NATIONALRAILROADADJUSTMENT BOARD

Award Number 19823

THIRD DIVISION Docket Number MW-19622

John H. Dorsey, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(St. Louis-San Francisco Railway Company

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

(1) The Carrier violated the Agreement when, on September 21, 22, 23, 24, 25, 30, October 1 and 2, 1970 it assigned or otherwise permitted a shop craft employe to operate a machine being used to pick up rail and scrap iron on the Ash Grove and Afton Subdivisions (System File D-6270/A-9259).

(2) The Carrier shall now allow Special Equipment Operator M. C. Plumb 64 hours' pay at his straight time rate and 16 hours at his time and one-half rate because of the aforesaid violation (basic rate - $638.51 per month).

OPINION OF BOARD: The work involved was the clearing of metal scrap from Carrier's right of way, which was performed with a Brown Hoist, equipped with a magnet, operated by a regular Mechanical Department Operator. Organization alleges that the work was of a nature reserved to MW employes by Agreement between the parties dated March 1, 1951,

On this property there are two separate and distinct co-existing agreements between the parties: (1) the Agreement of March 1, 1951, which covers Special Equipment Operators; and (2) Agreement dated April 1, 1951, covering the basic MW employes in track, bridge and building department. Material and relevant to the adjudication of this dispute is only the March 1, 1951 Agreement, hereinafter referred to as Agreement.

The Scope Rule of the Agreement, in Group B, lists 17 classifications of machine operators absent elucidation relative to specific work reserved to those operators. Therefore, we find that the Scope Rule, within the confines of Group B, is general in nature.

Brown Hoist operators are not listed in the 17 classifications. We are without jurisdiction to add them to the list. It is a principle of contract construction that when patties specifically list items covered by the agreement no others may be added by adjudicated fiat or by unilatteral action of a party.

The issue in this case is whether the work involved was, by application of principles of contract construction, exclusively reserved to employes within the collective bargaining unit. If the finding is affirmative it makes no difference as to what party stranger to the Agreement performed it; or; what machines, equipment or tools were employed in its accomplishment. If the finding relative to exclusivity is in the negative, then the claim lacks support in the terms of the Agreement.

Granting that it is thought within the industry that work of the nature here involved is most often reserved to MW employes, we can find no comfort in such a generalization. The terms of agreements and practices on the various properties are not uniform. Indeed, national agreements are often construed and applied in non-uniform fashion. As a consequence of the variances this Board, perforce, disposes of a particular dispute in the light of the record made on the property.

We find that the record before us is non-persuasive as to whether the work involved has been historically performed, exclusively, by employes covered by the Agreement. It is of no moment that Carrier's evidence fails to establish past practice. Petitioner has the burden of proof. When it failed to make a prima facie showing of exclusivity, predicated upon introduction of a preponderance of substantial evidence of probative value, the case, at that point, ripened for decision.

We are cognizant of the enormity of the burden to prove exclusivity; but, we are constrained to honor the hoary test imposed by the case law of the Board which causes the Board to dismiss for failure of proof.

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 Claim must be dismissed for failure of proof.

A W A R D

Claim dismissed for failure of proof.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 20th day of June 1973.