NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19969
THIRD DIVISION Docket Number MW-19722

C. Robert Roadley, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Duluth, Missabe and Iron Range Railway Company

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

(1) The Carrier violated the Agreement when it assigned Supervisor Jack Zeleznikar and John Swenson to supervise B&B employes in the installation of an air bubbling system on the Duluth ore docks on December 5 and 6, 1970 (System file 3-71).

(2) Assistant Foreman August Johnson and John Anderson each be allowed ten (10) hours' pay at their respective time and one-half rates because of the violation referred to within Part (1) of this claim.

OPINION OF BOARD: On Saturday, December 5 and on Sunday, December 6, 1970, the Carrier assigned B&B forces to install an air bubbling system at the Duluth ore dock. This work was supervised by two officials of the Carrier, the Manager of Structural Engineering and an Engineering Technician. The claim is based upon the fact that the two Claimants, who are regularly assigned Assistant B&B Foremen, were not used to perform the supervision involved. Claimants are seeking ten hours each at their respective time and one-half rates because the Carrier allegedly violated the Agreement by having the supervision performed by its officials.

In its submission to the Board Petitioner cited Rules 1, Scope; 2, Seniority; 15 (k), Work on Unassigned Days; 17 (c), Overtime; and 18 (a), Calls; and 26 (a) and (b), Classification of Work. However, a careful review of the record of handling on the property, as shown by the correspondence between the parties, indicates that the only rule violations advanced in behalf of Claimants were Rules 1, 17, and 26, (per General Chairman's appeal letter of May 22, 1971 and Superintendent's reply thereto, dated June 18, 1971). We will therefore limit our consideration to the partisan positions as argued on the property for it is a well established principle of this Board that the parties are barred from raising issues for the first time before the Board. See Award 17329 and many others regarding this principle.

Concerning Rule 1, the Organization summarized its position by stating:

"Further, Rule 1 (Scope) excludes Carrier Supervisors from the agreement, and therefore, it also excludes them from performing work which comes under the scope of the agreement, and the work performed by Carrier Supervisors and made subject to complaint is work which comes under the scope of the agreement. Seniority has no bearing on their right to enter a claim."

Concerning Rule 26, Petitioner stated:

"The Agreement rules provide for contract supervision. Rule 26 (a) reads, 'Any employee directing the work of men and reporting to supervisory officials of the Company shall be classified as Foremen.' Rule 26(b) reads in part, 'An employee who assists the Foreman to whom assigned shall be classified as an Assistant Foreman.' We believe these rules were put into the agreement to provide that Foremen and Assistant Foremen would be employed to supervise the men in their work."

Insofar as Rule 17 is concerned, Petitioner averred that where overtime work has been denied then overtime payment is justified.

The position of the Carrier was summarized as follows:

1. The work in dispute was an experimental project, that of installing a bubbler system to determine the possibility of keeping the waters open around the ore docks to prolong the shipping season. The project engineer, for the most part, developed the design and method of installation as work progressed.

2. Mr. John Swenson is the ore dock B&B supervisor and, as such, was properly assisting the project engineer in obtaining materials, gathering test data, and familiarizing himself with the construction and operation of the bubbler.

3. The work in dispute is not the exclusive work of employees covered by the Maintenance of Way agreement."

In its handling of this claim, both on the property and before this Board, Petitioner has asserted that the work in question belonged to the employees covered by the Scope Rule because, in part at least, one of the Claimants had been used in the past to supervise and instruct the men in the performance of the same type of work in dispute. The Carrier, on the other hand, has asserted that work of the nature involved herein has been performed on many occasions in the same manner as in this dispute without complaint.

In order to reach a logical conclusion in this case we must first determine whether the work in question comes within the purview of the Scope Rule in the Agreement.

We stated in Award 17944, in part:

> "It is axiomatic that the party alleging the breach of contract, has the burden of presenting evidence sufficiently substantial to enable us to render a sustaining award. .... Since the Scope Rule is the primary rule invoked in this case, we need not direct our attention to the other rules cited by the Organization since they do not become operative until a violation of the Scope Rule is found."

In the instant case we are confronted with two contradictory assertions by opposing sides without substantial evidence having been presented to support their respective contentions.

The Scope Rule before us is a general type Rule. Many decisions handed down by this Board require that the party alleging a violation of the rule must show by a preponderance of evidence that over a long, protracted period of time they have performed the work in question to the exclusion of all others.

In Award 18471 we stated, in part:

> "In order to sustain their contention, the Organization has the burden of proving that the Agreement clearly grants it exclusive right to the work complained of by saying that such work is reserved to the Organization, or, in the absence of such a Rule, it must prove, by probative evidence, that the work is of a kind that has been historically, customarily, and exclusively performed by employees covered by the Agreement."

There are innumerable prior awards of this Board that suscribe to the foregoing principle and we need not recite them here.

Based upon a thorough review of the record before us we are convinced that, although work similar to that complained of in this case may have been performed on occasion by contract employees, work of the nature described herein has not been performed by contract employees exclusively. The burden of proof rests with the Petitioner and that burden has not been met in this case. We will deny the claim.

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 not violated.

A W A R D

Claim denied.

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.