Award No. 13579
Docket No. MW-13688

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC COMPANY
(Pacific Lines)

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

(1) The Carrier violated the Agreement and practices thereunder when, beginning with March 6, 1961, it assigned other than B&B department employes on the Rio Grande Division to construct and/or repair truck bodies, sides and end-gates at El Paso, Texas.

(2) The Carrier further violated the Agreement and practices thereunder when, beginning with March 6, 1961, it assigned other than B&B department employes on the Rio Grande Division to paint trucks and other automotive vehicles, including the painting of numbers and lettering thereon at El Paso, Texas.

(3) B&B Foreman J. O. Chlarson, Assistant B&B Foreman J. R. Musgrove, Carpenters W. E. Srote, Jr., L. R. Evans, D. H. Cole, S. W. Hoskings, L. A. Golden, N. Z. Wallace, J. E. Locke, B&B Helpers A. Brady and Francisco Barragan each be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man-hours consumed by other forces in performing the work referred to in Part (1) of this claim.

(4) Furloughed Painter S. E. Galvan be allowed pay at the painter's straight time rate for a number of hours equal to that consumed by other forces in performing the work referred to in Part (2) of this claim.

EMPLOYES' STATEMENT OF FACTS: The factual situation involved in this dispute was fully described as follows within the letter of declination by the Carrier's highest appellate officer:

"This case was discussed in conference on August 16 and September 14, 1961. Prior to March 6, 1961, certain work on bodies of trucks

OPINION OF BOARD: The parties accepted the following quotation as a full statement of the facts involved:

"Prior to March 6, 1961, certain work on bodies of trucks at El Paso, namely construction and repair of wooden sideboards, end gates, etc., as well as painting, lettering and stenciling of trucks was performed by employes assigned to B&B Gang No. 14 at El Paso, although the repair of automotive equipment generally throughout the property, and in fact at El Paso except for the specific work enumerated above, is work considered as coming within the scope of the agreement effective May 1, 1948, covering those employes in the Maintenance of Way Department (Work Equipment — Roadway Machines and Scales Sub-Departments) who are represented by System Federation No. 114, Railway Employes Department, AFofL, Mechanical Section thereof. Since March 6, 1961, work on wooden truck bodies and painting and lettering of trucks has been performed by employes of the Maintenance of Way Work Equipment Repair Shop represented by the above organization, along with their other work on automotive equipment.

The issue in this case appears to be whether the B&B forces, by reason of having performed this work at this location prior to March 6, 1961, acquired thereby an exclusive right to the performance of said work at this particular location."

The latest awards of this Board seem to have established the principle that the Organization will not be considered to have the exclusive right to perform specified work unless the Schope Rule clearly grants it by saying that such work is reserved to the Organization. Where the Scope Rule, however, is general, listing merely the names or titles of jobs, the intention of the parties must be determined by resort to history, custom and practice.

The rationale of this doctrine is that no Organization has an inherent right to specific work, but can achieve such a right in one of two ways, either by the express agreement of the parties or under such circumstances that would persuade a reasonable person that the parties intended to grant exclusive rights to the Organization. Such circumstances seem to be that the Organization has so consistently, substantially and continually performed the work that the parties must have regarded such work as belonging exclusively to the Organization.

In this case, the Organization asserts that it has consistently, substantially and continually performed this work at El Paso. It raises the question squarely: If the work was always done by the Organization at this location, should the parties not be deemed to have considered that, at this location, it belonged exclusively to the Organization?

It argues that if the parties did not change a long standing local practice when they negotiated their agreement they intended the status quo to continue. It cited the following Awards in support of its argument that local practice rather than system-wide practice should prevail: Awards 4086, 2346, 4160, 4240, 4493, 5150, 5167, 6726, 8831 and 12422.

In reviewing these Awards, we find that many do not stand for the proposition that long standing local practice prevails against system-wide practice.

Award 4086 was not concerned with a local as opposed to a system-wide practice. The Board there pointed out,

"For that matter, this practice was no different than that which had been followed by the Company for years, on its Pullman cars, throughout the entire nation."

In Award 4240, Carrier was sustained because of a long standing practice. In Award 4493, long practice, not local practice, was the reason for sustaining the Claimant. Similarly, Awards 5150, 5167 and 8831 do not support local practice as against system-wide practice.

While some the Awards do support the Organization's position they do not represent the majority of Board Awards. See Awards 13347, 13094, 13048, 13442, 12787, 11758, 11526, 11239, 10615 and others.

It seems only sensible that where the parties have not expressly reserved work to an Organization we should not imply that they have done so unless the practice compels us to say that they so intended it. It is difficult to spell out such an intention if the practice varies from location to location. One cannot say that the Carrier considered the work as belonging to the Organization unless wherever the work is done it is always done by the Organization. It follows, therefore, that the inference that the parties intended to grant exclusivity to the Organization can be made only if the practice is system-wide.

The inference that the parties intended to freeze the status quo, which is essentially the argument of the Claimant, does not follow from the fact situation. There are many reasons other than freezing the status quo to explain why some work is always done by members of an Organization at a particular location. Convenience, inertia, availability of experienced personnel or mere happenstance may be just as valid as an explanation.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to the 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 Carrier did not violate 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 14th day of May 1965.