Award No. 12390
Docket No. MW-11461

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Michael J. Stack, Jr., Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when, on July 25, 1958, it arbitrarily discontinued the long established practice of using its Section forces at Shawnee, Oklahoma to unload and handle grain doors at that location and thereafter assigned the work to outside forces.

(2) The work of unloading and handling grain doors at Shawnee, Oklahoma be restored to the Section forces at that location.

(3) Each employe on the Shawnee Section be allowed pay at his respective straight time rate for an equal proportionate share of the total man-hours consumed by the outside forces in performing the work referred to in Part (1) of this claim since July 25, 1958.

EMPLOYES' STATEMENT OF FACTS: The work of unloading and handling grain doors at Shawnee, Oklahoma has been assigned to and performed by the Section forces at that location for more than thirty years.

Nonetheless, on July 25, 1958, the Carrier discontinued the practice of using its Section forces to perform the above referred to work and thereafter assigned such work to outside forces.

Consequently, the claim as set forth herein was presented and progressed in the usual and customary manner and was declined at all stages of the appeals procedure.

The Agreement in effect between the two parties to this dispute dated May 1, 1938, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

Many classes of employes handle grain doors on this property and it is not a monopoly of any Craft, and, as shown above, the petitioning Organization concedes their Agreement does not cover such work.

For the Board to sustain the instant Claim, would be writing into an Agreement something not now there, and an interpretation of the existing Agreement, based on the facts here, must decline the Employes' Claim.

We submit, on basis of the facts in this case, and for the reason advanced above, there was no violation of the agreement, and we respectfully request denial of the Claim.

OPINION OF BOARD: This issue is here raised:

Where employes of one craft for thirty years have exclusively performed the work at one facility of a Carrier and the employes job description in the effective Agreement does not specifically include this work does the Carrier violate the Agreement in assigning this work to outside forces?

We hold that it does.

The work of unloading and handling grain doors at Shawnee, Oklahoma had been handled by Maintenance of Way forces at this facility for over thirty years. There is nothing in the record to show other Carrier forces had handled this work at this location. In 1958 the Carrier assigned this work to outside forces. The Organization asserted this action to be a violation of the Agreement.

The Carrier replied that the definition containing the scope of the employes job description did not include this work. This part of the Agreement reads as follows:

"TRACK MAINTENANCE

Track Department employes shall be divided into the following classes:

Group 6.

Section Foreman, Extra Gang Foreman, or any other class of foreman in the Maintenance of Way Department reporting to the Roadmaster or to any officer having charge of the construction or maintenance of railroad track of any character:

(a) Extra Gang Foremen

(b) Fence Gang Foremen

(c) Section and Yard Foremen

(d) Assistant Extra Gang and Assistant Yard Foremen

* * * * *

Group 8.

Extra Gang Laborers and Fence Gang Laborers.

Group 9.

(a) Track Patrolmen. (See Memo No. 10)

(b) Sectionmen comprise all laborers working under the direction of Section Foremen or Yard Foremen."

It further established that the Organization, in writing, had conceded that the Agreement did not spell out the work in question as being specifically included in its terms.

However a practice once established continues in force until specifically abrogated by the parties, and where a contract is negotiated and existing practices are not rescinded or altered by its terms, such practices are enforceable to the same extent as the provisions of the contract itself, as though written therein.

The meaning of a contract is arrived at by ascertaining the action of the parties in implementing it.

We have considered the question that the claim was not handed in the usual manner on the property and find it to be without merit since the monetary nature of the claim was raised on the property.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 1st day of April 1964.

CARRIER MEMBERS' DISSENT TO AWARD 12390
DOCKET MW-11461

Five grave and inexcusable errors stand out in this award:

I.

THE AWARD DISREGARDS CONTROLLING PRECEDENT, A RECENT AWARD INVOLVING THE SAME PARTIES, SAME AGREEMENT AND SIMILAR ISSUES.

