NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19949
THIRD DIVISION Docket Number MW-19869

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Port Terminal Railroad Association

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 and of practices thereunder and also violated the National Railway Labor Act when, without negotiation and agreement with the BMWE, it allocated to the International Association of Machinists the work of repairing and maintaining Maintenance of Way Department trucks and roadway machines (System Time Claim MW-71-2).

(2) The work of repairing and maintaining MofW trucks and roadway machines be reassigned to employes formerly performing this work and who are represented by the Brotherhood of Maintenance of Way Employes.

(3) Nick Cortez and C. E. Corbin and/or their successors each be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man hours expended by machinists in performing the work described in Parts 1 and 2 above, beginning with May 31, 1971 and continuing until the work is restored as requested in Part 2 above.

OPINION OF BOARD: The merits of this case concern a scope claim; however, because the record presents an unusual third party issue, we believe a brief overview of the case is in order.

Work being performed by Maintenance of Way Employees was claimed by the Machinists, whereupon, the Port Terminal Railroad Association (Carrier hereafter), without discussion or agreement with the Maintenance of Way Organization, gave the work to the Machinists. The Carrier did not, however, in the resulting dispute with the Maintenance of Way produce the part of the Machinists' Agreement which it regarded as reserving the work to the Machinists, nor has it done so in its submission to this Board. In essence, then, we have two crafts claiming the same work, but the agreement language supporting one of the claims, the Machinists, is absent from the record made by the parties. In due course the Third Division, National Railroad Adjustment Board, gave the customary Third Party Notice to the Machinists, as required by Section 3 First (j) of the Railway Labor Act, but the Machinists have declined to appear. In speaking about its decision of non-appearance in a letter dated October 20, 1972, the Machinists Organization stated:

> "The Railway Labor Act provides that the jurisdiction of the National Railroad Adjustment Board over a dispute between a carrier and a System Federation, involving the interpretation or application of agreement between them concerning rates of pay, rules and working conditions of employes represented by our Organization, is vested exclusivly in the Second Division. The Third Division does not have jurisdiction or authority to issue an award determining a dispute between a carrier and employes in the crafts represented by our Organization. An Award issued by the Third Division purporting to do so would be beyond the jurisdiction of the Third Division and would be void. Accordingly, we will now (sic) appear or participate in the dispute bearing Docket No. MW-19869 now pending before the Third Division."

We are thus presented with the difficulties of the absence of a third party which has an important interest in the dispute, as well as the absence (from the record made by the parties) of the agreement language by which to determine such third party's rights. We do not find these difficulties insurmountable, however, and we shall dispose of the entire dispute, including the interests of the non-appearing third party.

With this general background before us, we note that essentially these same third party problems were presented to the Second Division in Award 5766 (Dorsey), September 10, 1969. There, after receiving the customary Third Party Notice, the American Railway Supervisors' Association asserted that--

> "Our Association handles our claims on the Fourth Division of the National Railroad Adjustment Board. Hence, we would have no interest in any claim presented to your Division involving any of the Shop Crafts."

The Second Division, in holding that its jurisdiction was not affected by the Association's non-appearance, stated the following:

> "Notwithstanding the declination we in fulfillment of our statutory obligations as enunciated by the Supreme Court in T-C.E.U. v. Union Pacific R. Co., 38U.S.157(1966), have made part of the record in this case and considered the Agreement between Carrier and the Association effective March 1, 1963, filed with the National Railroad Adjustment Board in compliance with the Railway Labor Act."

This same result was reached in an earlier Second Division Award, 5509, rendered by Referee Ives and approved by the Second Division on July 6, 1968. See also T-C. E. U. v. Union Pacific R. Co., 38 US 157 (1966), wherein the U. S. Supreme Court declared that the National Railroad Adjustment Board, after having given an appropriate Third Party Notice, but without regard to whether the noticed party actually appears, has the obligation to resolve the "entire dispute upon consideration not only of the contract between the railroad" and the petitioning Organization in the dispute, "but, 'in light of...contracts between the railroad'and any other union 'involved' in the overall dispute, and upon consideration of 'evidence as to usage, practice and custom' pertinent to all these agreements." Since the National Railroad Adjustment Board is composed of divisional boards, without there being any internal board which has exclusive jurisdiction over disputes which overlap divisional boards, this Supreme Court mandate must necessarily be carried out by one of the divisional boards. Accordingly, the Third Division Board has jurisdiction over the instant dispute, including jurisdiction over the non-appearing third party, the Machinists; in order to fulfill our jurisdiction we have made the Machinists' Agreement, which is officially on file with the National Railroad Adjustment Board, a part of the record of this dispute. (Such agreement is entitled "Agreement between the Port Terminal Railroad Association and the Employes Represented by System Federation No. 14, Railway Employes' Department, A.F. of L., Mechanical Section thereof, effective March 1, 1952.)

