Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No.41353
Docket No. MW-41069
12-3-NRAB-00003-080653

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Texas Mexican Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned non-BMWE General Foreman A. Andrade to perform Maintenance of Way and Structures Department work of regular track and switch inspection between the Corpus Christi, Texas Yards at Mile Post 157.00 and Mile Post 77.00 at Realitos, Texas, beginning on July 24, 2007 and continuing, and when the Carrier failed and refused to bulletin a Track Inspector position for said inspection pursuant to Rule 4 (System File WGF-07-08TM/K0407-6205).

(2) As a consequence of the violation referred to in Part (1) above, Claimant F. Rodriguez shall now be compensated for eight (8) hours at the applicable straight time rate of pay and at the applicable overtime rate of pay for the overtime hours, for each day the general foreman performed the aforesaid Maintenance of Way track inspector duties beginning July 24, 2007 and continuing until such position is bulletined and assigned in accordance with Rule 4."

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.

On September 20, 2007 the Organization filed a claim for all time dedicated daily by a non-BMWE-represented General Foreman performing track and switch inspection duties between Corpus Christi, Texas Yard (Mile Post 157.00) and Realitos, Texas (Mile Post 77.00) commencing on July 24, 2007 and continuing thereafter.

According to the Organization, there may be a dispute as to when the non-BMWE-represented General Foreman commenced daily performance of track and switch inspection, but there is no dispute that the work was performed by the non-BMWE-represented employee. In other words, the Carrier violated the Agreement when it assigned daily duties of track and switch inspection, which fall under Rule 1, Scope, to a non-BMWE-represented General Foreman, a stranger to the parties' Agreement.

On December 17, 2007 the Carrier denied the claim as follows:

> "I have reviewed this matter and conclude that your claim is without merit. In this regard, the claim you've submitted is at bottom a scope rule claim, founded on the most general of scope rules. The Organization therefore bears the heavy burden of proving that the employees it represents have exclusive right to the work via a demonstration of a system-wide historical practice. There exists no such demonstration on the record, nor could there be since track inspection duties are routinely performed by Roadmasters and/or

personnel similar in capacity to the foreman-general, whom you claim is performing work reserved to Track Foreman [Claimant]. The claim must fail on that basis alone."

The Organization submitted additional information in support of the claim's merits after issuance of the Carrier's denial; however, in on-property correspondence dated June 6, 2008 the Carrier stated, for the first time, that the claim was ". . . fatally procedurally defective since [the non-BMWE General Foreman was assigned on August 1, 2007 but the claim] was not brought forth within 60 days of the assignment of the foreman-general position about which you complain."

That is, the occurrence date cited by the Organization is July 24, 2007, but the claim was not filed until September 24, 2007, which is two days beyond the 60-day filing window prescribed in Rule 18, Time Limits for Presenting and Progressing Claims, Grievances and Discipline. Other Carrier arguments about timeliness are that the occurrence date initiating the 60-day filing period is November 13, 2006 and not July 24, 2007, and the Organization acknowledged the occurrence date was June 24 and not July 24. All occurrence dates relied upon or cited by the Organization (November 13, 2006 or June 24 or July 24, 2007) render the claim untimely since they fall beyond the 60-day window for filing or presenting a claim.

The Carrier's denial also addresses the claim's merits. Specifically, the Carrier asserts the work made basis for this claim is not reserved to BMWE – represented employees under Rule 1 and there is a practice to use non-BMWE-represented employees to perform track and switch inspections.

Filing a claim is the opening step in accessing the statutory scheme to resolve a minor dispute under the Railway Labor Act (RLA). This initial phase in the statutory scheme is an exercise of a fundamental right that affects a claimant at a personal and granular level, because it represents an effort to rectify a perceived and alleged imbalance in the employment relationship between the employer and the employee. Only an occurrence date that unequivocally and definitively establishes a claim as untimely should serve to preclude a claim from adjudication on its merits through the grievance process.

Of the many requirements in the procedural thicket, none is more closely observed than the time limits for filing and responding. The Carrier's June 6, 2008 letter identified the claim's alleged procedural defects six months after it denied the claim's merits. The Board invokes the time-honored and venerable view memorialized in Third Division Awards 10438, 12516 and 33153 to name a few, that not raising a timeliness argument at the earliest stage in the grievance process warrants concluding that the Carrier waived pursuit of these procedural concerns when it did not identify them in its claim denial.

By concluding that the Carrier waived the procedural defects, which it asserts afflict this claim, the Board embraces and reinforces Federal labor law and policy in effect for more than 75 years which dictates that there is a presumption favoring arbitration on the merits. Only the most forceful evidence should overcome this presumption; no such evidence exists in this case record. Because the presumption remains standing and a waiver is found under Rule 18, the Carrier's alleged timeliness defect does not bar the Board from addressing the merits of this claim.

