

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22588
Docket Number MW-22704

John J. Mangan, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Southern Pacific Transportation Company
((Pacific Lines)

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

(1) The Agreement was violated when, on September 13, 14, 15, 16, 17, 23, 24, 28, 29, 30, 1976 and October 1 and 4, 1976, track sub-department employees were assigned and used to perform Bridge and Building Sub-department work at Shed 10, Mile Post 179, east of Crystal Lake (System File 148-414).

(2) B&B Employees Joe Harrison, Jr., Martin L. Seadorf, J. George Schwarts, Jerry E. Lee, J. D. Jamison, E. A. George, George Callas, Gordon Price, Roy L. Cartwright and David A. Kipp each be allowed pay at their respective straight-time rates for an equal proportionate share of the total number of man hours (840) expended by Track Sub-department forces in performing the subject B&B work."

OPINION OF BOARD: This case asserts that employees of the Track Sub-department were utilized to perform work normally performed by Carrier's B&B Sub-department forces. The Organization describes the work in dispute in their submission as occurring at Donner Pass, on certain snowsheds, to be comprised of the following work elements:

"The work in dispute consisted of unloading styrofoam from box cars, cutting and placing second hand snow shed timbers along the back side of the snow shed to form a retaining wall for fill, cutting and applying styrofoam sheets to form a base to accept application of an outer shell of concrete applied by the gunite process, and clean-up work in connection therewith. This work required eight hundred forty (840) man-hours to complete."

Carrier, on the other hand, describes what occurred as follows (from Carrier's submission):

"* * * As a consequence, on the dates of claim, namely, September 13, 14, 15, 16, 17, 23, 24, 28, 29, 30, October 1 and 4, 1976, Carrier assigned employes of the Track Sub-Department, consisting of Foreman R. E. Paul and seven track laborers of his gang, along with two qualified truck drivers, to work along with B&B Gang No. 113 at Snowshed No. 10. The work performed by the Track Sub-Department employes was confined to putting material on top of the snowshed, pulling down timbers into backwork, unloading box cars and trucking the zonolite material to the work site, cleaning up construction debris, including that of picking up discarded bags that were scattered on the hillside, and placing them into the backwork behind the snowshed to be used as fill material."

It is obvious from the two descriptions of what transpired that there is a basic disagreement in facts between the parties - a disagreement which has not been resolved during the handling of the claim on the property and then, before this Board. However, it is likewise obvious that Carrier did utilize B&B forces to perform work which it felt was B&B work and supplemented this B&B force with Track forces. The dispute seems to center on what, or to what extent, Track forces performed work that allegedly belonged contractually to B&B forces.

Carrier, on the property, alleged that a portion of this claim was untimely presented. However, our review of the record fails to disclose any improper handling of the claim by the union; to the contrary, it was timely presented by the union in all respects.

For the first time upon presentation of this case to the Board, the Carrier has urged that, notwithstanding other arguments it has raised in defense of this claim, the fact that winter would soon unleash snowfalls on Donner Pass placed this work in an emergency category and it could take such action with impunity under the agreement. Secondly, it has argued damages for the first time on appeal to this Board. Such positions have been given weight in many of our previous decisions, and we would be in a position here to do so were it not for the fact that they were not discussed on the property. Again, we must remind the parties that it is their affirmative obligation to make such issues and arguments known to each other in direct discussions of the claim between them - we have well established this principle in light of the requirements of our Circular No. 1 and the Railway Labor Act.

Thus, our consideration of this claim is drawn upon the arguments and evidence disclosed to each other by the parties during the handling on the property. As we said before herein, there is a basic evidence question, and we are not satisfied that either party has made a prima facie case.

Concerning the arguments, the Union has argued that its B&B employees had the right to perform the work in question contractually, and has cited awards to the effect that system-wide exclusivity has no bearing on such matters. On the other hand, Carrier has cited a substantial number of awards, equal or greater in number, which have established the line of authority on this property that before a group of employees may establish contractual right to work, it must be proven that these employees have performed the work on a system-wide basis to the exclusion of others. Other awards cited by Carrier stand for the proposition that there is no reservation of work to any particular employees of a sub-department in Carrier's Maintenance of Way absent the same showing - to wit - system wide exclusivity.

The problem with both the arguments of Carrier and the Union here is an evidentiary one. First, it is apparent that the track and B&B employees supplemented each other on this work project and that each of them performed work that was not arguably the property of the other sub-department. It follows that the claim for 840 hours total work involved in this claim is grossly excessive and that neither party has taken the time to examine the true evidence and facts in this case - to wit - was there any work, or elements of work performed by the Track sub-department which have historically and by custom been performed by the B&B Department employees. While we would much rather resolve such claims on their merits for the future guidance of the parties, where, as here, there has not been a full examination of the facts of a case by both parties on the property, we are unable to do so - and likewise - we are unable to dismiss such claims in their entirety. Therefore, as we have done in the past, we are remanding this case for the parties to iron out on the property, taking into consideration (as only the parties are familiar with) the history, custom and practice involved in work performed by employees of both the Track and B&B sub-departments and admonishing the parties to examine the work performed in the instant case in light thereof. We admonish both parties to honestly review the claim in this light and determine what amount of this claim should be sustained and make a settlement on such a basis.

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 Employees involved in this dispute are respectively Carrier and Employees 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 claim is remanded to the Parties.

A W A R D

Claim remanded to the Parties as provided in the Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A.W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 30th day of October 1979.