NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20841
Docket Number MW-20765

Louis Norris, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Northwestern Pacific Railroad Company

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

(1) The Agreement was violated when the Carrier used employes of the Southern Pacific Transportation Company to repair the Van Duzen steel truss bridge at M.P. 261.78 and to perform maintenance work on culverts between Alton and Scotia (System File NWP MofW 148-349).

(2) Foreman J. D. Ireland, Carpenter 2nd Class D. L. Duncan, Carpenter 1st Class L. W. Johnson, Welder S.M. Mair, Carpenter 1st Class L. A. Ruebenack and Carpenter 1st Class J. B. Sears, B&B Gang No. 3, each be allowed pay at their respective rates of pay for an equal proportionate share of all hours worked by the employes of the Southern Pacific Transportation Company in performing the work mentioned in Part (1) hereof.

OPINION OF BOARD: The Petitioner contends that Carrier violated the Agreement when it used employees of the Southern Pacific Transportation Company (SPT Co.) to repair a certain steel truss bridge and to perform certain maintenance work "on culverts between Alton and Scotia" on the property of Carrier. Claim is made for compensation to six Claimants "at their respective rates of pay for an equal proportionate share of all hours worked" by the SPT Co. employees in performing the disputed work.

Basically, it is Petitioner's position that the disputed work being within the specific coverage of the Scope Rule of the Agreement, and the Claimants being fully qualified and available, such work should have been assigned to them.

Carrier and Organization have exhaustively analysed various principles that each deems pertinent to the resolution of this dispute, citing many prior Awards as precedent. We shall refer to each of these issues separately.

THE CLAIM

It is conceded that the claim presented on the property was for payment to Claimants at the rates of pay allowed to SPT Co. employees, which were higher than those paid to Claimants. On the appeal to this Board, Petitioner amended its claim and conceded that the proper rate, assuming violation of the Agreement, was Claimants' "respective rates of pay". In these circumstances, Carrier raises the objection that the instant claim being different from that handled on the property, should be dismissed. We cannot agree.

Firstly, the basic issue presented on the property and now to this Board remains essentially the same as stated in part (1) of the Statement of Claim. The only change, and this a reduction, relates to the monetary "damages" which are an incidental consequence of the violation proper. Secondly, the Agreement speaks precisely in relation to applicable rates of pay, and this Board has held repeatedly in numerous past Awards that in the event a claim is sustained the relief granted will be consistent with the Agreement between the parties. "Carrier should not be heard to complain when petitioner seeks less than the ultimate". (See Award 19064 (Cull)).

We do not consider the change in claim, therefore, to be so basic as to deprive the Board of jurisdiction; nor of such impact as to deter us from resolution of this dispute on the merits. Accordingly, we do not sustain this objection of Carrier.

Additionally, Carrier urges that the claim is fatally defective for failure to allege specific dates of violation. However, the Statement of Claim sets forth the specific locations at which the alleged violations occurred and refers to "all hours worked by the employes" of SPT Co. in performing the disputed work. Conceivably, as a matter of reasonable inference, Carrier maintained precise records of the working time of employees of SPT Co. in performing such work.

We acknowledge the established principle that Carrier is not required to make its records available to an Organization bent on a fishing expedition. But this is far from the case here. The Statement of Claim is sufficiently precise in nature to vest the Board with jurisdiction, and Carrier is in the position by simple recourse to its records to ascertain the precise working time pertinent to this dispute.

Accordingly, on this issue we do not find Carrier's objection to be well founded. (See Awards 15497 and 18447, among others).

NEW MATTER

Various specific issues and Exhibits are objected to by the Organization and by Carrier, respectively, on the ground that these being new matters not raised during the progress of this dispute on the property are not properly before the Board now as part of the appellate process. We have consistently sustained such objection in innumerable prior Awards, to such an extent that the applicable principle is now considered "STARE DECISIS". We will specifically apply it here as follows:

1. Carrier contends that "special circumstances" and "emergency conditions" existed, requiring it to use outside forces to perform the disputed work. However, as contended by Petitioner, the record indicates that such issues were not in fact presented on the property. Accordingly, we will not consider such matters as relative to this dispute.