Notwithstanding this decision on timeliness, the Carrier's Submission frames two additional procedural barriers that, it asserts, warrant the Board declining to assert jurisdiction over this claim. First, the Organization "failed to timely provide a separate copy of the Notice of Intent" to the Carrier as required by the Board's June 23, 2003 Uniform Rules of Procedure at § 1(A) - "A separate copy of the Notice of Intent must be furnished to the Respondent by the Petitioner."

Because the Carrier previously notified the Organization of its highest designated officer for receipt of such matters, the Carrier asserts that the Organization's failure to furnish a copy of the Notice of Intent to its highest designated officer " prejudiced the Carrier's procedural due process rights" because the notice "apprise[s] a party that its opponent has instituted the statutory dispute resolution mechanisms" and "indirectly triggers the 75-day period allotted for the parties to furnish Submissions to the Board.

The record shows that the Organization furnished its Notice of Intent to a Carrier official no longer designated as the Labor Relations officer. In other words, the Notice of Intent was furnished not to the current designated official, but to a former designated official. The Notice of Intent places a party on alert that a claim is filed with the Board and the 75-day period for filing a Submission "begin[s] on the date of the Board's letter to the parties acknowledging the Notice of Intent" (§ 1(A)).

The Board issued its acknowledgement letter on the same date to each party albeit addressed to the incorrect official for the Carrier. Nevertheless, the Carrier failed to establish how many days of the 75 days allotted it was denied due to the errant address and how that denial prejudiced its Submission. Aside from the ministerial error of an incorrect address, the Notice of Intent contains all information required by the Board's Uniform Rules of Procedure and, in responding to that Notice of Intent, the Carrier has not demonstrated prejudice to its due process rights.

Given these findings based on the record of § 1 (A) as argued by the Carrier, the Board concludes that the Organization complied with the material aspects of § 1(A) and the Carrier was not prejudiced by the Organization's ministerial mistake in submitting the Notice of Intent to the Carrier's former Labor Relations officer.

This conclusion - no prejudice to the Carrier's due process rights - is further buttressed by a review of the second barrier to jurisdiction argued by the Carrier. That is, the dispute was not considered in conference as required pursuant to the RLA. In denying the claim on December 17, 2007, the Carrier stated that it was "also amenable to a telephone conference of this matter at your [BMWE's] discretion." The Organization exercised its discretion to conference by telephone with the Carrier's highest designated officer.

A telephone conference commenced on February 11, 2008; additional discussions addressing the claim's merits occurred on May 9, May 14, and June 3. The discussions concluded with the Carrier informing the Organization during the June 3 call that the claim was "fatally procedurally defective" and confirming that in writing on June 6, 2008.

Based on these telephone discussions where the parties remained in dispute about the merits of the claim, the Carrier would not have been startled or surprised by the Organization's filing or a Notice of Intent even though that Notice was initially furnished to a Carrier official not involved with Labor Relations.

Standing alone, the February 11, 2008 telephone discussion did not constitute a conference. Considered in the parties' framework of ongoing, substantive discussions, however, they constitute a conference that commenced on February 11 and concluded on June 3. This conclusion as to conference is fact-specific to the

peculiar circumstances in this proceeding. As required by Rule 18(c) the Organization filed its Notice of Intent on September 10, 2008 with the Board within six months of conference conclusion (June 3, 2008). The second barrier to jurisdiction asserted by the Carrier - conference and Rule 18 - is rejected.

The progression of this claim on the property reveals that it was timely processed in the manner agreed to by the parties, including placement before the highest officer of the Carrier designated to handle it. Therefore, this claim is properly before the Board for adjudication.

The Roadmaster's email statement asserts that "track inspection . . . has always been done by the Asst. Roadmaster in the past. I did it from 1996 to 1998 and Mr. Ramon Gonzalez inspected from 98 until retirement on 2007. I still inspect track when I have to and make minor repairs."

During this time (1996—2007) that an Assistant Roadmaster was inspecting track, the Carrier assigned inspection of track and switches between Mile Post 00 and Mile Post 77 on September 14, 2006 to a BMWE-represented Track Inspector. Thus, at the same time, a non-BMWE-represented employee (Ramon Gonzalez) was performing track inspection duties between Mile Post 77 and Mile Post 157 and a BMWE-represented Track Inspector was handling track inspection duties between Mile Post 00 and Mile Post 77.

Based on this evidence, the Carrier tacitly recognized that track and switch inspection duties fall within Rule 1 for BMWE-represented employees but, nevertheless asserted that such duties have not been performed solely by them during the past two decades as reflected by the assignment of track inspection work to Assistant Roadmasters and other officials due to the practice of using BMWE-represented and non-BMWE-represented employees.

This practice, asserted by the Carrier, ceased with the October 21, 2005 posting to receive bids from BMWE-represented employees for Track Inspector positions without restriction - e.g., limited between Mile Post 00 and Mile Post 77. When the BMWE-represented Track Inspector assigned on September 14, 2006 was restricted by the Carrier between Mile Post 00 and Mile Post 77, the Organization identified this dispute with the Carrier.

