NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23832
Docket Number MW-22695

Dana E. Eischen, 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 Agreement was violated when, on May 3, 4 and 5, 1977, track department forces were used to install (renew) two (2) 'all-rail' crossings at Missabe Junction (System Claim 37-77).

(2) B&B employes S. M. Beron (#10619), Steve H. Knutie (#10942) and T. J. Walczynski (#11032), who were furloughed and available on the claim dates, each be allowed twenty-five and one-half (25-1/2) hours' pay at the B&B Carpenter's rate."

OPINION OF BOARD: Prior to November 1, 1963 there was disagreement between the Carrier and the Brotherhood of Maintenance of Way Employes concerning which subdepartment of the Brotherhood; viz., Track Department Employes or Bridge and Building (B&B) Department Employes, possessed the exclusive right to perform the work of installation, renewal, replacement and repair of grade crossings. An agreement concerning the disputed work was signed by the parties on November 1, 1963. This rule is presently known as Supplement No. 9 and is the rule under which the instant claim arises. On May 3, 4 and 5, 1977 Carrier assigned the Missabe Junction Track Crew (all Track Department Employes) to install two grade crossings at Missabe Junction. The work required eighty-eight (88) man-hours to complete. On June 17, 1977 the Organization filed a claim on behalf of then-furloughed B&B employes S. M. Beron, S. H. Knutie and T. J. Walczynski for 25½ hours' pay each at the B&B Carpenters current rate of pay. The claim was denied at the first and subsequent levels and denied on final appeal on March 24, 1978.

Supplement No. 9, the rule at issue, reads as follows:

"SUPPLEMENT NO. 9

Jurisdiction of Work - Track Department - B&B Department

B&B employees will install, renew, replace and repair all grade crossings, except that:

"1. Track Department Employees may be used to install a new crossing or to perform repairs on a particular crossing when such repairs or installation can be performed by Track Employees or Employee in a total of not more than 12 hours within any six-month period. (Travel time is not to be included in the computation of the 12 hours.)

"2. Track Department Employees may remove, replace, and repair crossing planks, slabs or other crossing materials with same or other materials when performing programmed track maintenance work which is understood to be either surfacing, ballasting, or tie or rail replacement through the crossing area. The aforementioned is not to include spot tie removal or spot tamping or raising. When spot tie removal or spot tamping or raising work is performed, only those planks involved in such work may be removed or replaced by the Track Employee.

"3. Governmental agencies or their contractors may perform crossing surfacing when done in connection with street or highway improvements.

When a crane is used in Ore Dock repair work, such work will be assigned to the proper Track Department Employees."

Both grade crossings involved in this claim were of the type designated "all-rail" crossings, which indicates that steel rail is incorporated parallel to the track rails as a bearing surface for automobile and other traffic crossing the grade. Carrier concedes that the language of Supplement 9 is unequivocal when it states that "B&B employees will install, renew, replace and repair all grade crossings..." Carrier disputes, however, that the rule as constructed was intended to cover even those crossings constructed of rail. To support this argument, Carrier asserts that 1) there has never been a question that the placement of rail trackage in grade crossings is Track employees work; 2) whenever the installation or maintenance of a grade crossing of "all-rail" was required, Track employees were used. Carrier further maintains that between 1963 and 1975, thirty-five (35) "all rail" grade crossings were installed on Carrier's property by Track employees without any protest from B&B employees. The Carrier urges, therefore, that if Supplement 9 is ambiguous with respect to "all rail" grade crossings, past practice is clear and supports allocation of the work of installation of all-rail grade crossings to Track employees.

The Organization counters that Supplement 9 is clear in allocating the work of installation, renewal, replacement and repair of all grade crossings to B&B employees. It notes that exceptions to the rule are listed in Supplement 9, and asserts that since all-rail grade crossings are not specifically named in those exceptions they are thereby included in the phrase "all grade crossings." The Organization does not dispute allocation of the work of installing and maintaining running rails to Track Department employes. It points out, however, that rails used in all-rail grade crossings are not used as running rails, but as a crossing surface for vehicle traffic. Finally, the Organization maintains that even if, arguendo, track employes have previously performed the work of all-rail grade crossing installing without complaint from B&B employes, the Organization retains its right to protest such practice now. The Organization argues that where language of an Agreement is clear and unambiguous it takes precedence over contrary past practice.

The issue in this dispute centers on one principal and two derivative questions. The first question to be answered is: Is Supplement 9 (supra) clear and unambiguous in allocating to B&B workers installation, renewal, replacement and repair of all (every kind of) grade crossings (with the exceptions as noted)?

The derivative questions are 1) If the answer to the principal question is negative, has the Organization shown a pattern of system-wide past practice of exclusive reservation of the installation, renewal, replacement and repair of all-rail grade crossings to B&B workers? and 2) If the answer to the principal question is affirmative, does Carrier's asserted 13-year past practice of allocating such work to Track employes without protest from B&B employes take precedence over the clear and unambiguous language of the agreement?

Careful reading of Supplement No. 9 suggests no ambiguity with respect to assignment of work on grade crossings. It clearly states that "B&B employes will install, renew, replace and repair all grade crossings..." (emphasis ours). Nowhere in the three exceptions following the rule is reference made to all-rail crossings. It is a well established principle on this and other Divisions that where specific exceptions to a rule are enunciated in the Agreement a situation not so enunciated is presumed included by implication in the main body of the Rule. To find otherwise would impute meaning to a Rule other than that which the parties themselves have written (Awards 7166, 7718, 1-20077, 1-20312).

Having thus determined the threshold issue we must next address the question of whether Carrier's heretofore unchallenged past practice takes precedence over the clear and unambiguous contract language. We have reviewed the awards cited by Carrier on this issue and find them readily distinguishable from the instant case. Awards 3-22042 and 3-22156, for example, involve situations in which Organization General Chairmen had agreed some time prior to the claim with Carrier concerning the past practice at issue. Such is not the case in the instant matter. Moreover in Award 3-22156 there was not, as here, clear and unambiguous contract language. In Award 3-16752 the disputed work was ruled to be entirely outside the Scope of the Agreement, not an implied exception to the specific wording of the Agreement.

It has been a generally accepted principle in many previous awards that past practice may not take precedence over clear and unambiguous contract language (3-22148, 3-18064, 3-6144). We find nothing in the record before us to support overturning that principle.

Based upon careful consideration of the entire record, and for the reasons set forth above we must sustain 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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 26th day of March 1982.