NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19924

THIRD DIVISION Docket Number MW-19972

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Burlington Northern Inc.

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

(1) The Agreement was violated when Electrician Jim Butcher and Helper John Lusvey were assigned or otherwise permitted to install a new top on the table in the engineman's lunch room at Alliance, Nebraska on May 21 and 22, 1971 (System File 10-3/MW-84(c)-3, 9-16-71).

(2) First Class Carpenter I. E. Quick be allowed eight hours of pro-rata pay because of the aforesaid violation.

OPINION OF BOARD: On Friday May 21 and on Saturday May 22, 1971, Carrier assigned two Mechanical Department employees, an electrician and an electrician's helper, the task of installing a new top on the table in the enginemen's lunchroom in Alliance, Nebraska. Claimant was a Shop Carpenter within the B & B sub-department assigned to this area; his regular work week was Monday through Friday with Saturday and Sunday as rest days.

Petitioner argues that the work in question is within the scope of the Agreement, dated May 1, 1971, and cites Section H of Rule 55 in support:

"RULE 55. CLASSIFICATION OF WORK

H. Shop Carpenter.

An employe assigned to building or repairing of cabinets, desks or other furniture or engaged in the performance of bench carpenter work shall be classified as a shop carpenter."

The Carrier contends that the work of placing a new top on the table in the shop lunchroom is not work reserved exclusively to Maintenance of Way employees. Carrier contends that the work in question has been by past practice performed by Mechanical Department employees and for this reason under the provisions of Rule 69(c) the adoption of Rule 55 did not extend the jurisdiction of the Maintenance of Way employees to such work. Rule 69(c) provides:

"C. It is the intent of this Agreement to preserve pre-existing rights accruing to employes covered by the Agreements as they existed under similar rules in effect on the CB&O, NP, GN and SP&S Railroads prior to the date of merger; and shall not operate to extend jurisdiction or Scope Rule coverage to agreements between another organization and one or more of the merging Companies which were in effect prior to the date of merger."

Before dealing with the substantive issues, Carrier claims that the Organization has tacitly admitted that the past practice had been to assign similar work to that involved herein to other crafts than Petitioner. This position is based on Petitioner's lack of specific denial or exception to two statements by Carrier officials. In the letter dated July 29, 1971, Carrier's Superintendent stated:

> "I have determined that work of this type is not strictly assigned to B&B forces, as repairs to tables and chairs have been made previously by other crafts. I have, however, issued instructions to all concerned that work belonging to B&B Department will only be performed by them in the future and there should be no further controversies in this regard."

In a letter to the General Chairman dated October 11, 1971, the Carrier's Vice-President Labor Relations said:

> "....Rule 55 classifies work that comes under the scope of the Maintenance of Way Agreement. The work in question has by past practice been performed by Mechanical Department employees and pursuant to the provisions of Rule 69(c) the adoption of Rule 55 did not extend jurisdiction or Scope Rule coverage of such work to Maintenance of Way employees."

The two statements above constituted the principal arguments raised by Carrier on the property. We do not agree with the position of Carrier that the lack of specific exception by Petitioner is sufficient to establish the "fact" of past practice. In this case the appeal to the next step per se was a denial of the major argument made by Carrier, and in addition there is a reference in the record that the issue was discussed in conference between the parties, with Petitioner denying the past practice.

The record in this case is devoid of any evidence to support Carrier's contention of past practice. We have held in many cases over the years that the party asserting a past practice as a defense must prove, by substantial evidence, the existence of such practice. In Award 17000 for example, we said:

> "Past practice is an affirmative defense and must by a preponderance of evidence be proven by the party relying on it. Insofar as this record is concerned there is no evidence upon which this Board can find that such a practice did in fact exist.... In the absence of evidence to sustain their position however, their argument is reduced to a mere declaration, and we accordingly must reject it."

Since the claimed past practice was not established by Carrier, the provisions of Rule 69(c) are not applicable to this dispute. Rule 55 (H) is clear and unambiguous and as both parties concede classifies the work coming under the scope of the Agreement. As a basic principal, work of positions covered by an Agreement belongs to those employees for whose benefit the contract was made and such work may not be assigned to employees outside the Agreement. (See Awards 3955, 10871 and others.) Therefore, we must conclude that Carrier erred in assigning the work in question to employees not covered by the Maintenance of Way Agreement.

Carrier argues that Claimant has suffered no monetary loss and no rule of the Agreement requires or provides for a penalty payment. We have examined with care the cases cited by both parties on the subject of punitive damages and recognize the divergent philosophies expressed in those Awards. In the case before us Carrier has offered no proof that the work in question could not have been performed on overtime (in fact the work was performed partially on one of Claimant's rest days) or that it could not have been performed during regularly scheduled hours of work. We agree with those cases which hold that Claimant lost his rightful opportunity to perform the work and is entitled to a monetary claim. See Awards 12671, 17059, 18365, 16430, 19441, and 19840.

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: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 7th day of September 1973.