The award completely disregards our recent **Award 10860** (Kramer), same parties, same Agreement and similar issues, in which the Board ruled:

> "The Scope Rules under the binding Agreement in this dispute are in the opinion of this Board specific in that it lists the work covered. It guarantees to the Employes no rights to perform work other than specifically covered in the Agreement, regardless of local practice. . . ."
>
> * * * * *
>
> "A pertinent position was taken in Award 7031 and with which we concur, it reads in part as follows:
>
> > '. . . Where work may properly be assigned to two or more crafts, an assignment to one does not have the effect of making it the exclusive work of that craft in the absence of a plain language indicating such an intent. Nor is the fact that work at one point is assigned to one craft for a long period of time of controlling importance when it appears that such work was assigned to different crafts at different points within the scope of the agreement.'"

Under our consistent decisions, the precedent established in **Award 10860** (Kramer) is controlling in subsequent cases involving the same parties, same Agreement and similar issues, for there is no evidence that it is palpably wrong. See **Awards 12335** (Engelstein), **11759** (Dorsey), **11584** (Rose), **11160** (Moore), **11035** (Hall), **10917** (Boyd), **10086** (Dugan).

Although **Award 10860**, as well as a large number of Awards which support the sound reasoning thereof, was cited to the authors of **Award 12390** during the handling of this case in panel, they have ignored it completely and have conceded their inability to distinguish it or to demonstrate any error in it by their failure to mention it. Such procedure can only bring discredit upon this Board. Our obligation under the law is to achieve consistency in our decisions, not create chaos.

II.

THE AWARD RESOLVES THE DISPUTED ISSUE OF FACT IN FAVOR OF THE CLAIMANTS WITHOUT ANY EVIDENCE TO SUPPORT THE CONCLUSION REACHED, THUS IGNORING THE MOST BASIC AND ELEMENTARY RULES ON EVIDENCE AND BURDEN OF PROOF.

The award states:

> "This issue is here raised:

Where employes of one craft for thirty years have exclusively performed the work at one facility of a Carrier and the employes job description in the effective Agreement does not specifically include this work does the Carrier violate the Agreement in assigning this work to outside forces?"

Here, as the sole factual basis for the decision, we have the conclusion that section forces at Shawnee, Oklahoma, have "exclusively performed the work" of unloading grain doors at that location.

We do not need to go further than the Labor Member's own memorandum for a frank admission that the employes' allegations of exclusive performance of the work at this location are denied by Carrier and the employes failed to submit any evidence to support the disputed allegations. At page 4 of his memorandum, the Labor Member states:

"For over thirty years section forces have performed this work, there is no showing that others have so performed the work as contended by the Carrier.

While it may be true that the record lacks statements to support the Employes' contention this is no bar for Carrier has not denied that its section forces have performed this work, it has merely asserted others have performed the work."

The employes' initial submission (page 6) reproduces the letter of Carrier's officer on the property which advised the General Chairman in connection with this claim that:

". . . **employes of other crafts have also handled such work, but it is not a monopoly of any craft.**" (Emphasis ours.)

Since Carrier denied the employes' allegations of exclusive performance, it was incumbent upon the employes to come forth with competent evidence proving that they had performed the claimed work exclusively on Carrier's entire system. The Employes had the burden of proving all essential elements of their claim. In the absence of proof on the essential question of practice, the claim obviously should have been denied.

Award 12046 (Engelstein)	BofMWE v FEC
Award 12011 (Christian)	BofMWE v Sou. Ry.
Award 11973 (Kane)	SG v IC
Award 11846 (Rose)	B of MWE v SP (PL)
Award 11658 (Dolnick)	BofMWE v Ala. Great Sou.
Award 11343 (Miller)	ORT v GM&O
Award 11128 (Boyd)	BofMWE v Ga. Sou. & Fla.
Award 11118 (Sheridan)	BofMWE v D&RGW
Award 11081 (Ray)	BofMWE v CRR Co of NJ
Award 10985 (Hall)	BofMWE v CRR Co of NJ
Award 9963 (Weston)	BofMWE v I C

Award 12340 (Stack — This award was proposed by Referee Stack two months after he released his proposed erroneous **Award 12390** and subsequent to re-argument thereof. Due to further re-argument of erroneous **Award 12390**, a lower number was assigned to the subsequent decision in which Referee Stack obviously overruled himself in important respects, particularly with regard to burden of proof.)

