Award No. 2363
Docket No. 2142
2-CUT-CM-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Edward F. Carter when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 150, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

THE CINCINNATI UNION TERMINAL COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement the Carrier improperly assigned Bridge and Building employes to perform Carmen's work by building six car cleaner scaffolds on February 4, 1954.

2. Accordingly the Carrier be ordered to compensate Carman C. M. Kidd, Sr., in the amount of 8 hours pay at the applicable overtime rate for February 4, 1954.

EMPLOYES' STATEMENT OF FACTS: The carrier maintains a force of fifty-four (54) carmen employed on the first shift shown on the force statement, with working hours 7 A. M. to 3 P. M., one job from 8 A. M. to 4 P. M. with twenty minutes for lunch. This includes fifteen (15) regular relief assignments with five days of work and two consecutive rest days to do work on rest days of seven day assignments, three (3) five day assignments with no relief, two (2) six day assignments that are relieved one day, thirty-four (34) seven day assignments with two consecutive rest days.

The carrier assigned bridge and building employes to build six (6) car cleaner scaffolds on February 4, 1954. These scaffolds are portable as they are used by male and female car cleaners represented by our organization to do cleaning and washing on the interior of cars used in passenger train service. They carry them from the tool room to cars to be worked on by them and they are in no sense a part of a bridge, building or structure.

Carman C. M. Kidd, Sr., hereinafter referred to as the claimant was available to perform this work if called on his rest day.

The agreement revised and signed September 1, 1949 is controlling.

POSITION OF EMPLOYES: The employes contend that the work involved in this dispute is carmen's work covered by the classification of work Rule 73 (a) applicable part reading:

question was properly assignable to such employes. In that situation it cannot be said there has been a violation of the agreement. It follows negotiation is required to effect a change."

In Second Division Award 1691 (Referee Wenke) it was said in part, "It is fundamental that a practice once established remains such unless specifically abrogated by the contract of the parties."

In Second Division Award 1764 (Referee Carter) it was said in part, "We think the long practice employed is rather conclusive of the meaning intended to be given to Rule 158 by the parties. The Board has said many times that where uncertainty of meaning exists that the interpretations given to the questioned provision by the parties over the years affords a safe guide in determining what the parties had in mind when the agreement provisions were made. The organization is in no position at this late date to have the provision construed more favorable to them. By their acquiescence in the application of the rule for more than thirty years they have fixed its meaning and removed any uncertainty growing out of the language used."

Before this case is decided by the Second Division, the Brotherhood of Maintenance of Way Employes should be made aware of the fact that the carmen are endeavoring to take work away from them which they have been performing for 21 years.

The employes are claiming punitive rate of pay and this is without merit as there are many awards denying such claims at punitive rates of pay for work not performed and that pro rata rate was proper rate.

Carrier has shown that the work in question has been performed by the B & B forces for 21 years and the carmen are endeavoring to exploit the work, after having acquiesced to the practice for 21 years. Even though the agreement has been changed and many memorandum of agreements have been consummated over the period of 21 years no proposal has ever been received from the employes to change the rule or to change the practice.

A practice of 21 years standing certainly had the acquiescence of all parties concerned and the carmen by neglecting to take proper action in opposition to the practice have implied consent thereto, consequently practice should not be disturbed.

The present claim is without merit and should be denied in its entirety.

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.

Carrier assigned Bridge and Building employes to build six car cleaning scaffolds. The Carmen assert that this is work belonging to them and claim is made that a Carman should be compensated for the work.

The record shows that the scaffolds are portable and are used by coach cleaners in the cleaning and washing of the interior of cars in passenger service. They are not a part of a bridge, building, or any other structure. The

claim is based on that part of Rule 73(a) of the Carmen's Classification of Work Rule which provides in part:

> "* * * planing mill, cabinet and bench carpenter work, pattern and flash making and all other carpenter work in shops and yards, except work generally recognized as bridge and building department work; * * * and all other work generally recognized as Carmen's work."

The only question for determination is, therefore, whether or not B and B employes may properly be required to perform this work under an existing practice of long standing. There is some evidence in the record that B and B employes have repaired coach cleaners scaffolds in the past. There is abundant evidence that B and B employes have performed the same type of work over the years, such as the building and repairing of benches, lockers, ladders, step stools, material bins, garbage boxes, and the like. We hold that it has been the practice on this carrier for B and B employes to perform this class of work, —work that is without the terms buildings, bridges or other structures. The practice exists as to the class of work and does not need to be established item by item. We are required to state, therefore, that by practice on this Carrier the work may be performed by Carmen or B and B employes. We are required to take notice of the exception stated in the quoted portion of Rule 73(a). There was not, therefore, a violation of the agreement in the instant case.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December, 1956.

DISSENT OF LABOR MEMBERS TO AWARD No. 2363

The majority ignores the plain meaning of Rule 73(a) and attempts to justify the use of B & B employes in place of carmen because, according to the majority, "it has been the practice on this carrier for B and B employes to perform this class of work." First of all, there is no proof in the record of such practice and, even had there been, it has been held again and again that practice will not change a plain unambiguous rule—such as is Rule 73(a).

Such practice would be a breaking down of a condition established by the rule and invite a result where exceptions to the rule would become more important than the rule itself.

Secondly, the language of Rule 73 (a) "all other carpenter work in shops and yards" was construed in principle in Dockets 1088 and 2201, Railway Board of Adjustment No. 2, to mean all carpenter work except that in connection with the erection and repair of buildings. The Second Division recognized and applied that correct interpretation of the language in Award 1656, where it is stated "The same reasoning (as that in Dockets 1088 and 2201) supports our holding that all painting of removable supply bins, work benches, furniture and the like, is the work of carmen as against the claim of Bridge and Building forces."

The majority in the present instance admits that the scaffolds are portable. "They are not a part of a bridge, building, or any other structure. . . ."

The use of B & B employes in lieu of carmen in the instant case was a clear violation of Rule 73(a) and we are constrained to dissent from the findings and award of the majority.

George Wright
R. W. Blake
C. E. Goodlin
T. E. Losey
Edward W. Wiesner