NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20230
THIRD DIVISION Docket Number NW-19991

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Inc. (Formerly Northern Pacific
(Railway Co.)

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

(1) The Carrier violated the Agreement when it assigned the work of constructing a sand conveyor and a sand storage tank at Livingston, Montana to outside forces (System File MW-84(c) 7/20/71).

(2) B&B Foremen Jack Footer and Arnie Lindland, First Class Carpenters Sig Swanson and K.W. Maass, Jr., Second Class Carpenters B. B. Altimus and Bill Garcia, Truck Drivers E. R. Ricci and Leo Cavarrubias, B&B Helper H. W. Wilkinson and B&B Bricklayer W. T. Hughes each be allowed pay for an equal proportionate share of 240 man-hours at their respective straight-time rates and Welder Steve Bailly be allowed 120 hours' pay at his straight-time rate of pay because of the violation referred to within Part (1) of this claim.

OPISION OF BOARD: In March 1971, Eggar Construction and Cement Company constructed a conveyor and storage tank on company property. The Organization asserts that said facilities are used by the Carrier in the performance of common carrier service. It is contended that the Carrier violated its Scope Rule, and a 1962 Letter of Agreement which states in pertinent part:

> "Employes included within the Scope of the agreement . . . perform work in the Bridge and Building Subdepartment and in the Track Subdepartment of the Maintenance of Way Department in connection with the construction and maintenance or repairs of . . . . structures or facilities located on the right of way and used in the operation of the Railway Company in the performance of common carrier service."

Initially, Carrier urges a dismissal because during the handling on the property the Organization relied only upon the letter of agreement, yet when it came before this Board, it alleged a violation of other Rules. We do not feel that there is a deficiency. The Letter of Agreement makes specific reference to the scope of the agreement and accordingly, we feel that an issue was properly submitted to Carrier and this Board.

Secondly, Carrier urges a denial because the Organization failed to show that the work in question was historically, customarily and traditionally performed by bargaining unit employees to the exclusion of others, citing Award 16640 (McGovern) concerning these same parties. We are unable to find that Carrier raised that issue on the property, but rather, relied upon an assertion that the facilities in question were leased to Eggar Construction. Accordingly, the Carrier's "customary" defense is not properly before us.

Although Carrier concedes that the Eggar Company constructed the conveyor and storage tank it denies a violation because the facilities were erected on ". ..land leased from the Railway Company." We have considered the Awards submitted to us which have ruled that a Carrier may lease, sell, grant, etc. its property and that an Organization may not claim work concerning leased premises having no bearing on the operation of the Carrier. See for example Awards 4783, 9602, 10080, 10722, 10986, 10826, 14019, 14641, 19253 and 19639.

We have also noted Award Number 19623 (Brent) concerning these parties:

> 'While the Carrier asserted on the property that the work performed by the sub-contractor was performed on land granted to the State of Oregon, no probative evidence to sustain that allegation was introduced. A copy of the actual easement to the State of Oregon would have sufficed. Absent such proof this Board must find that the passing track is on operating property...."

The Carrier asserts that it has cured the deficiency of Award 19623 because, on the property, it presented the Organization a copy of the "lease" it entered into with the Eggar Company.

We conclude that a resolution of the basic issue of whether or not Carrier leased the land in question to the Eggar Company disposes of this dispute. During the handling of the matter on the property, Carrier presented a copy of its Agreement with the Eggar Company. The Document does not contain a Caption, but it is obviously an "Agreement" between Carrier and the Eggar Company. It recites a desire by Eggar to construct, maintain and use the facility upon the right of way of the Railroad. Eggar is obligated to pay the Railroad:

> "... the sum of twenty five dollars ($25.00) upon the execution hereof, for the first five year period and for each subsequent five years that this permit remains in effect. (underscoring supplied)

The Agreement makes repeated reference to the facility, but makes no reference to land use and either party may terminate at any time upon thirty days written notice, The Carrier has raised the "lease of land" as an affirmative defense, and thus has a burden of establishing the facts necessary to that defense. In our view, a lease of land suggests a divestiture of property by one in possession and another party's assumption of possession for a period of time. Further, the party in possession obtains a degree of control over the property. Here we note a significant degree of control by the Carrier over construction and maintenance of the facility, as well as its occupancy.

For all of the reasons stated above, we are unable to conclude that Carrier has demonstrated, by a preponderence of the evidence, that the agreement does, in fact, amount to a lease of land for uses not related to the Carrier's business, as contemplated by the Awards cited above.

Finally, the Carrier states that no Award of damages may be made because the record fails to show that any employee suffered any financial damage. This Referee has fully considered the issue of "full employment" as a deterant to Awarding damages in Award 19899. While that Award dealt, in significant part, with damages when Article IV of the May 17, 1968 National Agreement was violated, it did trace the history of damage Awards in this type of dispute. For the reasons stated in Award 19899 we hold that this Board has jurisdiction to award compensation during a period when claimants were on duty and under pay.

On the property, the Organization identified specific Claimants and based its claim upon the assertion that three Eggar Company employees devoted 1-1/2 months to erect the facility. The Company never disputed the basis of the monetary claim, while the matter was being handled on the property. While we will not entertain a speculative claim for monetary damages, in the absence of contrary evidence, we feel that the Organization has established an appropriate basis for the claim.

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 sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of the Third Division

ATTEST: A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1974.