With regard to the merits, the Petitioner alleges that, on this property, the Carrier's Bridge and Building employees, Maintenance of Way Department, have traditionally performed the work of repairing, maintaining, and servicing Maintenance of Way trucks and roadway equipment. It is further alleged that the duties of claimants, a carpenter and helper in the Maintenance of Way Department, prior to May 5, 1971, consisted solely of work involving such repairing, maintaining, and servicing trucks and roadway equipment; such work was performed in a Maintenance of Way shop and also, when necessary, on the line of road. Upon protest about this work by the Machinists, the Carrier gave that craft the foregoing work performed by claimants, effective May 5, 1971. No discussions or agreement with the Maintenance of Way Employees preceeded this action. Claimants were offered the opportunity to continued performance of the work, as new employees of the Machinists craft, but they declined and two new hires resulted.

Carrier's defense to the Maintenance of Way claim is essentially based on the contentions that: (1) the Maintenance of Way Agreement does not reserve the disputed work to that craft; and (2) the Machinists' Agreement does reserve the work to the Machinists and the mere fact that such work may have been assigned to Maintenance of Way employees for a period of time is not relevant.

The record does not support these contentions. With regard to the first of these contentions, although their scope rule is a general one, the Maintenance of Way Employees have proved a reservation of the involved work by a preponderance of the record evidence. Written statements from the two claimants and six other Maintenance of Way employees, all of whom appear to have first hand knowledge about the disputed work, abundantly demonstrate that such work has been traditionally and customarily performed on this property by Maintenance of Way employees for at least 32 years. Nowhere in the record does Carrier dispute or offer any evidence to contradict the Petitioner's evidence and, moreover, while the claim was on the property, the Carrier made an admission which strongly corroborates Petitioner's evidence. In an August 31, 1971 letter, the Carrier, in pertinent part, stated:

> "We all agree that over the past years this repair and maintenance work was spread over the different departments of the Association with each craft taking care of their own equipment, but when faced with claims from the International Association of Machinists as to this falling under the existing agreement between the Association and this craft, and failing to find any portion of the other crafts agreement, Maintenance of Way included, that either called for a mechanic or spelled out the work assigned to a mechanic of that craft, the Association Management agreed to assign the repair and maintenance of Port Terminal Railroad's company trucks and roadway machine equipment to the machinist craft."

In view of the foregoing, and on the whole record, we find that the disputed work belonged to the Maintenance of Way Employees at the times in question and that the Carrier's action in respect to such work violated the Maintenance of Way Agreement.

The Carrier's second contention, that the work belonged to the Machinists, apparently is based on Rule 36 of the Machinists' Agreement which reads as follows:

> "CLASSIFICATION OF WORK
>
> Rule 36
>
> "Machinist's work shall consist of laying out, fitting, adjusting, shaping, boring, slotting, milling and grinding of metal used in building, assembling, maintaining, dismantling, and installing locomotives and engines (operated by steam or other power), pumps, cranes, hoists, elevators, pneumatic and hydraulic tools and machinery, shafting and other shop machinery, rachet and other skilled drilling and reaming; tool and die making, tool grinding and machine grinding, axle truing, axle, wheel and tire turning and boring; engine inspecting; air equipment, lubricator and injector work; removing, replacing, grinding, bolting and breaking of all joints on superheaters; oxyacetylene, thermit and electric welding on

work generally recognized as machinist's work; the operation of all machines used in such work, including drill presses and bolt threaders using a facing, boring or turning head or milling apparatus; and all other work generally recognized as machinist's work."

From our study of the above rule, and the whole record, we find no reason for altering our conclusion that the disputed work belonged to the Maintenance of Way Employees. Moreover, it appears that a series of Second Division Awards have ruled adversely to the Machinists on the very work under consideration here. See Second Division Awards 1110 (Thaxter), 1808 (Carter), 2250 (Carter) 3544 (Bailer), and 3363, 3364, and 3365 (all Stone).

By reason of the foregoing we conclude that the Carrier is obligated to permit the work to be performed by the Maintenance of Way Employees. Accordingly, we have resolved all issues in the dispute, including the rights of the third party Machinist Organization affected by the dispute, in accordance with the Supreme Court mandate in T-C. E. U. v. Union Pacific R. Co., 38 US 157 (1966). We shall sustain the claim in accordance with this opinion.

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 sustained in accordance with opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1973.