NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20042
THIRD DIVISION Docket Number MW-19804

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Inc. (Formerly Spokane, Portland
(and Seattle Railway Company)

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

(1) The Carrier violated the Agreement when it assigned the work of repairing switch points and frogs to employes holding no seniority under the Agreement (Schedule No. 4) between the SP&S Railway Company and the Brotherhood of Maintenance of Way Employes effective June 1, 1956 (System File 362-F/MW-90 6/15/71).

(2) Welders E. Reiberg, H. Iffla, Helpers and/or Grinders V. Hilden, E. Gonzales and Cutter M. Banning each be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man hours expended in performing the work referred to in Part (1) hereof.

OPINION OF BOARD: In March of 1971, Carrier shipped two carloads of frogs, switch points and other material from Vancouver to Tacoma. The Organization claims that the frogs and switch points were repaired at Tacoma, by employees with no seniority under the Agreement.

Rule 40 of the Spokane, Portland and Seattle Railway Company Agreement was preserved by Rule 69-C of the Burlington Northern, Inc. Agreement, Rule 40 states:

> "All work on Operating property, as classified in this Agreement, shall be performed by employes covered by this Agreement, unless by mutual agreement between the General Chairman and designated Representative of Management, it is agreed that certain jobs may be contracted to outside parties account inability of the railroad due to lack of equipment, qualified forces or other reasons to perform such work with its own forces. It is recognized that where train service is made inoperative due to conditions such as, but not limited to, washouts or fires, individuals or contractors may be employed pending discussion with respect to such mutual agreement."

Carrier argues that the claim submitted to this Board is at variance from that submitted on the property. We disagree. While the original claim urged a violation because of transfer of material, it also alleged a violation because of transfer of work. The original money claim requested

2080 hours at straight time rates for each Claimant, whereas the claim presented here requested straight time rates as related to the actual time spent in performing the repair work. We do not find that the claim presented to the Board is substantially different from the Statement of Claim presented to the Carrier on the property (see Award 16607 (Devine)), nor do we find the altered wording prejudicial to Carrier's rights.

Carrier states that the Organization failed to establish that Rule 40 reserves the repair work in question to Claimants. That Rule reserves all work on the operating property, as classified in the Agreement, to employees covered by the Agreement, with certain exceptions not here material.

While the Organization cited Rule 40 on the property, the entire Agreement is before us and we may consider other Rules as they may clarify that Rule. Rule 64 suggests that repair of frog and switch points is reserved to Welding employees. Further, on the property, Carrier did not appear to anchor its defense upon an assertion that Claimants were not the appropriate employees to perform the repair work; but urged that the Organization had not proved that repair work had been performed, and that Claimants were fully employed at the time.

Claimants assert that the Carrier would not have shipped the material to Tacoma unless it was for repair work. We cannot indulge in that type of speculation. In order to prevail, the Organization must show that repair work was, in fact, performed by employees not subject to the Agreement. The record on the property only establishes that 11 frogs were repaired at the Tacoma Store Department. Our Award must be limited accordingly.

Claim (1) is sustained to the extent of finding a violation of the Agreement regarding repair of 11 frogs.

Concerning Claim (2) the Carrier raises the defense of "full employment." This Referee has fully considered that defense in Award 19899 and has noted that full employment is not a deterrent to an Award of damages. Claimants are entitled to pay at straighttimerates in proportion to the amount of time expended by non-Agreement employees on repair of the 11 frogs. Accordingly, the matter will be remanded to the parties to resolve the question of the specific amount due Claimants concerning the repair of the 11 frogs, consistent with the Opinion of this Board.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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.

A W A R D

Claim (1) is sustained to the extent stated in the Opinion of the Board.

Claim (2) is remanded to the parties as set forth in the last paragraph of the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

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