Award No. 6029
Docket No. 3665
2-PRR-SM-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee David Dolnick when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION No. 152, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Sheet Metal Workers)

PENNSYLVANIA RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement the Carrier failed to notify the representative who filed the claim within sixty (60) days from the date instant claim was filed, in writing, the reasons for such disallowance.

2. That the current agreement, particularly the footnote in the Sheet Metal Workers' Graded Work Classification, was violated when the Carrier advertised four (4) new positions to the Carmen's craft, covering items of work accruing to the Sheet Metal Workers, as provided for in the Sheet Metal Workers' Graded Work Classification, instead of filling these positions from the roster of the Sheet Metal Workers' Craft.

3. That accordingly, the Carrier be ordered to advertise these positions to and fill from the roster of the Sheet Metal Workers' craft and the following named claimants be compensated for all the time involved for the period October 13, 1958, until the positions are properly advertised and the work assigned to the Sheet Metal Workers' Craft:

Miscoe, Joseph E.
Biercewicz, Stanley
Kuzia, Chester J.
Kargle, Albert A.
Boker, William J.
Petraglia, Frank S.
Ricci, Nicodemo C.
Raynor, Ronald E.
Argenas, James J.
Bohince, Jos. V.
Stabryla, Alojzy W.
Kromaka, Joseph S.
Templin, William
Smeresky, Michael, A. Jr.
Kaniewski, Alexander
Watson, William C.
Furtive, Francesco
Sgambati, Anthony J.
Santucci, Robert J.
Grace, Edward
Bankert, Richard F.
Organisciak, Thaddeus, J.
Santomauro, Francesco V.
Hozempa, Adolph J.
Moore, Herman L.
Tommarello, Livio
Martin, Percy
Watson, William C.
Nist, William P. P.
Fritz, Alex J.
Beam, Charles R.
Miller, Harvey J.
Heming, James V.
Effinger, Clendon C.
Bankowsky, John
Meier, Eugene F.

Howell, Herbert H.	Oreskovich, William	Silbaugh, Samuel R.
Sassano, Richard	Lichtenfels, Harry D.	Campbell, Robert W.
Fisher, Chester R., Jr.	Sisitka, Mike G.	Pricer, John J.
Gearhart, Alexander	Matava, Joseph M.	Bober, Joseph, Jr.
Cole, William E., Jr.	Fox, Ralph L.	Freshwater, Michael F.
Bailey, Irvin C.	McDonald, Howard C.	Santomauro, Frencesco
Ross, Ivan G.	Pezzoni, George E.	Organisciak, Thaddeus
Darstek, Albert	Himick, Peter	

CARRIER'S SUPPLEMENTAL SUBMISSION: This docket involves reconsideration of a dispute dealt with in an award (No. 3746) entered by Referee Mitchell on June 12, 1961 which became the subject of enforcement proceedings in the District Court in New York. Under date of August 30, 1968 Judge Pollack issued an order which set aside Award No. 3746 and remanded the dispute to this Board. The relevant portion of Judge Pollack's order reads:

> "ORDERED as follows:
>
> 1. That the plaintiffs' application to substitute for the name of the railroad in the title of this action its present title, to wit, 'Penn Central Company' is granted and the title of the action is amended accordingly.
>
> 2. The plaintiffs' motion for partial summary judgment is in all respects denied.
>
> 3. The motion of defendant, Penn Central Company, for summary judgment, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, remanding the controversy to the Second Division of the National Railroad Adjustment Board is in all respects granted, and it is
>
> ORDERED FURTHER that Award No. 3746 and the Order of the National Railroad Adjustment Board, Second Division, rendered in its Docket No. 3665 is hereby set aside, and the controversy involved in said Docket and in this action be and the same is hereby remanded to the National Railroad Adjustment Board, Second Division, for a determination of the whole dispute herein, with all parties including the defendant, Transport Workers Union of America, A. F. L. - C. I. O. to be given notice and an opportunity to be heard in the further proceedings in said Docket to be held before the aforesaid National Railroad Adjustment Board, Second Division and to be bound by the determination of such Board, subject to such right of appeal as is provided by law; and that the Clerk of the Court shall forward a true copy of this order to the Executive Secretary of the Second Division of the National Railroad Adjustment Board."

