

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20412  
Docket Number MW-19966

Dana E. Eischen, Referee

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

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

(1) The Carrier violated the Agreement when it assigned or otherwise permitted other than B&B **employes** and machine operators to perform steel erection work (steel tower) at Portland, Oregon from **August 2** through August 13, 1971 (System File **374F/MW-84(s)-3**, g-11-71).

(2) The Carrier violated the "NOTE to **Rule 55**" when, without advance notice to or agreement with General Chairman Frank H. Funk, it assigned the aforesaid work as indicated in (1) above.

(3) **B&B** Foreman L. Fricke, Asst. Foreman **M** Middleton, Carpenters H. Tucker, H. **Katzberg**, H. Dietrich, D. Paul, **J. Dolson** and S. **Glenzer** each be allowed seventy (70) hours' pay at their respective straight time rates.

(4) Machine Operator D. **Legore** be allowed sixteen (16) hours' pay at his straight time rate.

OPINION OF BOARD: In August 1971, Carrier **commenced** construction of a steel microwave antenna tower **at** Portland, Oregon on the property of the former Spokane, Portland and Seattle **Railway Company (SP&S)**. The tower, 26 feet **wide** at its base and 120 feet high, was assembled into sections on the ground and the assembled **sections** hoisted into place by a **crane**. Carrier utilized **employes** from the **Communication** Department to perform the assembly and an outside **contractor** for the crane operation.

The record indicates that the former **SP&S Communication** Department **employes** were, at the time of the tower assembly, represented by the Brotherhood of Railroad, Airline and Steamship Clerks (**BRAC**); but, since January 1, 1973 these **employes** have been represented by the International Brotherhood of Electrical Workers (**IBEW**) and covered by the schedule **Agreement between** Carrier **and** that Organization.

By letter dated August 19, 1971, Petitioner filed the instant claim on behalf of the named **claimants**. Petitioner relies primarily upon its classification of Work **Rule 55(I)** and the Note to **Rule 55 in** support of its claim. **Rule 69(c)** also has been cited by Petitioner. The pertinent provisions of the **Agreement** read as follows:

**"RULE 55**

"I. Steel Bridge and Building Mechanic.

An **employee** assigned to the setting of columns, beams, girders, trusses, or in the general structural erection, replacement, maintaining or dismantling **of** steel in bridges, buildings and other structures and in the performance of related bridge and building iron work, such as riveting and rivet heating, shall be classified as a steel bridge and building mechanic. NOTE: On former **SP&S** and NP, B&B carpenters performed this type of work and will be under **Rule 44.**"

"NOTE to **Rule 55**: The following is agreed to with respect **to** the **contracting** of construction, maintenance or repair work, or dismantling work customarily performed by employes in the Maintenance of Way and Structures Department:

"**Employes** included within the scope of this Agreement-in the Maintenance of Way and Structures Department, including employes in former GN and **SP&S** Roadway Equipment Repair Shops and welding **employes-perform** work in connection with the construction and maintenance or repairs of and in connection with the **dismantling** of tracks, **structures** or facilities located on the right of way and used in the operation of the Company **in** the performance of **common** carrier **service**, and work performed by employes of **named** Repair Shops.

"By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employes described herein, may be let to contractors and be performed by contractors' forces. However, such work **may** only be contracted provided that **special** skills not possessed by the Company's employes, special **equipment** not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency **time** requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is **practicable** and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. If the

"General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and Organization representative shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith.

"Nothing herein contained shall be construed as restricting the right of the Company to have work customarily performed by employes included within the scope of this **Agreement** performed by contract in emergencies that affect the movement of traffic when additional force or equipment is required to clear up such emergency condition in the shortest time possible."

**"RULE 69. EFFECTIVE DATE AND CHANGES**

**"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&Q**, 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."

Petitioner maintains that the **express** language of **Rule 55(1)** specifically grants to **B&B** employes the general structural erection of steel in structures, including the microwave tower here in issue. Accordingly, Petitioner **argues** that Carrier violated said rule by assigning the work to employes not covered by its Agreement, **i.e.** the **Communication** Department employes. Additionally, Petitioner contends that contracting out of the crane work without notification and conference with its General Chairman constitutes, in the facts herein, a violation of the Note to **Rule 55**.

