

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Soo Line Railroad Company

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

(1) The Carrier violated the Agreement when it assigned Signal Department forces instead of Bridge and Building Department forces to construct shelving and to paint the floor in the Signal Department building at Shoreham on May 10 and 11, 1983 [System File 45(c,e) 4(o) 1/800-46-B-173].

(2) As a consequence of the aforesaid violations, B&B Foreman R. Palmer, Assistant B&B Foreman W. H. Nichols, Jr., Carpenter V. Kostrzewski, Temporary Carpenter C. Bailey and Carpenter Helpers E. Dunn and S. DeJarlis shall each be allowed five and one-quarter (5 1/4) hours of pay at their respective straight time rates."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

As Third Party in Interest, the Brotherhood of Railroad Signalmen was advised of the pendency of this dispute but chose not to file a submission with the Division.

By letter of June 28 1983, the General Chairman filed claim on behalf of Bridge and Building Crew 614. The General Chairman alleged Carrier violation of the Scope of the Agreement as well as Rule 45, paragraphs (c) and (e) and Rule 4, paragraph (o). The alleged violations were due to Carrier's use of Signalmen to build shelves and paint the cement floor in the Signal Department building at Shoreham over a two day period.

The Carrier denied said claim on the basis of past practice. It noted that such work at Shoreham had been done by Signalmen for a number of years. It also noted that the Communications Department had similarly built shelving without Organization complaint.

This Board's review of the entire Submission finds differences between what is presented by the parties as the on property correspondence as well as newly presented Ex Parte positions. Employees' Exhibit B was not clearly documented in the on property correspondence. Carrier's references to exclusivity and arguments that the employees were fully employed were not raised on property, but presented for the first time before the Board. Such materials and arguments are therefore not properly before this Board (Third Division Award 25974).

The Organization has the burden of establishing that said work properly belongs to the B&B Crew under the Maintenance of Way Agreement. A careful review of the record and the Agreement supports that position. Clearly the work herein disputed was work which accrued to the employees covered by this Agreement.

The basis of the Carrier's denials in the instant case are grounded in its arguments on past practice. The Carrier does not directly challenge the contract language or that the work performed rightfully belongs by Agreement to the Claimants (except in reference to past practice). Carrier notes only that it has been the practice "for a number of years" that Signalmen performed the disputed work. Carrier's assertion stands unrefuted.

The Organization does not deny that this is past practice, but only that:

"the rules cited are clear and unambiguous and must supersede past practice. Previous claims of this nature have been allowed on the property on the same basis."

On the whole of this record, Part 1 of the Claim must be sustained. The contested work belongs to B&B Crew 614 by Agreement.

As for Part 2 of the Claim, the Board has often ruled that where the Organization has not protested a practice and in essence slept on its rights, compensation would not be equitable. However, in the instant case, the Carrier did not deny that it had been previously warned by prior claims that the Organization protested such practice. The Carrier does not refute that previous similar claims have been allowed. Such stands as fact. We also note that the Carrier did not contest the compensatory part of the claim on property as to the availability of Claimants, or the dates and number of hours of the disputed work. As such, Part 2 of the Claim must be sustained as presented.

Form 1
Page 3

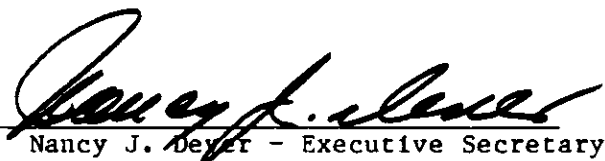
Award No. 27119
Docket No. MW-26615
88-3-85-3-365

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 17th day of May 1988.