Consequently, the present hearing has been set in order to reconsider the entire dispute in this case and to consider the dispute in the light of the contracts between both the Sheet Metal Workers and the Transport Workers Union.

The dispute arose in 1958 when the former Pennsylvania Railroad Company decided to transfer certain work being performed at Yard D, Pittsburgh, Pa. to Yard C and the passenger station at the same location. The

Date	Total Force		% Change	Sheet Metal Workers' Positions		% Change
6-15-57	527		—	8		—
6-15-58	410	—	22.2	8		None
6-15-59	423	—	19.7	12	/	50.0
6-15-60	343	—	34.9	10	/	25.0
6-15-61	281	—	46.7	9	/	12.5
6-15 62	280	—	46.9	9	/	12.5
6-15-63	218	—	58.6	7	—	12.5
6-15-64	166	—	68.5	7	—	12.5
6-15-65	160	—	69.6	7	—	12.5

It is obvious that reductions in force which have been carried out have affected sheet metal workers much less heavily than other crafts, particularly carmen.

We do not intend that these subsequent changes are controlling in the decision of this grievance which arose in 1958. However, they do tend to show that there are no longer any valid continuing claims and that sheet metal workers in general have not been deprived of their fair share of the work in this area.

FINDINGS: The Second 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 were given due notice of hearing thereon.

On June 12, 1961 this Board adopted Award No. 3746 sustaining the instant claims on the merits. A civil action was thereafter filed in the United States District Court, Southern District of New York, Case No. 63 Civ. 2348, requesting that the carrier be required to comply with the Award and the Order. On August 30, 1968 United States District Judge Milton Pollack entered the following order:

> "Ordered Further that Award No. 3746 and the Order of the National Railroad Adjustment Board, Second Division, rendered in its Docket No. 3665 is hereby set aside, and the controversy involved in said Docket and in this action be and the same is hereby remanded to the National Railroad Adjustment Board, Second Division, for a determination of the whole dispute herein, with all parties including the defendant, Transport Workers Union of America, AFL-CIO, to be given notice and an opportunity to be heard in the further proceedings in said Docket to be held before the aforesaid National Railroad Adjustment Board, Second Division, and to be bound by the determination of such Board, subject to such right of appeal as is provided by law; and that the Clerk of the Court shall forward a true copy

of this order to the Executive Secretary of the Second Division of the National Railroad Adjustment Board."

In further proceedings seeking to clarify Judge Pollack's order, Judge Edward Weinfeld, Jr., rendered an opinion on January 14, 1970 which, among other things, says:

> "* * * The Court construes the order entered in August 1968 to require that the further proceedings upon remand be conducted before the full Second Division of the Adjustment Board, including the referee. That the award made by the Board, which included the neutral referee, was vacated and remanded for further consideration of the competing claims of the unions did not deprive the Board of its jurisdiction to determine the controversy. The referee remains a member of the Board until it discharges its statutory duty by rendering a final and binding award."

An order was entered in accordance with the opinion.

Since the referee who sat with the Second Division when Award No. 3746 was adopted is deceased, the Second Division requested the National Mediation Board to appoint another referee to sit with the other members to hear and decide the claim in Docket No. 3665. On May 8, 1970 the National Mediation Board appointed David Dolnick as Referee and as a member of the Second Division, National Railroad Adjustment Board for the purpose of rendering an award in Docket No. 3665.

Pursuant to the Court Orders previously cited, the Executive Secretary of the Second Division, National Railroad Adjustment Board, by letter dated May 13, 1970, wrote to the Petitioner, to the Carrier and to the Transport Workers Union of America, AFL-CIO, in part, as follows:

> "You are hereby advised that request for hearing before the Division with the referee present on this case has been granted and that such hearing will be held at the headquarters of the Second Division of the Adjustment Board, for the purpose of considering evidence as may be offered, hearing argument, and rendering an award in this case at 10:00 A. M. (CDST), Tuseday, June 16, 1970."

The Second Division, with Referee, convened at the hour and place noted in the letter of May 13, 1970. Representatives of the Petitioner and the Carrier appeared and argued their respective positions. No one appeared for the Transport Workers of America, AFL-CIO. The claim was presented and argued by the parties de novo and was considered by the Board.

