conference was requested and none was held. Thus, that case is distinguishable on the facts and the statement as to when the conference should be held is given little weight here in the absence of any statement in the Act or Circular No. 1 as to when the conference should be held. Conferences are required by the Act and Circular No. 1 and we affirm the long line of cases which hold that where no conference is held the claim must be dismissed. Awards 14386, 15159, 15622 and numerous others. But here a conference was held. Except for Award 14873, which we affirm only to the extent that it holds a conference is required, there is no showing that a conference must be held before the filing of the Notice of Intent. A conference held when this one was would serve the same purpose of meeting face to face and discussing the matter with a view to settlement as one held earlier. In the circumstances of this case, we find that a conference was held as required.

As to the remaining contentions Carrier contends that the Claim before the Board does not specify the amount of reparations sought although during handling on the property different amounts of time were stated by Petitioner as being involved. The claim before the Board is substantially the same as the claim handled on the property. The record clearly reveals from the correspondence between the parties that the Carrier was in no way misled by the variances in the amount of time claimed. Award 18950 (Hayes) citing Award 13229, also Award 16309 (Ives). The same findings will be made as to the Rules contention. It is noted that Petitioner did quote Rule 26 in its letter of August 30, 1962. When Carrier's Superintendent pointed out the inapplicability of Rule 26 in his letter of September 17, 1962 to the General Chairman, the latter, by letter of September 19, 1962 stated the correct Rule to be Rule 46(e).

The record clearly reveals that there was no confusion at any time and Carrier was not misled. Accordingly, the Claim is properly before this Board.

Carrier contends that Petitioner must prove exclusivity to have a valid claim. We disagree. Taking into consideration Rule 46(e), the record in this case and the awards involving these parties, Awards 18950 and 18852 (Hayes) and 8508 (Lynch), we find that the work involved belonged to Claimants herein.

The record reveals a dispute as to the amount of hours it took to do the work. Petitioner claimed 18 or 20 hours. The best evidence we have before us is that it took 6 hours. Accordingly, we find that the total man hours involved was 6 hours.

On the basis of the foregoing we will sustain the Claim.

Notification of the dispute was sent to the Brotherhood of Railway, Airline and Steamship Clerks, the representative of the employes who did the work. They failed to participate in these proceedings and did not make a submission to this Board. Accordingly, we shall consider their action as a disclaimer of interest. (See Transportation-Communication Employees Union v. Union Pacific Railroad Company, 385 U.S. 157, 1966).

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 as indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1972.

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