NATIONAL RAILROAD ADJUSTEMENT BOARD

Award Number 20412
THIRD DIVISION Docket Number MW-19966

Dana E. Eischen, 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 other than B&B employes and machine operators to perform steel erection work (steel tower) at Portland, Oregon from August 2 through August 13, 1971 (System File 374F/MW-84(s)-3, 9-11-71).

(2) The Carrier violated the "NOTE to Rule 55" when, without advance notice to or agreement with General Chairman Frank H. Funk, it assigned the aforesaid work as indicated in (1) above.

(3) B&B Foreman L. Fricke, Asst. Foreman M. Middleton, Carpenters H. Tucker, H. Katzberg, H. Dietrich, D. Paul, J. Dolson and S. Glenzer each be allowed seventy (70) hours' pay at their respective straight time rates.

(4) Machine Operator D. Legore be allowed sixteen (16) hours' pay at his straight time rate.

OPINION OF BOARD: In August 1971, Carrier commenced construction of a steel microwave antenna tower at Portland, Oregon on the property of the former Spokane, Portland and Seattle Railway Company (SP&S). The tower, 26 feet wide at its base and 120 feet high, was assembled into sections on the ground and the assembled sections hoisted into place by a crane. Carrier utilized employes from the Communication Department to perform the assembly and an outside contractor for the crane operation.

The record indicates that the former SP&S Communication Department employes were, at the time of the tower assembly, represented by the Brotherhood of Railroad, Airline and Steamship Clerks (BRAC); but, since January 1, 1973 these employes have been represented by the International Brotherhood of Electrical Workers (IBEW) and covered by the schedule Agreement between Carrier and that Organization.

By letter dated August 19, 1971, Petitioner filed the instant claim on behalf of the named claimants. Petitioner relies primarily upon its classification of Work Rule 55(I) and the Note to Rule 55 in support of its claim. Rule 69(c) also has been cited by Petitioner. The pertinent provisions of the Agreement read as follows:

"RULE 55

"I. Steel Bridge and Building Mechanic.

An employe assigned to the setting of columns, beams, girders, trusses, or in the general structural erection, replacement, maintaining or dismantling of steel in bridges, buildings and other structures and in the performance of related bridge and building iron work, such as riveting and rivet heating, shall be classified as a steel bridge and building mechanic. NOTE: On former SP&S and NP, B&B carpenters performed this type of work and will be under Rule 44."

"NOTE to Rule 55: The following is agreed to with respect to the contracting of construction, maintenance or repair work, or dismantling work customarily performed by employes in the Maintenance of Way and Structures Department:

"Employes included within the scope of this Agreement-in the Maintenance of Way and Structures Department, including employes in former GN and SP&S Roadway Equipment Repair Shops and welding employes-perform work in connection with the construction and maintenance or repairs of and in connection with the dismantling of tracks, structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service, and work performed by employes of named Repair Shops.

"By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employes described herein, may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. If the

"General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and Organization representative shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith.

"Nothing herein contained shall be construed as restricting the right of the Company to have work customarily performed by employes included within the scope of this Agreement performed by contract in emergencies that affect the movement of traffic when additional force or equipment is required to clear up such emergency condition in the shortest time possible."

"RULE 69. EFFECTIVE DATE AND CHANGES

"C. It is the intent of this Agreement to preserve pre-existing rights accruing to employes covered by the Agreements as they existed under similar rules in effect on the CB&Q, NP, GN and SP&S Railroads prior to the date of merger; and shall not operate to extend jurisdiction or Scope Rule coverage to agreements between another organization and one or more of the merging Companies which were in effect prior to the date of merger."

Petitioner maintains that the express language of Rule 55(I) specifically grants to B&B employes the general structural erection of steel in structures, including the microwave tower here in issue. Accordingly, Petitioner argues that Carrier violated said rule by assigning the work to employes not covered by its Agreement, i.e. the Communication Department employes. Additionally, Petitioner contends that contracting out of the crane work without notification and conference with its General Chairman constitutes, in the facts herein, a violation of the Note to Rule 55.

