NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19898
Docket Number MW-19765

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Inc.

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

(1) The Carrier violated the Agreement when it assigned or otherwise permitted Blacksmiths Ray Rozalski and Norman Roupe to repair the top on V-S3 Chore Boy in the Equipment and Repair Shop at Vancouver (System File 349 F/MW-84(i) - 5, 3-5-71).

(2) Mechanics H. Fisher, R. Robertson, C. Lassiter, J. Hayes, G. Godvig and C. Dykman each be allowed three and two-thirds (3-2/3) hours' pay at their respective straight time rates account of the aforesaid violation.

OPINION OF BOARD: The Organization objects to Carrier's use of Blacksmiths to repair the top of a V-S3 "Chore Boy" in its equipment and repair shop.

A "Chore Boy" is described as being a three-wheeled, mobile device, closely resembling an electric golf cart.

Initially, Carrier points out that the Organization, on the property, cited Rule 41 of the Agreement, but did not allege a violation of Rule 40 and consequently any present reference to that Rule is an attempt to raise new issues not properly considered on the property.

Of course, an Organization must cite a specific rule violation while the Claim is being considered on the property and the Referee in this case has so determined previously in Award 19855. However, that concept does not appear to dispose of the matter in this instant dispute.

Very clearly, the Organization raised Rule 41 in its initial claim. A review of the Agreement demonstrates that Rule 40, 41 and 42 are directly related and all three appear under the heading of Article X - "Classification of Work." Thus, by a citation of Rule 41 in its claim, it would certainly appear that the Carrier was specifically placed on notice of the allegation that work on the property was performed by employees not covered by the Agreement in question. Even if the Claim is not that broad, Carrier, a party to the Agreement, must clearly have understood the implications of a citation of Rule 41.

Rule 41 states that:

"Roadway Machinery Equipment and Automotive Repair Department forces will be composed of the following classes of employes as the nature of the work requires: 1st Mechanics are those men performing work of building, repairing, dismantling or adjusting roadway machine equipment and machinery, automotive equipment, and responsible for such work. 2nd - Helpers are employes assigned to assist mechanics with any work under their jurisdiction."

Carrier states that it must prevail on the merits because, (1) the Organization failed to demonstrate exclusive job performance and (2) a Chore Boy is neither roadway nor automotive equipment.

Concerning the initial assertion, this Board has required a demonstration of work performance, by custom, practice and/or tradition, in order to sustain a violation of a general Scope Rule, and has required a showing that the work has been performed by the employees in question, to the exclusion of others. But if the Scope Rule is specific in nature, and sets forth the duties or functions of the positions, it is not necessary to demonstrate "exclusivity."

While the degree of proof necessary may vary under the rules discussed above, the Board is stating, essentially, that a Carrier may not contract out (or otherwise perform) work of a type intended to be covered by an Agreement with the employees, absent certain exceptions not here applicable.

At this point, it should be noted that the Claim, as presented and prosecuted on the record, does not appear to dispute the fact that certain parts may, on occasion, be "fabricated" by Blacksmiths; which parts are then used in repair work. To the contrary, the Claim more properly goes to the question of repair of the machinery in question. Accordingly, this decision is limited to a consideration of the repair of the "Chore Boy" as contrasted to fabrication of parts.

As it relates to this dispute, the Board views Rule 41 as specific and consequently we are not required to resolve any conflicts as to whether or not employees covered by the Organization's Agreement have performed the repair work exclusively.

Finally, we consider the Carrier's assertion that a "Chore Boy" is neither roadway nor automotive equipment. The Board may not rewrite or reform an Agreement, but must consider the available evidence as it applies to the written words of the Agreement, absent evidence of "intention" when language is ambiguous. A piece of machinery which resembles an electric golf cart and which transports people and material would appear to be automotive equipment of a type, even though it is not used on a road or highway, and Rule 41 would appear to be broad enough to include such machinery. In any event, the treatment of

the issue, on the property, disposes of the matter in this dispute. On the property, the Carrier never suggested that the "Chore Boy" was not the type of machinery contemplated by Article 41. In fact, in its April 21, 1971 Denial the Carrier stated that "the work of repairing roadway equipment machines is not work reserved exclusively....". The clear implication of that statement, and the entire record of the treatment of the issue, on the property, compels the conclusion that the machinery was of the type described in Article 41. Accordingly, the Board is of the view that the Carrier violated the Agreement.

Concerning the Claim for compensation, the Carrier raises the question of "full employment." For reasons stated by this Referee in **Award 19899**, "full employment" is not a deterrent to awarding damages if the claim is not speculative and is advanced and/or developed on the property.

The Organization consistently claimed three hours and forty minutes at the straight time rate for six mechanics. A review of the Record demonstrates that said Claim is related to the time spent by Blacksmiths in both fabricating and repair. We have noted above that the Claim more properly goes to the question of repair of the machinery in question and stated "... this decision is limited to a consideration of the repair of the 'Chore Boy' as contrasted to fabrication of parts." The record shows that the two Blacksmiths devoted three hours apiece to the repairs in question; a total of six hours. Accordingly, we will sustain Claim (2) to the extent of Awarding each of the six Claimants one (1) hour of pay at their respective straight time rates.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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.

A W A R D

Claim (1) is sustained.

Claim (2) is sustained to the extent and in the Amount stated in the final paragraph of the Opinion of Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 8th day of August 1973.