Award No. 11231

Docket No. MW-10474

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Phillip G. Sheridan, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

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

(1) The Carrier was in violation of the currently effective Agreement on August 8, 9, 12, and 13, 1957 when it assigned or otherwise permitted employes of the Corn Construction Company to perform the work of grading the roadway within the East Yard at Grand Junction, Colorado.

(2) The decisions of Division Engineer A. C. Black and of Superintendent C. E. McEnany were not in conformance with the requirements agreed to and stipulated within the provisions of Section 1(a) of Article V of the August 21, 1954 Agreement.

(3) Because of the aforesaid non-conformance with Agreement rules, the claim as presented to Division Engineer Black be allowed.

EMPLOYES' STATEMENT OF FACTS: On August 8, 9, 12 and 13, 1957, the Carrier had its roadways within the East Yard at Grand Junction, Colorado graded by the Corn Construction Company, instead of using its own forces for such work.

Claim was then filed as follows:

"Grand Jct Colo.
Aug 15, 1957

A. C. Black:
Grand Jct.

We the undersigned are claiming 28 hours at 2.378 per hour for Corn Const. Co. road Grader, doing work in East Yard at Grand Jct.

Matt. J. Evans Oper L-3
Earl B. Cain Oper L-5"

All data in support of Carrier's position have been submitted to the Employes and made a part of the particular question in dispute. The Carrier reserves the right to answer any data not heretofore presented to it.

(Exhibits not reproduced.)

OPINION OF BOARD: In August 1957, the Carrier contracted out certain road grading to a private contractor, and the Claimants contend that this work was reserved to them pursuant to the provisions of their Scope Rule.

Before arriving at an ultimate decision in this dispute, we must resolve a procedural question that has been posed by the Organization. They contend that the Carrier did not conform with the provisions of Section 1(a), Article V of the August 21, 1954 Agreement.

Article V is an integral part of the Agreement, its requirements are mandatory, a failure to comply with the provisions of this Article prohibits any further discussion of this case on its merits.

The respective parties have presented this referee with many prior awards involving an interpretation of Section 1(a), Article V, some concerned these identical parties.

We will consider first, Award 10138 of this Board, a first impression derived from reading this award would lead one to reaffirm that award by entering a sustaining award based on similar facts in this dispute.

The language utilized by the Carrier in denying the claim under discussion in Award 10138 is similar to that used in this dispute.

The claim in Award 10138 was sustained for the reason that the denial of the claim was not forwarded in writing by the Carrier to the Claimant within sixty (60) days. Therefore, it is distinguishable from this dispute.

In Award 9933, the Assistant Superintendent merely stated "request denied." Referee Weston commenting on the denial language in Award 9933 asserted that this expression of denial was in no manner a compliance with Section 1(a) of Article V.

Award 9492 was presented as an adjudication for sustaining a default in this dispute.

The factual situation in Award 9492 is not controlling in this dispute.

The claim in Award 9492 was filed on July 13, 1955 and in this case, a conference was held between the respective parties within sixty (60) days of filing the claim. At the conference, the Carrier through its representatives orally denied that certain specific rules were not violated.

Within the sixty (60) day period, the Carrier forwarded a letter to the Organization acknowledging the discussion at the conference and concluded its letter as follows:

> "There was considerable discussion of the matter, however, we were not able to reach an agreement."

This correspondence was the last communication between the parties, and the Organization made demand for payment of the claim pursuant to the provisions of Section 1(a), Article V.

It is obvious that the factual situation in Award 9492 is distinguishable from the factual situation presented herein.

We have been presented with other awards for consideration in order to sustain the Organization's position that this dispute should be defaulted.

These awards are distinguishable, the claims presented therein were sustained because the denial was not presented within sixty (60) days of filing the claim, or it was plainly evident that the denial in writing contained no pretense of a reason.

A most recent award compels a refusal to default the claims upon the basis that the denial in writing was insufficient in not setting forth a reason for the claims denial.

Award 10400, Docket TE-8618 has been presented to this referee for our examination and analysis in order to sustain their position that they have complied with Section 1(a), Article V of the Agreement.

We have read Award 10400 and the source of its origin Docket TE-8618.

Referee Mitchell said in Award 10400 "We will not discuss the question of whether this question was raised in time by the Employes because the record shows that during the handling of this claim on the property the Carrier's officials notified Claimant and representative of the reasons for denying the claim."

The language presented to Referee Mitchell was contained in letters from Carrier to the Organization and we quote as follows:

* * * * *

> "I cannot find any basis for your claim that the Agreement between the Railroad Company and the Order of Railroad Telegraphers has been violated."

Another letter in the series of negotiations, stated as follows:

* * * * *

> "After a full discussion, you were informed that we do not view this as a violation of the applicable Agreement."

In this dispute, the first two officers in the sequence with which this claim was processed utilized the following language in denying the claim.

* * * * *

> "Since there is no violation of the Article of Maintenance of Way Agreement claim is denied."

* * * * *

"Find no violation of any Article of the Maintenance of Way Agreement claim is denied."

It is our opinion that the latter quotations from the instant dispute are sufficient reasons for denying the claim, and we hold that Section 1 (a) of Article V was not violated.

The Scope Rule, the subject of this controversy merely lists the positions and does not define the work involved, therefore, the burden of proving its position rests upon the Claimant.

It is well settled by this Board that where the Agreement lists the positions rather than defining the work, the Organization's assertions that it is work reserved to them must be supported by proof of historical practice and custom. Thus, we are presented with a factual situation.

The record reveals that the Carrier in its response to the Organization's claim placed the Organization on notice that the Carrier had contracted out similar work and we quote from the relevant portion of the letter as follows:

> "With respect to your statement that the work of operating a motor grader to grade roads within the East Yard at Grand Junction, Colorado, is work covered by your Agreement and has been in the past performed by employes holding seniority in the machine operators' department is not correct. At the time the East Yard was constructed all work of building access roads was contracted out and maintenance of these roads since that time involving as in the instant case the use of motor grader and roller has been performed by outside contractors."

There was no denial of this defense, although, the record reveals that it had contracted out similar work at the same site on three occasions prior to the filing of this claim, and twice at two other sites on the Carrier's system.

We cannot find any support that this work is exclusively the work of the Organization. The burden of proof is on the Claimants, they have failed to support their claim by a preponderance of the evidence. Mere assertions that the work involved is theirs, did not reach the requirements of proof.

See our Award 11118 involving the same property.

The Agreement was not violated.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of March 1963.