Carrier has denied the claim in its entirety, primarily on the ground that no clear reservation of the work in question is found in Petitioner's Agreement. On this premise, Carrier asserts that Petitioner has failed to demonstrate exclusive reservation of microwave antenna tower erection by custom, practice or tradition, and, accordingly, urges that the claim must fail. In this latter connection, Carrier points out that custom and practice relegates the work to IBEW-represented Communication Department employes rather than to Petitioner. Without prejudice to its substantive position, on the merits, Carrier insisted throughout the handling of this case that no erection work was performed on the tower on dates of August 2, 3, 4, 5 and 6, 1971. Finally,

Carrier asserts arguendo that no damages should lie if a violation is found because claimants were "fully employed" on the claim dates in question.

The IBEW, as interested third party was afforded the opportunity to participate in the hearing in this matter and filed a submission dated March 6, 1973. IBEW contends essentially that the erection of microwave antenna towers is exclusively reserved to Communication Department Employes by its Scope and Classification of Work rules with the merged Carrier. In addition, IBEW asserts that no custom or past practice has been shown by Petitioner to warrant the instant claim and, accordingly, urges that it be denied.

In resolving this claim, we turn first to the argument of IBEW that its rules are decisive on this claim arising on the former SP&S in August 1971. Close examination of the record and the applicable Agreements compels us to reject this position. The work in question was performed some sixteen months prior to the consummation of Implementing Agreement No. 2 on January 8, 1973 whereby IBEW assumed representative and schedule agreement coverage of the former SP&S Communication Department employes. Accordingly, the Scope and Classification of Work rules of the IBEW schedule can have no relevance to the particular facts and circumstances of the instant claim. It should be noted that we are not here deciding their relevance or determinative effect in future such cases.

Turning to the specific Classification of Work Rule 55 (I), we find that rule specifically classifies the work coming under the scope of the Maintenance of Way Agreement on the former SP&S property. Said rule clearly encompassed the erection of the steel tower for the microwave antenna in August 1971. Therefore, we can only conclude that Carrier erred in assigning the work in question to employes not covered by the Maintenance of Way Agreement, in violation of Rule 55(I). See Awards 3995, 10871 and 19924.

As to the claim for the crane operation work, we have ruled in prior cases involving these same principal parties that the operation of a crane is not the exclusive work of any craft, and we have cited with favor Second Division Award No. 1829, to wit:

> "It is the character of the work performed by the crane that ordinarily determines the craft from which its operator shall be drawn."

See Awards 13517 and 14004. It follows ineluctably from the foregoing that the crane work in connection with the tower erection in August 1971 was Maintenance of Way work for purposes of the Note to Rule 55. The uncontroverted record shows that this work was let to a contractor without notification or meeting with the General Chairman as required by the Note to Rule 55, thereby violating said provision of the Agreement.

As to the question of damages, Carrier asserts that the Claimants were employed full time when the violation occurred. This Board has held in numerous recent awards that notwithstanding "full employment" or the lack of a specific rule granting monetary relief, pro rata damages may be awarded upon the proven loss of work and earnings opportunity through Carrier misassignment of Agreement work. Awards 14004, 17319, 18923, 19337, 19552, et al. In our judgment, there was unquestionably lost work opportunity to claimants in the decision to use outside forces and employes not subject to the Maintenance of Way Agreement to perform work reserved to them by the Agreement in August 1971.

As noted supra, there was some ambiguity on the record concerning the actual number of days worked by the Communication Department employes in the erection of the tower. Petitioner asserts it was August 2, 3, 4, 5, 6, 9, 10, 11, 12 and 13, 1971. Carrier has maintained throughout that the Communication Department crew worked on the project August 9, 10, 11, 12, 13 and 25, 1971. Both parties concur that the crane was operated on August 10 and 11, 1971.

We do not find it necessary to decide the number of days and hours actually worked on the erection of the tower. The make whole theory will be satisfied by Carrier paying to each Claimant in Claim (3) his straight time rate for the hours actually worked in erection by the Communication Department employes, as recorded in Carrier's records kept in the ordinary course of business; but in no case less than the 48 hours as admitted by Carrier on the record herein. See Awards 14004, 20042. As to Claim (4) there is no such dispute and it is sustained accordingly.

We reiterate that the decision herein is based strictly upon the Agreement, facts and circumstances applicable upon the former SP&S property in August 1971 and cannot be deemed dispositive of questions regarding this type of work on the merged property in futuro. Such claims will turn on their merits if and when they arise.

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.

Claim (3) is sustained to the extent indicated in the Opinion.

Claim (4) is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: C. W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 27th day of September 1974.