

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29887
Docket No. MW-28492
93-3-88-3-300

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(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 the Carrier assigned BRAC employees instead of BMWE Bridge and Building Subdepartment employees to operate the maintenance raft at the Duluth Ore Docks beginning April 25, 1987 (Claim No. 19-87).
- (2) As a consequence of the aforesaid violation, B&B Mechanic S. Swanstrom shall be allowed two (2) hours and forty (40) minutes pay for April 25, 1987 and he shall be compensated for all other wage loss suffered beginning April 26, 1987 and continuing for so long as BRAC employees are assigned to operate the maintenance raft at the Duluth Ore Docks."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

As Third Party in interest, the Transportation Communications International Union was advised of the pendency of this dispute and filed a Submission with the Board.

The Carrier operates large iron ore docks at Duluth and Two Harbors, Minnesota. At the base of these docks is a concrete fender, which is part of the foundation of the dock. When ore is handled on the dock, there is inevitably some spillage which collects on the dock fenders. To prevent excessive ore buildup, Carrier employees periodically operate a vessel around the dock base, and wash the ore into the slip using an on-board water pump and high-pressure spray.

Before 1970, the Carrier used a tugboat to spray the ore from the dock fenders, both at Duluth and Two Harbors. This vessel was owned by the Carrier, and the work was performed by "Tug employees" who were not organized in any labor bargaining unit.

Sometime in the early 1970's the tugboat began to make fewer trips to Duluth and the Carrier began utilizing a "maintenance raft" which it owned at Duluth Docks, to wash dock fenders there. Bridge and Building employees, who had responsibility for much of the maintenance work on the raft and who operated it for making various dock repairs, assumed the work of operating the raft while Ore Dock Employees operated the pump and hose to wash the dock fenders.

In 1982, a raft was purchased at Two Harbors docks, and Ore Dock employees represented by TCU were assigned to operate this raft and its water spray apparatus to clear the dock fenders. In 1985, the Carrier began utilizing Ore Dock employees at Duluth to operate the raft, in addition to running the pump and spray hose, when the task to be done was cleaning dock fenders. The BMW Organization representing B&B workers, began submitting time claims on account of this change in work assignment.

Claimants contend that the Agreement was violated when the Carrier assigned BRAC (Brotherhood of Railway and Airline Clerk's) employees instead of BMW Bridge and Building Subdepartment employees (B&B) to operate the maintenance raft at the Duluth Ore Docks during fender cleaning beginning April 25, 1987. The claim is a continuing one since the practice was expected to continue in the future.

The Organization contends that the assignment of BRAC employees to operate the maintenance raft at Duluth Docks to wash the dock fenders is a violation of Rule 26(j) and Supplement 13 of the Agreement.

Rule 26 (j) provides:

"Other classes of employees not here set out shall preform the work heretofore regularly performed by them."

Supplement 13 provides:

"In the event a Carrier decides to effect a material change in work methods involving employees covered by the rules of the collective agreement of the organization party hereto, said Carrier will notify the General Chairman there of as far in advance of the effectuation of such change as is practicable and, in any event not less than fifteen days prior to such effectuation."

The Organization also argued that Supplement 13 was violated because the Carrier never involved their office by a letter or telephone, or by a meeting to discuss the change in work methods.

The Organization has also relied on Rule 1 "Scope" and Rule 3- "Seniority" to support its position.

Rule 1 "Scope" provides:

"The rules contained herein supersede all previous rules and agreements and shall govern the hours of service, rate of pay, and working conditions of all employees in any and all subdepartments of the Maintenance of Way and Structure Department.

The agreement shall not apply to the following:

1. Assistant Roadmaster, Track Maintenance Supervisors of Bridge and Buildings, and other supervisors above the rank of foreman.
2. Clerical and Civil Engineering forces.
3. Employees in Signal, Telegraph, and Telephone Maintenance departments."

Rule 2 provides:

"II - Bridges and Building Sub-Department.

