Award No. 10399

Docket No. MW-8553

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE COLORADO AND SOUTHERN RAILWAY COMPANY

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

(1) The Carrier violated its Agreement with the Brotherhood of Maintenance of Way Employes when it assigned employes outside the scope thereof to perform the usual and customary duties of a Laborer-Truck Driver on Saturday, September 17, 1955 and on Sunday, September 18, 1955;

(2) Laborer-Truck Driver Ben Leyba be reimbursed for the exact amount of monetary loss suffered account of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The claimant, Mr. Ben Leyba, was regularly assigned to the position of Laborer-Truck Driver in the Shop and Roundhouse Laborer's Department at Trinidad, Colorado. One of the duties of the aforementioned position is the operation of the Carrier's truck at this location to facilitate the performance of whatever work or transportation is necessary among the several Mechanical Departments in and around Trinidad.

The claimant was regularly assigned to a 40-hour work week, consisting of five days, eight hours each, Monday through Friday, with Saturdays and Sundays as designated rest days.

On Saturday, September 17, 1955 and on Sunday, September 18, 1955, the Carrier assigned a Carman, who holds no seniority rights under the provisions of this agreement, to perform the usual and customary duties of a Laborer-Truck Driver; specifically, the work consisted of the operation of the Carrier's truck from Trinidad to Ludlow and return on September 17, and from Trinidad to Walsemburg and return on September 18. A total of sixteen hours was consumed in the performance of the above referred to work.

various crafts from transporting themselves as their work demands and from hauling their own equipment and material. This, we sincerely submit, is clearly beyond the authority of your honorable Board. See Award No. 1149.

There is absolutely no sound basis for the claim, contractually or otherwise, and, accordingly, it should be categorically denied and the Carrier so urges.

The Carrier affirmatively states that all data herein and herewith submitted has previously, yet unavailingly, been made known to the Employes' representative.

OPINION OF BOARD: The first question that confronts us is one of jurisdiction. The Carrier member claims that Division Three had no jurisdiction of the claim because it involves a Railroad Shop Laborer whose dispute belongs to the Second Division N.R.A.B., citing Section 3 First (h) of the Railway Labor Act.

This case has been pending before this Board for about six years, it has been fully considered on the property and long and extensive briefs have been filed by the Carrier. It cites 381 Awards of the Board on the merits of the case, of course no Referee is going to read 381 Awards, and why they are cited is hard for this Referee to understand. It was not until the oral submission by the Carrier member before this Referee, that the question of jurisdiction was raised. Certainly no court would permit a case to be handled as this has, and then deny the right to the Employes to proceed, upon an alleged jurisdictional question, raised six years late. If there was ever a case in which the jurisdictional question was waived, it is this case, and this Board holds that it does have jurisdiction. Claimant was assigned to work Monday thru Friday, with Saturday and Sunday as his rest days. Claimant claims he was assigned to drive the Company truck at Trinidad, the Carrier contends that he was assigned as a Laborer, and that at times he drove the truck.

That on September 17 and 18, 1955, Saturday and Sunday, a Carman, (not covered by the Maintenance of Way Contract) was assigned and did drive the truck on Carrier business. Claimant says he was available to drive the truck on each of the days, but was not called to perform the usual and customary duties of his position.

The issue before us, is whether or not the Carrier has properly assigned work belonging to its Maintenance of Way Employes by right of contract to employes who hold no contractual seniority under the effective Agreement.

There is no dispute between the parties as to the work performed on the dates stated, nor as to who performed it. The principle involved is whether or not the Claimant, a Laborer-Truck Driver, was entitled under said Agreement to perform the work.

It is the claim of the Employes that the work is within the coverage of the Agreement and its performance by others is in violation of same. That the Employes are entitled by the Agreement to the exclusive work of driving the truck.

First we call attention to the letter of December 22, 1953, from the General Chairman to the General Manager of the Railroad we quote:

"there has been put into use a number of trucks in that department. Inasmuch as we do not have a rate of pay or an agreement covering these positions, I should like to meet with you for the purpose of negotiating an agreement and rate of pay for these positions."

The General Manager refused to meet with the Employes, and no rule was negotiated.

Thus it appears that there was some doubt in the mind of the General Chairman as to whether the position was covered by the Agreement.

There is nothing in the Agreement covering the operation of trucks, except that Rule 57—Rates of Pay list "Laborer and Truck Driver at Trinidad".

Certainly a mere listing of a position in a rate schedule in the Agreement doesn't vest in its occupant any exclusive rights to perform all work which, at one time or another has been required of him.

In Award No. 8083 this Division said, we quote:

"We cannot attach to the mere listing of the word 'welders' the sweeping significance contended for by the organization and close our eyes to other pertinent facts.

"We hold that the interpretation contended for by the Organization reads too much into this very briefly worded contract that isn't there.

"We hold that under the facts and circumstances of this case, and particularly the facts that complainants do not possess the necessary skills for this kind of electric welding and that this particular kind of welding has been done by others and has never been theirs in the past, that the position of the complainants cannot be supported. (See award 6159 by Jasper in accord and No. 5041 by Carter to the contrary.)"

In Award No. 7584 this Division said, we quote:

"An examination of the effective agreements fails to disclose any provisions that either directly or by inference place the work of transporting men and materials within the sole purview of Track Equipment Operators.

"The organization's assertion that this condition and practice have prevailed in the past is completely unsupported by evidence to sustain such allegation. To the contrary evidence of record indicates that employes of other crafts and classifications have in the past performed such of these duties as were necessary to facilitate the accomplishment of their assignments.

"This Division stated in Award 6748 that:

' * * * the Carrier asserts the rule is that the burden of establishing facts sufficient to permit the allowance of a claim is upon the party who seeks its allowance * * * There is such a rule, which is frequently applied, and we think the instant case is one requiring its application * * * Claimant

has failed to maintain the burden of establishing his claim and it must be denied.'

"A similar burden has not been discharged here, so therefore, this claim must be denied."

We can find nothing in the Scope rule or the Agreement which gives to the Claimant the right to exclusive performance of the work of driving the truck.

In Award No. 615, by Referee Swacker, the Third Division said, we quote:

"The Board does not intend in this case in the slightest to impinge upon or limit the principles asserted by the Clerks but it is a mistaken concept that the source of the right to exclusive performance of the work covered by the agreement is to be found in either the scope or seniority rules; they may be searched in vain for a line even implying that they purport to accord to the employes represented the exclusive right to the performance of the work covered by the agreement. The Scope rules describe the class of work; they do not undertake to specify directly the inclusion of all of such classes of work; the Seniority rules merely control the disposition of the work that is available under the agreement."

There are in the record better than a hundred statements and affidavits by Employes of the Carrier of various crafts that show that they have driven the truck at Trinidad. Claimant merely challeneges Carrier's assertion.

The record clearly shows that the Claimant did not have the exclusive right to drive the truck, and the claim must be denied.

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 Employe involved in this dispute are respectively Carrier and Employe 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 there was no violation of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 8th day of March 1962.

CONCURRING OPINION, AWARD NO. 10399, DOCKET NO. MW-8553

The Opinion in this Award is correct in its conclusions regarding the merits of the case. However, the merits should never have been reached be-

cause of the basic jurisdictional defect under the Railway Labor Act which can be raised at any time and cannot be waived. Unassailable authority to this effect was cited.

/s/ T. F. Strunck

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ D. S. Dugan