Award No. 9849
Docket No. MW-9186

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

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

(1) The Carrier violated the effective Agreement when it assigned the work of cleaning cars at Ladue, Missouri to outside forces.

(2) Section Laborers holding seniority on the Section at Ladue and any section laborer affected by force reduction on the seniority district involved each be allowed pay at their respective straight-time rates for an equal proportionate share of the total man-hours consumed by outside forces in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: A coal mine is in operation at Ladue, Missouri which is and has been served by this Carrier. Cars furnished to this Coal Company for coal loading are required to be cleaned of all foreign material and ever since this Carrier has served this coal company, the work of cleaning cars for coal loading at Ladue, has been exclusively assigned to Section Forces at Ladue, Missouri.

However, beginning early in 1956, the Carrier required Section Forces at Ladue, Missouri to discontinue cleaning these coal cars and contracted the work to an individual holding no seniority rights under the agreement here in question and holding no employe-relationship with this Carrier.

Protest and claim were then presented and progressed in the usual and customary manner; the Carrier declining to allow the protest and claim.

The Agreement in effect between the two parties to this dispute dated September 1, 1949, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

EMPLOYES' POSITION: Article 1. Scope, reads:

"Rule 1. These rules, in their entirety, constitute an agreement between the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas and the Brotherhood of

"We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose * * *'"

Further, in Award 1638 of the Second Division, the Board stated:

"The power to inflict penalties when they appear to be just carries with it the power to do so when they are unjust. The dangers of the latter are sufficient basis for denying the former."

Inasmuch as the Agreement contains no provision for awarding a penalty and inasmuch as the agreement does not contain the penalty the employes and organization request the Board to assess, there is no agreement basis for the request made by the employes and the claim must be denied.

Further, there is no authority in the Board to impose fines or penalties and the Board is without authority at law and is without jurisdiction to grant the request of the employes and assess a fine or penalty on the Carrier, for which reason the claim must be denied.

* * * * *

All data submitted in support of the railroads' position have been heretofore submitted to the employes or their duly authorized representatives.

The railroad requests ample time and opportunity to reply to any and all allegations contained in submission and all pleadings of the employe or employes and the Brotherhood of Maintenance of Way Employes.

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas deny each and every, all and singular, the allegations of the employe or employes and the Brotherhood of Maintenance of Way Employes.

For each and all of the foregoing reasons, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas respectfully request the Third Division, National Railroad Adjustment Board, deny said claim and grant said Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas all other relief to which they or either of them may be entitled.

(EXHIBITS NOT REPRODUCED).

OPINION OF BOARD: On February 15, 1956 the Carrier discontinued the use of section laborers in cleaning coal cars at Ladue, Missouri and thereafter used the services of a private contractor for that work (the work thus being performed by persons who were not employes of the Carrier).

In Award 5869, involving this same Carrier and this same Organization, the Board recognized that past practice of the parties is of great importance in determining what work belongs to the employes under the Maintenance of Way Agreement involved herein. Both Parties in the present case recognize that past practice is highly relevant to the decision of the case.

The Record herein is replete with general allegations by both Parties regarding past practice, in most instances unsupported by any concrete evidence in the Record. The Carrier's unsupported allegation that on this railroad the work of cleaning cars had customarily been performed by various classes of persons and by various classes of employes of the Carrier, is to be contrasted with the Organization's likewise unsupported allegation that the work of cleaning coal cars at coal mines had been exclusively performed for thirty years on this railroad by laborers under the Maintenance of Way Agreement. There is no adequate evidence in the Record as to what the system-wide practice may have been either in reference to the cleaning of cars in general or of coal cars in particular. Since the Record does not contain adequate evidence as to system practice, the probative evidence which the Record does contain as to the practice concerning the cleaning of coal cars at Ladue must govern the disposition of this particular case.

It is abundantly clear from the Record that the cleaning of coal cars at Ladue from November, 1952 (when the coal mine at Ladue was first opened and the Carrier first started serving same) until February 15, 1956 was performed only by section laborers under the Maintenance of Way Agreement. Indeed, the only concrete evidence offered by the Carrier to show that any persons other than employes under the Maintenance of Way Agreement have cleaned coal cars on this railroad, is that concerning coal cars at mines near McAlester, Oklahoma; but the Carrier failed to provide essential detail as to the McAlester situation in that it failed to indicate when the use of a private contractor at that point commenced (did it commence before, or after, the 1956 change at Ladue), it failed to indicate the duration of the use of the private contractor, and it failed to indicate whether the Carrier's own employes performed the work prior to use of the private contractor (and if so, which of the Carrier's employes did it). It thus becomes obvious that insofar as decision of the present case is concerned, the evidence as to cleaning of coal cars near McAlester cannot govern over the complete and unqualified evidence as to practice concerning the cleaning of coal cars at Ladue.

In view of the inadequacy of the Record herein as to the practice at any other points on this railroad concerning the cleaning of cars in general or of coal cars in particular, the finding in the present case is restricted to the conclusion that as to the work of cleaning coal cars at Ladue the Carrier violated the Agreement in not using employes under the Maintenance of Way Agreement for said work.

Regarding the Carrier's objection (as to Article V, Section 1 (a) of the August 21, 1954 National Agreement) that the claim was not filed in behalf of any named Claimant, it need only be noted that specific individuals were identified in the handling of the claim on the property when, pursuant to express request made by the Carrier, the March 28, 1956 letter from General Chairman Jones to Assistant General Manager Winkel supplied the names of the individuals involved in the claim; moreover, the nature of the disputed work is such that any section laborer would be qualified to perform it. Also see Award 9248 for a summary of relevant decisions under the aforementioned Section 1 (a).

It follows from the above considerations that on behalf of the individuals identified as being involved in the claim by the March 28, 1956 letter from General Chairman Jones to Assistant General Manager Winkel, the claim should be sustained as to the work of cleaning coal cars at Ladue, Missouri.

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 Carrier violated the Agreement as indicated in Opinion.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1961.

DISSENT TO AWARD 9849, DOCKET MW-9186

The award of the majority ignores the basic doctrine of burden of proof resting with the Claimant which must be met if the claim is to be sustained.

The award admits "There is no adequate evidence in the record as to what the system-wide practice may have been either in reference to the cleaning of cars in general or of coal cars in particular," but still it goes on to sustain a claim under an agreement system-wide in its application as to the craft of employes involved. The majority thus point out the failure of the Organization to meet its burden of proof and then go on to ignore the failure in its findings.

As we have previously held practice on the property generally, not at a particular location, controls where practice determines the issue. See Awards 6687, 7784, and 8001.

For these reasons, we dissent.

/s/ D. S. Dugan

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ W. H. Castle

/s/ J. F. Mullen