Carrier has denied the claim in its entirety, primarily on the ground that no clear reservation of the work in question is found in Petitioner's Agreement. On this premise, Carrier asserts that Petitioner has failed to **demonstrate** exclusive reservation of microwave ant-tower erection by custom, practice or tradition, and, accordingly, urges that the claim must fail. In this latter connection, Carrier points out that custom and practice relegates the work to **IBEW-represented Communication** Department employes rather than to Petitioner. Without prejudice to its substantive position, on the merits, Carrier insisted throughout the handling of this case that no erection work was performed on the tower on dates of August 2, 3, 4, 5 and 6, 1971. Finally,

Carrier asserts arguendo that no damages should lie if a violation is found because **claimants** were "fully employed" on the claim dates in question.

The **IBEW**, as interested third party was afforded the opportunity to participate in the hearing in this matter and filed a submission dated March 6, 1973. **IBEW** contends essentially that the erection of microwave antenna towers is exclusively reserved to Communication Department **Employees** by its Scope and Classification of Work rules with the merged Carrier. In addition, **IBEW** asserts that no custom or past practice has been shown by Petitioner to warrant the instant claim and, accordingly, urges that it be denied.

In resolving this claim, we turn first to the argument of **IBEW** that its rules are decisive on this claim arising on the former **SP&S** in August 1971. Close examination of the record and the applicable Agreements compels us to reject this position. The work in question was performed **some** sixteen months prior to **the consummation** of Implementing Agreement No. 2 on January 8, 1973 whereby **IBEW** assumed representative and schedule agreement coverage of the former **SP&S** Communication Department **employees**. Accordingly, the Scope and Classification of Work rules of the **IBEW** schedule can have no relevance to the particular facts and circumstances of the instant claim. It should be noted that we are not here deciding their relevance or determinative effect in future such cases.

Turning to the specific Classification of Work **Rule 55 (I)**, we find that **rule** specifically classifies the work coming under the scope of the Maintenance of Way Agreement on the former **SP&S** property. Said rule clearly encompassed the erection of the steel tower for the microwave antenna in August 1971. Therefore, we can only conclude that Carrier erred in assigning the work in question to **employees** not covered by the Maintenance of Way Agreement, in violation of **Rule 55(I)**. See Awards 3995, 10871 and 19924.

As to the claim for the crane operation work, we have ruled in prior cases involving these same principal parties that the operation of a crane is not the exclusive work of any craft, and we have cited with favor Second Division Award No. 1829, to wit:

"It is the character of the work performed by the crane that ordinarily determines the craft from which its operator shall be drawn."

See Awards 13517 and 14004. It follows ineluctably from the foregoing that the crane work in connection with the tower erection in August 1971 was **Maintenance** of Way work for purposes of the Note to Rule 55. The **uncontroverted** record shows that this work was let to a contractor without notification or meeting with the General Chairman as required by the Note to Rule 55, thereby violating said provision of the Agreement.

As to the question of damages, Carrier asserts that the Claimants were employed full time when the violation occurred. This Board has held in numerous recent awards that notwithstanding "full employment" or the lack of a specific rule granting monetary relief, pro rata damages may be awarded upon the proven loss of work and earnings opportunity through Carrier **misassignment** of Agreement work. Awards 14004, 17319, 18923, 19337, 19552, et al. In our judgment, there was unquestionably lost work **opportunity** to claimants in the decision to use outside forces and employes not subject to the Maintenance of Way Agreement to perform work reserved to them by the Agreement in August 1971.

As noted supra, there was some ambiguity on the record concerning the actual number of days worked by the **Communication** Department **employes** in the erection of the tower. Petitioner asserts it was August 2, 3, 4, 5, 6, 9, 10, 11, **12** and 13, 1971. Carrier has maintained throughout that the **Communication** Department crew worked on the project August 9, 10, **11, 12**, 13 and 25, 1971. Both parties concur that the crane was operated on August 10 and **11**, 1971.

We do not find it necessary to decide the number of days and hours actually worked on the erection of the tower. The make whole theory will be satisfied by Carrier paying to each Claimant in Claim (3) his straight time rate for the hours actually worked in erection by the **Communication** Department employes, as recorded in Carrier's records kept in the ordinary course of business; but in no case less than the 48 hours as admitted by Carrier on the record herein. See Awards 14004, 20042. As to Claim (4) there is no such dispute and it is sustained accordingly.

We reiterate that the decision herein is based strictly upon the Agreement, facts and circumstances applicable upon the former **SP&S** property in August 1971 and cannot be deemed dispositive of questions regarding this type of work on the merged property in futuro. Such claims will turn on their merits if and when they arise.

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

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That the Agreement was violated.

A W A R D

Claim (1) **is** sustained.

Claim (2) is sustained.

Claim (3) is sustained to the extent indicated in the Opinion.

Claim (4) is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

*C. W. Paulus*  
Executive Secretary

Dated at Chicago, Illinois, this 27th day **of** September 1974.