Award No. 1818
Docket No. 1651
2-AT&SF-CM-'54

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 97, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (Eastern Lines)

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement the Carrier on or about January 1, 1952 improperly assigned Carmen Helpers to spray paint preservatives to the roofs of cars.

2. That accordingly the Carrier be ordered to cease assigning Carman Helpers to apply paint preservatives to car roofs and assign Carman Painters to such work.

EMPLOYES' STATEMENT OF FACTS: The carrier employs a regularly assigned force of carman painters at Fort Madison, Iowa, whose contractual duties are to perform painter work on cars and other equipment. On or about January 1, 1952, at Fort Madison, Iowa, the carrier unilaterally assigned carman helpers to apply paint preservatives to car roofs. Prior to this time carman painters were used to apply paint preservatives to car roofs, which is supported by statement of Carman Painter Wilhelm submitted herewith and identified as Exhibit A.

The employes have used all honorable approaches in an attempt to have the carrier correct the violation; however, the carrier has refused to do so.

The Agreement dated August 1, 1945, as subsequently amended September 1, 1949, is controlling.

POSITION OF EMPLOYES: It is submitted that the carrier, on or about January 1, 1952, arbitrarily removed the work of applying paint preservatives to car roofs from carman painters and assigned the work to carman helpers, which is supported by Exhibit A. The carrier's action was inconsistent with, and a violation of Rule 29(a) reading:

> "(a) None but mechanics or apprentices regularly employed as such shall do mechanics' work as per special rules of each craft. This rule does not prohibit foremen in the exercise of their duties, or foremen at points where no mechanics are employed, to perform work."

may be a bar because of laches. Awards 1289, 1606, 1640, 1645. It seems to us that this is particularly true where the controversy concerns simply the rates of pay. Employes do not ordinarily accept wages over a period of a year and a half or longer without protest if they believe they are not receiving what is due them according to terms of their contract. They should not permit an employer to continue in their belief that the agreement has been complied with and then after a long lapse of time enter a claim for accumulations of pay."

In Third Division Award 1811 the Board stated:

"Persuasive with us, however, is the interpretation which the parties have placed on the agreement by their conduct. After their initial protest, for a period of almost thirteen years they acquiesced in the procedure adopted by the carrier and thereafter up to the time of filing this complaint made but feeble protest. During all this time three new agreements were negotiated in which no settlement of this particular matter was sought. Under well recognized principles they are now estopped to claim that the agreement has been violated. Awards 1289, 1640. (See also Award 1806 in Docket CL-1657)."

In this connection also see Third Division Awards 1435, 2436, and 2576.

The carrier further contends that the organization has failed to prove that the agreement has been violated in the instant dispute and their request is nothing more than an outright attempt to secure a change in rules, which is something that can only be obtained through negotiation between the carrier and the organization.

The Railway Labor Act, as amended, (Section 6) prohibits changing working conditions without agreement and as has been stated by your Board in many previous awards, it is the function of this Board to interpret agreements and not to make agreements; therefore, inasmuch as this work is not included in the classification of work rule for carmen and is specifically provided for by the carmen helpers' classification of work Rule No. 104, it is the contention of the carrier that this work properly belongs to carmen helpers. This is further evidenced by the fact that such practice has been followed for some 24 years at Ft. Madison, Iowa, without previous protest from either of the two organizations holding the contract during that time. In view of this acquiesced in practice, the period of time and the rules involved, the carrier maintains that the request of the employes should be denied.

In conclusion, the carrier would point out that, **the Board is limited in its consideration of this dispute, to the interpretation and application of agreements as agreed to between the parties, without authority to add to, take from, or write rules for the parties.** See Third Division Award 5079 and numerous others.

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.

The parties to said dispute were given due notice of hearing thereon.

Carmen of System Federation No. 97 ask that carrier be ordered to cease using carmen helpers at Fort Madison, Iowa, to apply paint preservatives to car roofs and that it be required to assign carmen painters to do this work.

They base this request on the contention that the work comes within the provisions of Rule 102 of the parties' agreement and consequently, because of the provisions of Rule 29 (a) thereof, none but carmen painters regularly employed as such can do this work.

Rule 102, insofar as her material, provides:

> "Carmen's work shall consist of * * * painting * * * all passenger and freight cars, both wood and steel, * * * painting, * * * surfacing, * * * all other work generally recognized as painters work under the supervision of the Locomotive and Car Departments, * * *"

Carrier says the work consists of applying car cement to roofs and other parts of cars by the use of either a spray gun or a stiff brush and is done to prevent leaks and comes specifically within the following language of Rule 104 of the parties' agreement: "* * * employes engaged in * * * applying cement to freight cars, * * *"

The work of applying this cement roofing compound to freight cars could properly be said to come specifically under either the following language of Rule 102, "surfacing," or under the following language of Rule 104, "applying cement to freight cars," as the latter has no qualification as to where carmen helpers may apply it. In view of this ambiguous situation we must look to the past practice of the parties under these rules to ascertain which of these rules they considered controlling.

Carrier says that since about 1929 carmen helpers have been performing the work of applying cement to roofs and other parts of cars by the use of spray guns or stiff brushes. On the other hand the organization supports its contention with the statement of Freight Car Painter V. C. Wilhelm that up until the new paint tracks were put into operation at Fort Madison the application of this roofing compound to freight car roofs was done by freight car painters of the carmen's craft but since the new paint tracks have been put into operation carrier has been assigning the work to carmen helpers. We think this latter practice was followed and is here controlling. The work therefore falls within the provisions of Rule 102.

While it is true the roofing compound cannot be said to be a "paint preservative" its use is nevertheless covered by the quoted language of Rule 102 and the claim is meritorious.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of July, 1954.