2. Petitioner asserts in its Statement of Facts that "Without Notice to the Employes" Carrier used forces of SPT Co. to perform the disputed work. Carrier contends that such issue of "Notice" was not raised on the property and is therefore improperly before the Board now. The record evidence sustains the position of Carrier and, on the basis of the principle set forth above, we are compelled to exclude such new issue from consideration of this dispute. (See Awards 20255, 20121, 20064 and 19101, among many others.)

Additionally, we find no Rule in the Agreement nor any specific arrangement between the parties, (as was the case in Award 19899), requiring notice to the Organization under the instant circumstances. We do not, therefore, consider the issue of "Notice" as bearing on the merits of this dispute.

3. Similarly, the record indicates that the issues now raised by Carrier, as to "the availability of equipment" or "the ability of Claimants to perform" the disputed work, were not raised on the property. We will therefore sustain Petitioner's objection to consideration of these issues on the basis of controlling precedent cited above.

4. For the same reasons we sustain Petitioner's objection to the Letter of Understanding of August 1, 1952 (Carrier's Exhibit "A") and to Carrier's Exhibits "G" and "H". Consequently, these documents being new matter not presented on the property, they will not be deemed pertinent to the resolution of this dispute on the merits.

SCOPE RULE

The basic contention of Petitioner is that under the assertedly specific language of the Scope Rule (Rule "1" of the Agreement), together with the rights acquired by Claimants under Rules 3, 4, 5 and 8, dealing with their seniority rights, the disputed work was reserved to Claimants, and that Carrier violated these Rules when it used employees of the SPT Co. to perform the work in question. We quote these Rules specifically.

"SCOPE RULE 1.

This Agreement between the Northwestern Pacific Railroad Company and its employes herein designated, represented by the Brotherhood of Maintenance of Way Employes under

"the Railway Labor Act, as amended, establishes rates of pay and working conditions for employes of the Northwestern Pacific Railroad Company engaged in repair, maintenance and/or construction work in the Track, and Bridge and Building Sub-Departments of the Maintenance of Way and Structures Department, (not including work performed in the Electric, Signal, Telephone and Telegraph Sub-Departments) of the Northwestern Pacific Railroad Company. These rules do not include supervisory employes above the rank of foreman.

(a) Foremen and Assistant Foremen, and all employes coming under the supervision of the Maintenance of Way Foremen.

(b) Mechanics and Mechanic Helpers."

"RULE 3.

Seniority begins at the time an employe's pay starts in the class in which employed, except as provided in these rules."

"RULE 4.

Rights accruing to employes under their seniority shall entitle them to consideration for positions in accordance with their relative length of service with the Company as provided in these rules."

"RULE 5.

Seniority rights of all employes are confined to the sub-department in which employed."

"RULE 8.

Seniority rights of employes in Bridge and Building, and Track Sub-Departments shall be restricted to the territory comprising the Northwestern Pacific Railroad Company."

Firstly, as to the Seniority Rights of Claimants, there is no dispute here as to the right of Claimants to perform the disputed work, provided that such work is probatively established as coming within the Scope Rule. Consequently, Awards 2716, 5200, 15640, 19758, 11752 and 5621, for example, cited by Petitioner and which deal with seniority rights as between employees covered by the same Agreement, are not relevant to this dispute.

In addition, it is not disputed that SPT Co. employees had no seniority rights under the Agreement with which we are concerned here. However, before we can determine the applicability or relevancy to this dispute of Seniority Rules 3, 4, 5 and 8 above quoted, it must first be established that the disputed work is exclusively within the confines of this Agreement, either by an "exclusive reservation of work" rule or by probative evidence showing its coverage under the controlling principles applicable to Scope Rule interpretation. See Awards 15943 (Heskett), 17943 (McGovern), 18243 (Devine) and 19032 (O'Brien), among others.

> ". . . with respect to the seniority rules, it is quite clear that seniority rights can only be considered when the right to perform the work is established (Award 15943 and 17943). . . " See Award 20417 (Lieberman).

Secondly, with respect to "reservation of work rule" we find no such specific Rule in the Agreement. Nor are the prior Awards cited by Petitioner on this issue relevant to this dispute.