III.

THE AWARD IS GRAVELY ERRONEOUS IN HOLDING THAT PRACTICE AT A SINGLE LOCATION, RATHER THAN SYSTEM-WIDE PRACTICE, IS CONTROLLING IN AN UNCOMPLICATED CLAIM TO SPECIFIC WORK THAT IS BASED ON PAST PRACTICES AND A SYSTEM-WIDE AGREEMENT.

Throughout the entire processing of this claim on the property, the employes did not refer to any provision of any Agreement, and in their submission to this Board they refer only to one rule which is of general application to the entire system. No rule having reference to any local situation is cited or involved. There is a mere claim to an exclusive right to perform specific work. If the claim is to be sustained, it must be on the basis of the rules of the controlling Agreement having general and system-wide application. The claim is that the employes have an exclusive right to perform specific work which is admittedly not mentioned in any way in their Agreement. In these circumstances, our decisions are uniform and consistent in holding that system-wide practice is controlling, and no exclusive right to work at a single location can be established by mere proof that such work has been assigned to the employes exclusively at that location for a long period of time, where Carrier alleges that such work has been assigned to others at other points on the system.

Award 12381 (O'Gallagher)	CL v SP-TNO
Award 12356 (Dorsey)	ORT v D&H
Award 12257 (Dolnick)	ORT v T&P
Award 12147 (Engelstein)	ORT v B&LE
Award 11973 (Kane)	SG v IC
Award 11963 (Christian)	CL v Penn RR
Award 11880 (Christian)	CL v StLSW
Award 11864 (Seff)	CL v Ann Arbor
Award 11758 (Dorsey)	BofMWE v AT&SFe
Award 11605 (Coburn)	BofMWE v IC
Award 11526 (Dolnick)	SG v SP(PL)
Award 11331 (Coburn)	ORT v GM&O
Award 11239 (Moore)	ATD v Penn RR
Award 11067 (McMillen)	ATD v Penn RR
Award 10970 (McMillen)	ORT v C&O
Award 10867 (Kramer)	SG v CGW
Award 10615 (Sheridan)	CL v Penn RR
Award 10014 (Weston)	CL v L&N
Award 7784 (Lynch)	CL v Erie
Award 7031 (Carter)	CL v Seaboard
Award 36782 (Johnson)	Sys. Fed. 10 v D&RGW

The correct rule is stated as follows in **Award 11526** (Dolnick) which involved contracting out work:

> "The Agreement between the parties is system-wide. It is not confined solely to Sacramento or to West Oakland or to any one of the Carrier's Divisions. It includes them all. While it is true that the Employes do not have access to all of Carrier's records, and that it is sometimes difficult to know all that is happening in the system, it is nevertheless, the obligation of the Employes to make certain that the work belonging to Signalmen is specifically set out in the Agreement. If it is not so set out, then the work belongs to them only if by practice, custom and usage on the property, work has been done system-wide exclusively by Signalmen. See Awards 8207 (McCoy), 5404 (Parker), 7806 (Carey) and 4208 (Robertson)."

In **Award 10924** (Hall) we said:

> ". . . one of the most basic and fundamental principles recognized by this Board is that the assignment of work is the prerogative of Carrier unless such right has been limited by contract. See Awards 6856, 7307, 7362 and 7849 among others."

In **Award 12346** (Stack), this Referee recognized the universally accepted rule that:

> "All inherent rights of management that the Carrier has not contracted away remain with it."

This "most basic and fundamental" principle, the prerogative of management to assign the work, would soon be reduced to mere sham if those charged with the duty to interpret labor Agreements could lawfully pervert voluntary work assignments at individual facilities into contracts depriving management of its right to change those assignments in order to meet changing conditions. Nothing short of an established practice of exclusive, system-wide assignment of work to a single class of employes reasonably justifies the inference that by merely adopting a general Scope Rule listing that class of employes but not listing the work, the parties intend to give such employes any exclusive rights to such work. The Awards we have cited above are typical of our many consistent decisions on this point.