In reaching a decision on the claim in Docket No. 3665 this Board had before it and considered the appropriate rules and provisions in the schedule agreement between the Carrier and the Petitioner and had available the schedule agreement between the Carrier and the Transport Workers Union of America, AFL-CIO. All rights of the Transport Workers Union of America, AFL-CIO were treated equally with those of the Petitioner and the Carrier.

Carrier first urges that this Board has no "jurisdiction to entertain or decide this dispute" because it is essentially a jurisdictional dispute between two craft organizations which can be resolved only by a joint jurisdictional committee as provided in Section 7 of an Agreement dated September 12,

1960 entered into between this Carrier, the Transport Workers Union, AFL-CIO, and System Federation No. 152, Railway Employes' Department, AFL-CIO. Had this claim arisen on and after September 12, 1960 and had the Carrier taken this position on the property and before this Board, we would have been compelled to sustain Carrier's position.

But the fact is that the claim before this Board arose on October 13, 1958, nearly two years before the date of the jurisdictional agreement. At no time on the property and in no submissions previously filed with Board did the Carrier invoke the provisions of Section 7 of the September 12, 1960 Agreement as a jurisdictional issue. There is no evidence in this record that Section 7 of that jurisdictional agreement applies retroactively. In the absence of such a showing, it must be presumed that the joint jurisdictional committee may rule on jurisdictional disputes which arose on and after September 12, 1960 and may not so rule on such dispute which arose prior to that date.

Further, Award No. 3746 was adopted on June 12, 1961, nine months after the date of the jurisdictional agreement. If Carrier's position is valid now, it would have been valid if it had been urged at any time prior to June 12, 1961. Yet, the Carrier at no time prior to June 12, 1961 sought to amend its submissions or to file a supplemental memorandum invoking the jurisdictional issue.

While this is a de novo hearing, the Board is bound by the record in the case as of the time the act occurred. The Agreement of September 12, 1960 was not then in effect, it was not invoked by the Carrier prior to June 12, 1961 and there is no evidence that this agreement was retroactive. For all these reasons, this Board may not now, under its rules, consider the jurisdictional issue raised by the Carrier. The orders of the court do not contemplate or authorize the Board to violate the procedural rules of the National Railroad Adjustment Board and of this Division. This Board has authority to adjudicate the dispute on the merits.

On January 9, 1959 the parties entered into a Joint Statement of Agreed-Upon Facts which reads as follows:

> "Advertisement Bulletin No. 67, dated October 13, 1958, covering the four (4) positions in question listed in the subject and Assignment Bulletin No. 67, dated October 26, 1958, are attached as Exhibits and made a part of the facts, Correction Bulletin No. 67, dated October 26, 1958, is also made a part of the facts.
>
> A part of the duties of the four (4) positions involved include work covered by the following paragraph in the Graded Work Classification for Sheet Metal Workers:
>
> > 'This grade of work covers general work in connection with sheet metal, pipe and plumbing work; steam, water and air lines on passenger cars, this to include installation and maintenance of water raising system, heating system, pipe work in connection with air conditioning, lavatories, and shower baths on cars excluding under body work on camp cars, all freight cars and auxiliary water cars.'
>
> The footnote in the Graded Work Classification covers this particular item:

'In consideration of the equities accruing to employes of the Carmen's Craft who are now engaged in the performance of such items of work, the allocation of such work to the Sheet Metal Workers' Craft is without prejudice to the rights of employes in the Carmen's Craft, whose assignment on December 1, 1942, included these items of work, to continue to perform the work until they vacate their positions, but as vacancies occur or new positions are created covering these items of work, they will be filled from the roster of the Sheet Metal Workers Craft.

No separation of these items of work shall be made where such separation would require the use of more employes than would be required if the work were continued as part of the work of the Carmen's Craft.'

It is agreed that the work performed by Car Repairmen, Yard 'C,' on each trick covered by the above quoted Grade Work Classification Item could be segregated and assigned to one (1) Sheet Metal Worker on each trick who would be fully employed for each 8-hour tour."

For the purpose of clarity and brevity Carmen shall hereinafter be referred to and identified as employes in the craft represented by the TWU and Sheet Metal Workers as employes in the craft represented by the petitioner.

