Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39881
Docket No. MW-38412
09-3-NRAB-00003-040364
(04-3-364)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1) The Agreement was violated when the Carrier assigned Mechanical Department employes to load Maintenance of Way equipment (extra gang machines) at Humboldt Yard on January 6, 2003 and to unload said machines at Glenwood, Minnesota on January 7, 2003, instead of Machine Operators M. Smith, J. Skroch, D. Bachmeier, D. Krause, L. Nelson, G. Schuldheisz and S. Gary (System File C-03-330-009/8-00228-076).

2) As a consequence of the violation referred to in Part (1) above, Claimants M. Smith, J. Skroch, D. Bachmeier, D. Krause, L. Nelson, G. Schuldheisz and S. Gary shall now each be compensated for sixteen (16) hours at their respective machine operator's straight time rate of pay."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

The Organization filed the instant claim on the Claimants' behalf, alleging that the Carrier violated the parties' Agreement when it assigned Mechanical Department employees, instead of the Claimants, to the work of loading and unloading extra gang machines.

The Organization initially contends that the Carrier simply ignored the clear and unambiguous provisions of Rule 1, Scope, when it assigned work specifically accruing to BMWE-represented Machine Operators to employees holding no seniority whatsoever in the Equipment Services Crane Sub-Department or the Equipment Services Equipment and Machine Sub-Department. There is no dispute that the Claimants were fully qualified and available to perform the work in question, and that they readily would have done so had the Carrier assigned them to do it.

The Organization maintains that it is the intent of Rules 1 and 2 to preserve work currently performed by Maintenance of Way and Structures Department employees covered by the Agreement. The Organization points out that the record contains a number of statements from BMWE-represented employees attesting to the fact that Machine Operators, and not IAM Mechanics, customarily and historically have performed the work at issue. This evidence establishes beyond question that the work in question is reserved to BMWE forces under the Agreement. The Organization insists that the Carrier's assignment of this work to IAM Mechanical Department employees, who have no seniority in the Maintenance of Way and Structures Department, clearly was in violation of the Agreement.

Citing a number of Awards, the Organization asserts that it is fundamental that work of a class belongs to those for whose benefit a contract was made, and delegation of such work to others not covered by the contract is in violation of the Agreement. The Organization argues that it established a prima facie violation of the Agreement, so the instant claim should be sustained in full.

Addressing the Carrier's challenge to the work reservation entitlement of BMWE forces in this instance, the Organization emphasizes that the work at issue is reserved to BMWE forces under the Agreement by virtue of past practice. The Organization insists that there is nothing in Rule 1 that provides for IAM forces to rip that work away from BMWE forces. The Organization points out that with regard to the statements submitted by the Carrier, only two referenced loading or unloading equipment at locations other than shops or for winter storage. The Organization emphasizes that the work in question did not occur in connection with storage or shop maintenance, but in connection with the movement of a track gang during its scheduled operations.

The Organization then contradicts the Carrier by arguing that it presented clear and concise information regarding the number of hours claimed for each claim dates, as well as the Claimants' furlough status. The Organization points out that the Carrier could have, but did not, submit its own records if it truly had a valid argument as to the number of hours claimed.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the claim submitted to the Board is not the same claim presented on the property. The Carrier asserts that there was no reference in the on-property claim to "extra gang machines," and the addition of this reference clearly modified the original claim presented. The Carrier argues that throughout the on-property handling of this matter, the Carrier consistently emphasized the Organization's failure to meet its burden of proof and identify the equipment involved. The Carrier insists that on this basis alone, the instant claim must be dismissed.

The Carrier argues that the Claimants are identified as Operators of speed swings, production tampers, regulators, etc., yet the Organization never met its burden of proving that these were the machines that were loaded. Moreover, the Organization failed to meet its burden of proving a Rule violation on the part of the Carrier. The Carrier insists that nowhere in the cited Rules is the loading, unloading, and securing of equipment mentioned.

The Carrier acknowledges that there is no dispute that a Machine Operator operates roadway equipment, but it argues that Rule 2 does not reserve such operation to Machine Operators in all instances. The Carrier points out that in the situation at issue, the equipment was loaded, unloaded, and secured for shipment to a destination where BMWE Machine Operators would utilize it to perform scope-covered work. The Carrier emphasizes that there is a practice on this property of utilizing mechanical forces, as well as members of the TCU, to perform this type of work.

The Carrier asserts that Rules 1 and 2 do not make any reference to loading equipment on a flat car for shipment. The Carrier points out that this work does not involve construction, maintenance, repair or dismantling of tracks, bridges, buildings, structures or facilities.

The Carrier contends that the Organization has not met its burden of proving a past practice. The Carrier asserts that the statements that it submitted counter the statements provided by Organization members. The statements from the Carrier's witnesses demonstrate that IAM-represented employees have been utilized when necessary to load, unload, and secure equipment. Mechanics certainly have driven equipment onto flat cars for shipment, and the Organization has not disputed this. The Carrier's records further demonstrate the large number of hours that its mechanics have spent in loading and unloading equipment. The Carrier insists that the record therefore establishes a mixed practice of performing this work.

The Carrier goes on to argue that the Organization failed to meet its burden of providing evidence to support the 16 hours claimed. The Organization provided no evidence as to who loaded the equipment in dispute and for how long, nor did the

Organization support seven mechanical employees loading machines for the number of hours claimed. The Organization also failed to provide evidence of the Claimants' alleged furlough status.

The Carrier insists that the evidence shows that the number of hours claimed is excessive, and seven Mechanical Department employees did not perform the work. The Carrier points out that the only work performed was to merely drive equipment onto a flat car. Contrary to the Organization's position, there is no classification in Rule 2 that reserves the claimed work. The Carrier argues that there is no Rule that requires it to call any particular employees to drive equipment onto a flat car.

The Carrier contends that the Organization failed to meet its burden of proof in this matter. The Organization has not shown that the work in question has traditionally, historically, or customarily been reserved to its members under either Rule 1 or Rule 2 of the Agreement. The Carrier suggests that the Organization is attempting to expand the existing Rule 1, governing scope. The Carrier does not dispute that the Organization may have performed such work, but this does not confirm a regular, customary, historical, or traditional practice of performing such work to the exclusion of others. The work in question does not in any way belong only to BMWE-represented employees.

The Carrier submits that if the Board should rule in favor of the Organization, any payment due the Claimants should be offset by any earnings that they made during the claim period.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record the record and finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement by assigning Mechanical Department employees to load and unload machines. Therefore, the claim must be denied.

The Organization simply failed to meet its burden to prove that BMWE-represented employees have the exclusive right over other Carrier employees to load and unload equipment. The Carrier presented evidence that IAM-represented employees have been utilized to perform the identical work that occurred here.

It is fundamental that the Organization bears the burden of proof in cases of this kind. In this case, the Organization simply failed to meet that burden. Therefore, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 31st day of July 2009.