The parties were not able to resolve the matter and offer differing views as to the discussion - the Organization asserts that the Carrier agreed to bulletin for a Track Inspector position between Mile Post 77 and Mile Post 157, whereas the Carrier contends that it did not agree to bulletin such a position. To establish a practice there must be mutual acknowledgement and agreement and there has not been mutual acknowledgement and agreement since at least September 2006.

When this matter resurfaced, the Organization filed this claim. Two items point favorably for disposition in favor of the Organization. One is the statement in the Organization's letter dated July 7, 2008 that a BMWE-represented Track Inspector in Laredo, Texas, was not restricted to a portion within territorial mile posts, but rather inspected the entire territory. The other is the Carrier's statement in its June 16, 2008 letter that it sought to "recapture work it allowed to leave" which is interpreted as an effort to reinstitute the practice that ceased in 2006.

The position of Track Inspector places the Claimant in the Track Sub-Department of the Maintenance of Way and Structures Department. Rule 1 mandatorily directs that "such employees shall perform all work in the Maintenance of Way and Structures Department[.]" By not assigning "all [track and switch inspection] work" to BMWE-represented Track Inspectors, the Carrier violated Rule 1.

Given these findings on the merits of this claim, the Board concludes that track and switch inspection by a BMWE-represented Track Inspector is work within Rule 1, Scope, because BMWE-represented "employees shall perform all work in the Maintenance of Way and Structures Department" but for certain exceptions which are not present or applicable in this claim. The Organization need not establish exclusivity because this is not a class or craft dispute.

Under Rule 2, Seniority, the Claimant established seniority in the Track Sub-Department as a Track Inspector on July 23, 2003 and performs track and switch inspection on a daily basis between Mile Post 00 and Mile Post 77. Daily track and switch inspection is work for BMWE-represented employees covered by Rule 1.

By not assigning the territory for track and switch inspection to BMWE – represented employees the Carrier breached Rule 1; however, this breach does not preclude a non-BMWE-represented General Foreman, Assistant Roadmaster or

other Carrier official from performing track inspection duties of a supervisory nature.

For the foregoing reasons, the claim is sustained and the Organization's remedy is granted.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 15th day of May 2012.

Carrier Members' Dissent
to
Third Division Award 41353; Docket MW-41069

(Referee Patrick Halter)

This Award is built on flawed conclusions. First, to conclude that track inspection falls under Rule 1 - Scope of the Agreement is palpably erroneous. The parties' Scope Rule is general in nature and lacks any description reserving track inspection or, for that matter, any other work as maintenance-of-way work.

Second, Rule 2 – Seniority does not establish a link to any reservation of work - be it track inspection or some other type of work. The Board has consistently held that so-called "classification of work" Rules, such as Rule 2 – Seniority, do not reserve work exclusively to the job classifications enumerated therein. (See Third Division Awards 12943, 17706, 18471, 18478, 19921, 21843, 22144, 27759, 27806 and 30742, among numerous others.) Rather, classification of work Rules were formulated for the purpose of establishing rates of pay for work performed and the employees' exercise of their contractual seniority and promotion rights. Stated differently, given the general Scope Rule contained within the parties' Agreement, it would have been necessary for the Organization to establish a system-wide exclusive past practice to support its assertion that the work in question was reserved to BMWE-represented employees. The case record is devoid of such evidence. It is significant to note that the Organization never refuted the Carrier's contention that a contrary practice was prevalent. Surprisingly, the Majority erroneously linked Rule 2 – Seniority to the Scope Rule, which in our opinion reveals the flawed logic used to sustain the instant claim. Under the Agreement, there is no nexus between track inspection, scope or seniority that establishes any reservation of such work.

As a matter of fact, the case record is devoid of any evidence that purports to demonstrate that BMWE-represented employees have performed track inspection work on a system-wide basis to the exclusion of all others. On the contrary, the record evidence clearly substantiates that Roadmaster Nevarez, Assistant Roadmaster Gonzalez and other non-agreement employees have performed track inspection work for a significant number of years. Thus, it is clear that track inspection is not work exclusively reserved for BMWE- represented employees.

Regrettably, the Majority mischaracterized the Carrier's June 16, 2008 letter to the Organization. Specifically, the Majority mistakenly inferred that the Carrier somehow acquiesced that the work had been previously reserved to BMWE-represented employees when it stated that ". . . *there is nothing in any of the rules that would allow the Organization to now capture work which was never reserved to begin with, or alternatively, to recapture work it allowed to leave . . . .*" That conclusion is completely inaccurate.

In the final analysis, the Majority's ruling flies in the face of Third Division Awards 27759 and 39725, which call for the Organization to prove that track inspection work is reserved to BMWE-represented employees by clear contract language or by long-standing system-wide custom and practice. Because the Organization failed to meet that burden of proof, the instant claim should have been denied.

Tammy Hardge Stephenson *Michael C. Lesnik*

May 15, 2012