Group (A)

1. Foremen.
2. Assistant Foreman
3. Mechanics (including Cabinetmakers, Carpenters, Composite mechanics, Fire Inspectors and Weldors, Fuel and Water Supply repairman, Masons Ore Dock Repairman, Scale Inspectors, Painters, Painters, Plasterers, Plumbers and Semi Truck Drivers."

The Organization contends that Rule 26(j) in conjunction with the fact that the work in question had been regularly performed by B&B Subdepartment employees at Duluth reserves the work at issue to B&B Subdepartment employees. The Organization argues that the Carrier realized that the operation of this maintenance raft for fender cleaning at the Duluth Ore Docks was exclusively reserved to B&B employees because it had traditionally, customarily and historically assigned all such maintenance raft operation work to B&B employees.

The Organization argues that in order to show the work in question was exclusively reserved to B&B employees, it need only show that the work was exclusively performed by B&B employees at the Duluth dock; it need not show that the practice was system-wide as contended by the Carrier.

The Carrier argues that fender washing by a powered raft is done both at Two Harbors and at Duluth. The Two Harbors raft was acquired in 1982, and it has been manned exclusively by BRAC for all washing of fenders since then. There never has been a system-wide practice of using B&B employees to operate the raft during fender cleaning necessary to support the claimed exclusivity. At Two Harbors, such work has always been done by either Tug Employees (until 1980) or Ore Dock Employees (after 1980). Historical practices involving the work have been mixed. Three crafts have shared in its performance. Therefore, no craft can claim exclusive jurisdiction on the basis of prior practices.

The Carrier also points out that the error of allowing B&B to operate the raft during fender washing at the Duluth Dock continued for approximately 10 years, not 25 as the Organization contends.

Prior to the mid 1970's the Duluth raft was not used for fender washing. In the mid 1970s, a raft was purchased which had equipment to do the job previously done by the tugboat.

The Carrier contends that none of the Rules cited by the Claimant grant B&B exclusive reservation of the operation of the maintenance raft while cleaning fenders. Rule 1, "Scope", merely states that the rules of the agreement apply to the employees who are in the Maintenance of Way and Structures Department. There is no mention of fender cleaning work.

Rule 2, Seniority, only establishes headings and sub-headings under which the covered employees may establish and hold seniority.

Rule 26, Classification of Work, doesn't reserve work; it only classifies work into categories.

With respect to the alleged violation of Supplemental Rule 13, the Carrier argues that it has been using Ore Dock workers to operate the raft for fender cleaning at Duluth since September 25, 1985. A claim was filed at that time, denied, and expired under the time limit rule. The Carrier contends that since the Organization was aware of this change in work methods at least 19 months before the date of the claim in this dispute, (April 25, 1987), it had de facto advance notice.

As the moving party, the Organization must demonstrate that the work belongs to Maintenance of Way employees. We conclude that the Organization has not established this by a showing of explicit language in the Agreement. Neither Rules 1 or 2 cited by the Organization contain explicit language which give B&B employees an exclusive grant to perform the work of operating the maintenance raft while it is being used for fender washing. Rule 26 only classifies work into categories; it does not reserve work. See Third Division Award 28399.

Having been unable to establish an exclusive right to the disputed work through explicit language in the agreement, the Organization must show that B&B employees have traditionally and historically operated the maintenance raft while it is being used to clean dock fenders exclusively on a system-wide basis. Third Division Awards 27902, 26831 and 19921 (All decided on this property). The Organization has not done this. The Organization has shown only that B&B employees have operated the maintenance raft at Duluth while it is being used to clean dock fenders for approximately 10 years.

We would note that in those Awards which found an exclusive grant of work in a particular location, the practice had been in

existence for much greater periods of time than is the case here.
Third Division Awards 11835, 12390, 15158.

Even were we to put the burden on the Carrier that the practice of operating the maintenance raft during the cleaning of dock fenders was not assigned to B&B employees exclusively on a system-wide basis, as was the case in Third Division Award 13334, the Carrier has met this burden.

Accordingly, the claim is denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 26th day of October 1993.