NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20308
THIRD DIVISION Docket Number MW-20210

Joseph Lazar, 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 used B&B Gang No. 26 instead of paint forces to patch plaster and to paint the sidewalls and stairway in the depot at McCook, Nebraska on December 3, 1971. (System File 33-P-3/MW-84(p)-1, 2-18-72)

(2) Paint Gang Foreman C. Schwartz, Painters E. L. McKinney, J. L. Gatchel, and S. P. Beckman each be allowed pay at their respective overtime rates for an equal proportionate share of the 48 man-hours consumed in the performance of the aforesaid work by B&B Gang No. 26.

OPINION OF BOARD: On December 3, 1971, B&B Gang 26, employed on the Omaha Region, McCook Seniority District, under a Foreman and three carpenters and two carpenter helpers, did plastering and painting on the side walls and stairway in the Depot at McCook, Nebraska. This patch plastering and painting work was performed by B&B Gang 26 during regular assigned hours at a point within their seniority territory and consumed 48 man-hours. On this date, Claimants held regular assignments and were working full time on the Carrier's Lines West Paint Gang, Omaha Region. Claim of the Carrier's Lines West Paint Gang is that each member be allowed pay at his respective overtime rate for an equal proportionate share of the 48 man-hours consumed in the performance of the work by B&B Gang No. 26.

As a preliminary matter, we must consider the following statement by the Carrier:

> "Rule 69 C of the May 1, 1971 Maintenance of Way Agreement, Rules 2 and 5 of the former CB&Q Agreement and a so-called Letter of Agreement dated January 27, 1954, cited on pages 3, 4, 5 and 6 of the Organization's submission, respectively, are used as the basis for various allegations and contentions by the Organization in its statement of position, pages 3 through 10. The Organization did not plead these rules, agreements, contentions, and allegations in support of the instant claim while it was being handled on the property. As such, they constitute new matters and raise new issues which, under the Railway Labor Act and National Railroad Adjustment Board Circular No. 1, this Board has no authority to consider."

This Board has carefully examined the correspondence between the parties on the property (Carrier's Exhibits C-1, 2, 3, 4, and 5) and accepts the Carrier's statement pertaining to the handling of the matter on the property. Accordingly, these items not having been handled on the property are not a proper part of this record and will not be considered here.

Coming to the merits, the claim here is based on alleged violation of Rule 55 J and Appendix K, paragraph 6 of the May 1, 1971 Agreement which read:

"Rule 55 Classification of Work

* * * * * * *

"J. Painter.

"An employe assigned to mixing, blending, sizing, applying of paint, kalsomine, whitewash, or other preservatives to structures, either by brush, spray or other methods, or glazing, including the cleaning, or preparation incidental thereto, shall be classified as a painter. (This will not preclude the use of carpenters to do painting or helpers to perform preparatory or other work customarily accepted as helpers' work)."

"APPENDIX K

"The following understandings are agreed to in connection with the new Maintenance of Way Agreement:

* * * * * * * *

"6. It is agreed that employes holding seniority as painters on any of the former railroads will be given preference to painting work to the same extent as prior to the effective date of this Agreement."

We concur in the Carrier's statement of the issue, which is as follows:

"The sole issue on the merits is whether carpenters and carpenter helpers in the B&B Sub-Department may be assigned painting and related preparatory work when all painters who held seniority as such on the Carrier's component railroads are regularly assigned and employed as painters on a full time basis."

The task of this Board here is to interpret and apply Rule 55 J and Appendix K, paragraph 6 to the facts of record. Rule 55 J expressly and in plain, clear language states: "(This will not preclude the use of carpenters to do painting or helpers to perform preparatory or other work customarily accepted as helpers' work)." This language of agreement unequivocally privileges the Carrier's use of carpenters and helpers to do the work stated.

The problem before us, however, is to read Rule 55 J in context with Appendix K, paragraph 6, which provides that "employes holding seniority as painters on any of the former railroads will be given preference to painting work to the same extent as prior to the effective date of this Agreement." The term "preference" according to Webster's New Collegiate Dictionary, 2d ed., 1960, has a meaning of "Priority in the right to demand and receive satisfaction of an obligation." This preference right of Appendix K, paragraph 6 is simply a right of priority. It is not a right of exclusivity. Nevertheless, this right of priority is not qualified or limited as to others over whom the preference right is exercised. Accordingly, the preference right of Appendix K, paragraph 6 provides priority to "employes holding seniority as painters on any of the former railroads" "to painting work to the same extent as prior to the effective date of this Agreement," and such preference right gives a priority over other painters not entitled to the Appendix K, paragraph 6 preference as well as over other persons including carpenters or helpers mentioned in Rule 55 J. In this manner, meaning and effect are given to the provisions of both rules and they are reasonably harmonized as the negotiators presumably intended.

We have stated that Appendix K, paragraph 6 provides for a priority right and does not provide for a right of exclusivity. It is not necessary here to describe the detailed substance of this preference right. It is enough to note that the Carrier unilaterally assigned B&B Gang 26 on December 3, 1971 to do the painting work in the Depot at McCook, Nebraska, and completely denied to Claimants any opportunity to express any preference to this work. Conceivably, Claimants might have preferred to remain on their regular assignments, and it is possible that Claimants might have rejected a choice of over-time if made available to them. Nevertheless, it is clear that a preference right can have practical existence only if full opportunity is accorded for its exercise. In the instant case, it is apparent that the preference right is not qualified to exclude regularly assigned and full-time employed painters as stated by the Carrier in its formulation of the issue. We must hold, therefore, that Appendix K, paragraph 6 of the Agreement was violated.

The record shows that of the four Claimants, only Claimant Schwartz was an employe holding seniority as painter on the former Chicago, Burlington & Quincy Railroad Company so as to qualify for the preference right under Appendix K, paragraph 6. The Carrier has denied the factual basis for such qualification of the other Claimants. This question of proof was presented on the property and remains unresolved. Since the burden of proof rests with the Claimants and has not been satisfied, on the record before us we must conclude that they are not qualified for the preference right.

Claimant Schwartz seeks a proportionate share of the 48 man-hours consumed by B&B Gang 26, or 12 hours, at overtime rate. Presumably, overtime is claimed on the basis that he was available for and would have worked such time as overtime if his preference right had been recognized and full opportunity had been accorded him by the Carrier to exercise such right. The facts of record, however, clearly establish that the work in question was performed during the very same hours Claimant was working on his regular assignment for which he was paid. No evidence is contained in the record to show that Claimant Schwartz had the possibility of availability, working overtime or otherwise, for the work in dispute. Further, no evidence is contained in the record to show that Claimant Schwartz suffered any financial loss or possibility of financial loss resulting from the Carrier's failure to accord to him his preference rights under Appendix K, paragraph 6. **Significantly,** this particular question of financial loss was directly raised by the Carrier on the property. Inasmuch as Claimant Schwartz had the opportunity and burden to develop proof on this aspect of the case on the property where this question was raised by the Carrier, and since Claimant did not meet this burden, there is no basis for awarding make-whole compensation to him. It is noteworthy, in this connection, that in the circumstances of this case: (1) the Agreement expressly privileges the Carrier to use the B&B employes for the work here involved absent the preference right of Appendix K, paragraph 6; (2) the Carrier acted in good faith; (3) the Carrier acted on a reasonable albeit erroneous construction of the Agreement; and (4) there was no blatant, deliberate, knowing violation of the Agreement.

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

Paragraph 1 of Claim is sustained.

Paragraph 2 of Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June 1974.