Flying directly in the face of these clear principles, as the authors of this award have done, is not only inexcusable, but it is also an unfortunate disservice to both labor and management. The welfare of both groups will be served best by achieving consistency and accuracy in our decisions.

IV.

THE AWARD ASSUMES THAT PRACTICE, STANDING ALONE AND WITHOUT REFERENCE TO ANY AGREEMENT, CREATES BINDING OBLIGATIONS THAT RESTRICT CARRIER.

The award states:

> ". . . a practice once established continues in force until specifically abrogated by the parties, and where a contract is negotiated and existing practices are not rescinded or altered by its terms, such practices are enforceable to the same extent as the provisions of the contract itself, as though written therein."

While the Referee has not noted the fact, this language is copied verbatim from a paragraph in **Award 10122** (Carey) which was quoted in the Labor Member's memorandum. When this statement of Referee Carey is read in context, it takes on an entirely different meaning, and is certainly not subject to the inference that a mere practice becomes binding upon parties when it is unrelated to some vague rule of the parties' Agreement. Referee Carey had before him a claim in which the employes contended that the parties had entered into a binding oral agreement, and they cited practice to prove the existence of the oral agreement. In the paragraph immediately preceding that containing the above-quoted words, Referee Carey stated:

> **"If the Claims submitted do not rest upon an Agreement of the parties they, of course, must fail.** The basic question is, was there such an agreement and if so, did it operate with reasonable uniformity on all or substantially all of the employes in the class?"

V.

THE AWARD CONTRAVENES SPECIFIC RULES OF THE AGREEMENT.

Carrier states that the Scope Rule covers only work of maintenance and construction character. Material portions of the rule read:

> **"RULE 1 — SCOPE**
>
> These rules will govern the hours of service and working conditions of all employes not including supervisory forces above the rank of foreman, performing **work of a maintenance and construction character in Maintenance of Way Department . . .**"
>
> "Section Foreman, Extra Gang Foreman, or any other class of foreman in the Maintenance of Way Department reporting to the Roadmaster or to any **officer having charge of the construction or maintenance of railroad track of any character: . . .**"

Since the Scope Rule limits its coverage to maintenance and construction work in the Maintenance of Way Department, defines section men in terms of being supervised by foremen, and in turn defines foremen in terms of employes reporting to officers having charge of the construction or maintenance of railroad track, the implication that section laborers and foremen are to have no rights to work that is not related to the construction and maintenance of railroad track is unavoidable. **Expressio unius est exclusio alterius.** This is the interpretation which the Board correctly placed on these rules in **Award 10860** (Kramer), see the first paragraph quoted under I, above.

The Agreement is concluded with Rule 46 which provides that:

> **"The rules enumerated above constitute in their entirety the agreement between these railways and their maintenance forces** and all rules, practices and working conditions previously in effect, are by this agreement abolished. . . ."

Thus the basic conclusion in the Award not only disregards controlling precedent, but it flagrantly violates the most basic rules for the interpretation of Agreements. It is elementary that the meaning of an Agreement **". . . cannot be stretched by the acts of the parties beyond what the language will bear. . . ." 17 Corpus Juris Secundum, Contracts, Sec. 325.**

The powers of the National Railroad Adjustment Board are limited. We cannot make or revise Agreements, we can only interpret them, and in doing this we are required to apply the ordinary rules of contract law. **Award 10585** (Russell).

The Award is also palpably wrong in holding that the claim for money was handled in the usual manner on the property. This claim was initially submitted to Carrier's highest officer after a mere protest had been handled with lower officers, and the highest officer did not concede that it was properly before him; he recognized only the protest which had been handled with the designated lower officers. **Award 8205** (Wolff), among others.

We dissent.

G. L. Naylor
W. M. Roberts
R. E. Black
W. F. Euker
R. A. DeRossett