Prior to October, 1958 four Carmen were employed in Yard D — one on each of three shifts and a relief. These four Carmen performed work such as inspection and repairs to air brake equipment on passenger cars, work which primarily belongs to the Carmen's Craft; they also renewed and repaired air, steam and water lines, work which primarily belongs to the Sheet Metal Workers' Craft.

At the same time four Carmen were employed in Yard C — one on each of three shifts and a relief. They, too, performed work belonging to the two crafts. Yard D was closed. Bulletin No. 67 dated October 13, 1958 advertised three new Carmen positions for Yard C and one Carman position at the passenger station. Bulletin No. 67 listed the positions, the rates of pay and the "Major Duties" as "Inspection and repairs to air brake equipment on passenger cars." Carmen assigned to the positions performed work of both the Carmen and Sheet Metal Worker Crafts.

Carrier argues that the advertised and assigned positions in Yard C and the passenger station were not new positions. They "were simply transferred from one location, to another within the same seniority district." But Bulletin No. 67 identified them as new positions. Having so designated the positions, Carrier may not now call them mere transfers. Presumably, Carrier complied with the schedule agreement rules when the positions were so identified and Bulletined. At least there is no evidence in the record to the contrary.

Carrier also argues that "if the sheet metal work on each trick were separated from the carmen duties attached to the three positions, such metal work would not and could not amount to eight hours per trick." But the Joint Statement of Agreed-Upon Facts, previously quoted, specifically says that the Graded Work Classification of Sheet Metal Workers "could be segre-

gated and assigned to one (1) Sheet Metal Worker on each trick who would be fully employed for each 8-hour trick." Whether work of the Sheet Metal Worker Classification was 35% or 25% of the total work performed by the Carmen of Yard C now is immaterial. Carrier has agreed that the work primarily belonginging to Sheet Metal Workers could be segregated and that one Sheet Metal Worker on each shift could have eight (8) hours of work. That being so, the Carrier could have properly made the assignments without the requirement of additional employes. No convincing evidence has been produced to sustain Carrier's assertive allegation that a "separation of the Carmen and Sheet Metal items of work could not be made without requiring the use of additional employes."

Work which primarily belongs to Sheet Metal Workers is clearly defined. The work description, previously quote, is clear and unambiguous. It does not infringe on work of Carmen. Only two conditions exist as contained in the footnote. One is that Carmen, who are now performing such work, are protected until they vacate their positions. The Carmen at the D Yard so vacated their positions when Carrier abolished the jobs at that Yard. The positions at the C Yard were new by Carrier's own designation. They were not mere transfers as contended.

Second, Carrier has not shown that the separation of Carmen and Sheet Metal work would require more employes than if Carmen alone performed all the work. By Carrier's own admission the work could be separated and three Sheet Metal Workers — one on each of three shifts — each of whom would have eight (8) hours of work in his own classification. This is the only relevant, probative evidence. It is an admission by the Carrier against its own interest. This Board has no right to ignore it and hold otherwise on statements that are mere assertions. That admission also seriously questions the allegation that Carmen's work in Yard C generally ran between 65% and 75% of all the work they performed.

For the first time in these proceedings the Carrier has raised the time limit rule — Article V of the August 21, 1954 National Agreement — because some of the listed claimants have been pensioned or are deceased and, therefore, not entitled to the assignments involved. Article V is a procedural rule, which, to be given consideration must be raised on the property. It may not be invoked at this late date.

Fifty-nine (59) individual Claimants are listed by the Petitioner. All of them may or may not have been and may or may not now be entitled to fill the vacancies at Yard C. An essential criteria for the filling of such vacancies and the recovery of compensation is for each such Claimant to hold seniority in the Pittsburgh Car Yard seniority district. Who they are and when they may have been entitled to compensation may readily be ascertained from Carrier's records. Likewise, those Claimants who held or now hold seniority in the Pittsburgh Car Yard district are readily identifiable from Carrier's records. Only the Claimants so identified who were and are deprived of employment at Yard C from October 13, 1958, and who were then and/or are now active employes on the payroll of the Carrier at the Pittsburgh Car Yard seniority district are entitled to the compensation claimed.

For all of the reasons heretofore stated, it is the finding of the Board that the Carrier violated the Agreement and that the claim has merit.

AWARD

Claim 2 is sustained.

Claim 3 is sustained in accordance with the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of November 1970.

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