NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21751

THIRD DIVISION Docket Number MW-21423

William G. Caples, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Western Pacific Railroad Company

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

(1) The Agreement was violated when employes of the Water Service Sub-department were used to perform work of the B&B Sub-department (painting) as described within General Chairman Krueger's letters of July 19, 1974 and October 7, 1974 to the Carrier's Manager - Labor Relations, Mr. W. S. Cope (Carrier's File D-Case No. 9829-1974-BMWE Local Case No. 118 - Maintenance of Way).

(2) Carpenter J. L. Berry shall now be allowed 235-1/2 hours of pay at his straight-time rate account of the violation described above.

OPINION OF BOARD: On January 8, 1974 the Carrier advised in conference and by letter the Organization that effective February 1, 1974 it was transferring work then being performed by Water Service employes to the Bridge and Building Superintendent and work being performed by the Bridge and Building employers to the Water Service Superintendent. The Carrier also advised:

> "Under the terms of the Mediation Case No. A-7128 of February 7, 1965, an implementing agreement is not required where the transfer of work is the only thing involved and the work being transferred is not across craft lines."

The Organization advised Carrier by letter dated January 21, 1974 that it could not transfer work in the manner contemplated:

> "nor xxx is the question one to be handled by an implementing agreement under the provisions of the xxx Mediation Agreement, Case No. A-7128."

Contending that neither the transfer of work or the transfer of employes was the matter involved. Stating:

> "It is rather one proposing the outright abolition of a subdepartment; established pursuant to Rule 4 of the current Agreement. Such rule can only be changed by mutual agreement between the parties or under the provisions of the Railway Labor Act pursuant to Rule 55 of said Agreement."

The Organization and Carrier after a series of conferences and extended correspondence were not able to reach an accord.

On or about April 29, 1974, an employe of the Water Service Subdepartment was assigned work of painting propane tanks, pump houses and plane booths along the Western Pacific right-of-way between Sandpass, Nevada and Elko, Nevada. Shortly thereafter, a second employe of the Water Service Subdepartment assisted in the painting of the outside of buildings at Elko, Nevada. This subject claim was thus filed on behalf of a furloughed employe of a designated Bridge and Buildings gang and is now before this Board.

It is the contention of the Carrier that this Board does not have jurisdiction over this matter since the claim involves an interpretation of the February 8, 1965, Mediation Agreement in Case A-7128. Carrier further contends the proper jurisdiction is Special Board of Adjustment No. 605, as set forth in Article VII of the aforesaid Mediation Agreement. Carrier thus asks the Board to dismiss this Claim for lack of jurisdiction. A number of awards of Special Board of Adjustment No. 605 are cited pertaining to interpretating of Article III, Section 1, particularly that part which reads as follows:

> "The Organizations recognize the right of the Carriers to make technological, operational and organizational changes, and xxx the Carrier shall have the right to transfer work and/or transfer employes throughout the system who do not cross craft lines."

A similar situation was considered by this Board in Awards 17982 and 20082 where different carriers were involved but the same organization. In Award 20082, this Board said:

> "We shall first consider the Carrier jurisdictional objection. In this Board's prior Award 17982, involving the same parties and the same contentions concerning the February 7, 1965 National Agreement, we held that where an employe, who was not a Welder, used a cutting torch (welders work), the situation did not come within the provisions of the National Agreement. In that Award this Board stated:

"AWARD 17982

'We find nothing in this record before us that Carrier transferred work within the contemplation of the Carrier shall have the right to transfer work as employed in Article III, Section 1, of the National Job Stabilization Agreement of February 7, 1965, supra. We therefor hold that Agreement is not applicable in the instant dispute and deny Carrier's motion that this Board discuss the Claim for lack of jurisdiction.'

Similarly, in this dispute, we have before us an alleged improper assignment of painters work to a welder. This is not a transfer of work within the meaning of the National Agreement and, thus, this Board has jurisdiction to consider the merits of the dispute."

This, too, is a matter of whether there was or was not an improper assignment of work within the terms of the Parties Agreement, and thus within the Board jurisdiction. We shall assume jurisdiction.

The pertinent parts of the agreement are:

"SCOPE

Rule 1. (As Revised 10-1-72.) These rules govern the hours of service and working conditions of all employes in the Maintenance of Way Department as shown in the wage schedule or which may hereafter be added thereto.

These rules do not include supervisory employes above the rank of foremen."

* * *

"PROMOTION

Rule 3. Employes' seniority entitles them to consideration for positions according to length of time in service as provided hereinafter in these rules."

"SENIORITY -- SUB-DEPARTMENT

Rule 4. Seniority rights of all employes are confined to the sub-department in which they are employed.

Seniority of employes in the following sub-departments shall be shown by classes: Track Sub-department; Bridge and Building Sub-department; Water Service Sub-department; and System Grading and Work Equipment Sub-department. (See Memorandum of Agreement dated 3-31-55.)"

* * *

"DATE EFFECTIVE AND CHANGES

Rule 55. This Agreement, except as otherwise modified, changed or superseded, shall be effective as of November 1, 1929, and shall continue in effect until changed or modified in accordance with the provisions of the Railway Labor Act, as amended.

Should either of the parties to this Agreement desire to revise or modify these rules, 30 days' written advance notice, containing the proposed changes, shall be given and conference shall be held immediately on the expiration of said notice unless another date is agreed upon mutually."

In Rule 4 it is clearly stated that Seniority rights of all employes are confined to the sub-department in which they are employed. Under the cloak of an Agreement not applicable to the particular situation, in the Carrier's words, "it was decided that some work currently being performed by Bridge and Building Sub-department would be transferred to positions within the Water Service Sub-department." Under the terms of the Agreement if seniority rights are to have any meaning, where they are confined to a sub-department, work cannot be taken from that sub-department unless the parties agree under Rule 55. An attempt was made to effect such an agreement here without reaching an accord.

It is our role to interpret the agreement. It appears under its terms that when members of one sub-department lost work to a member of another sub-department, without agreement by the Organization and Carrier, the Agreement was violated.

The Carrier also asserts "the monetary payment being sought by the Organization is improper. Claimant was fully employed on the dates in question and suffered no loss of earnings." Thus under the principle that a Claimant is limited to the actual pecuniary loss necessarily sustained no monetary payment is due.

The question to be decided here, however, is not whether the Claimant suffered actual pecuniary loss, but rather there having been an improper assignment of work within the terms of the Parties Agreement of work to which the Claimant was entitled, is he without remedy?

The Organization asserts Claimant under Rule 3 was entitled to perform the work in his seniority district. There is no evidence to the contrary as Carrier did not have the authority to transfer the work, as it contends. The Organization submits the proper remedy is to pay the Claimant the rate for the work performed citing many awards, essentially, assessing such a penalty for violation, citing, among other Third Division Award 685:

> "The Division xxx found that the Carrier made an improper assignment xxx. Accordingly, the claim, although it may be described as a penalty is meritorious and should be sustained. The Division quotes with approval this statement from the Report of the Emergency Board created by the President of the United States on February 8, 1937:
>
> > 'The penalties for violations of rules seem harsh and there may be some difficulty in seeing what claim certain individuals have to the money to be paid in a concrete case. Yet experience has shown that if rules are to be effective, there must be adequate penalties for violation.'"

The Organization also cites, Third Division Award 20310:

"Seniority rights are of prime importance in the bargaining relationship and are to be tampered with at Carrier peril."

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 Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 14th day of October 1977.