Thus, for example, in Award 9555 the claim was sustained because a prima facie case was made out that a specific rule of the agreement covered the disputed work. Similarly in Award 7945, there was a specific Rule 529 which covered the work there in question. In Award 17569, a specific Rule was involved requiring advance notice of assignment starting time. In Award 11540, the specific language of the Scope Rule stated "and such employes shall perform all work in the M. of W. & Structures Dept. . . ". In Award 18999, a distinct situation was involved in which Signalmen's work was expressly reserved to the Claimants under the specific language of the Agreement.

Similarly in Award 19898, in referring to a specific Rule of the Agreement, the Board held: "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."

In consequence of the foregoing, therefore, and since we have concluded that Seniority Rights are not pertinent at this point and there being no specific "reservation of work rule" in the Agreement, we proceed to the basic issue here involved - the Scope Rule.

We have carefully analysed the language of the Scope Rule (Rule 1) of this Agreement and we are unable to agree with Petitioner's statement that "Seldom are rules found which more clearly describe the classes of employes and character of work coming within the scope of the Agreement."

We have held repeatedly that classification rules and Scope Rules which merely list positions and duties are general in nature, and cannot be construed as exclusive job description rules or specific work reservation rules to a given class, in the absence of precise language to that effect.

See Awards 12501 (Wolf), 12505 (Kane), 13638 (Engelstein), 17421 (Goodman) and 18876 (Franden), among many others.

In Award 12501, supra, we stated:

> "The Classification Rule here contains no prohibition against the Carrier doing what the Organization protests. The mere inclusion of a classification rule does not, by itself, mean that the work of each classification will be restricted to the employes of the class."

Specifically, the pertinent language of the Scope Rule (Rule 1) of the Agreement here involved provides:

> "This Agreement . . . , as amended, establishes rates of pay and working conditions for employes . . . engaged in repair, maintenance and/or construction work" in various specified Sub-Departments.

It then goes on to list the various job titles embraced within Rule 1. It does not, however, specifically detail or exclusively reserve particular work to any craft or class. Such rule cannot be construed as exclusive grants of work to each classification. Basically, the Scope Rule and the Seniority Rules cited by Petitioner effectuate and protect the covered employees' rates of pay, promotions and seniority rights. This is a far cry indeed from a Scope Rule which contains specific job description rules and specific reservations of particular work to a designated class or craft.

We conclude, therefore, that the instant Scope Rule is non-specific and general in nature. In the latter context, we have held repeatedly that where the Scope Rule, as is the case here, is general in nature, the Petitioner has the burden of proving by a preponderance of evidence that the disputed work has traditionally and customarily been performed by Claimants (or the particular craft) on a system-wide basis to the exclusion of others "including outside contractors".

See Awards 10389 (Dugan), 13579 (Wolf), 15383 (Ives), 15539 (McGovern), 16609 (Devine), 18471 (O'Brien), 18935 (Cull), 19576 (Lieberman) and 19969 (Roadley), among a host of others.

The record fails to establish that Petitioner has submitted probative evidence sufficient to bring the disputed work within the exclusivity concept governing Scope Rules which are general in nature, as above set forth.

Additionally, Carrier contends that it has been its practice "for many years past" to "contract out" work similar in nature to the disputed work here involved, and that Petitioner was aware of such practice. This contention was made on the property by Carrier's letter of June 15, 1973, and although Petitioner now disclaims knowledge of such past practice, it did not on the property dispute such contention.

In effect, therefore, such contention of past practice constituted a material assertion which remained uncontradicted on the property. Accordingly, we are at liberty to accept such past practice as established fact.

See Awards 15503 (House), 16819 (Brown) and 19702 (Blackwell), among others.

Nor do the cases cited by Petitioner on the latter issue hold to the contrary. Thus, for example, in Award 9634 the contention of past practice was in fact disputed "and as it was disputed, we cannot assume its correctness". In Awards 9555 and 9678, no evidence was found to support the assertion of "past practice" which was in fact disputed on the property. Similarly, Award 5386 is not germane since it related solely to rates of pay.

In conclusion, therefore, and specifically with respect to the basic issue here involved, specific coverage of the disputed work within the quoted Scope Rule, we find that Petitioner has failed to sustain the burden of proof imposed upon it by controlling principle and established precedent.

Accordingly, we will dismiss the claim for lack of proof.

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 dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Panka
Executive Secretary

Dated at Chicago, Illinois, this 24th day of October 1975.