Award No. 2722
Docket No. 2418
2-MKT-CM-'57

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee D. Emmett Ferguson when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 8, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That effective July 16, 1955, the Carrier changed the hours of service of certain Car Inspectors and Coach Cleaners from eight continuous hours ending at 3:15 P.M., 11:15 P.M. and 7:15 A.M., to 1:00 P.M. and 2:00 A.M., with one hour for lunch and certain Coach Cleaners shifts ending at 3:15 P.M., 11:15 P.M. and 7:15 A.M. to 4:00 P.M., 12:00 Midnight and 8:00 A.M., in violation of the provisions of the current agreement.

2. That accordingly the Carrier be ordered to:

(a) Restore the aforesaid affected employes to their former assignment of hours;

(b) Additionally, that, each and all employes affected in any way be compensated for all of the hours of their duly assigned and regularly bulletined positions as were in effect prior to this change July 16, 1955;

(c) Additionally, that, they be further compensated for all service performed, beginning with the effective date of this change, outside of their duly assigned and regularly bulletined hours that are in effect and were in effect, prior to the date of this change, including services performed on their regularly bulletined and assigned rest days as are in effect and were in effect, prior to July 16, 1955.

There is no authority in the Second Division, National Railroad Adjustment Board to order payment of compensation to any employes other than for work performed as rule 83(c) provides, "It is understood that these rules shall apply only to those **performing the work as specified in this agreement** in the Reclamation Plant and Maintenance of Equipment Department." It will be seen **from this rule that the carrier pays only for work actually performed.** These employes have performed no work which has not been fully paid for by the company. The Board is without authority to re-establish positions or assignments or to order compensation for work not performed on assignments not in existence and on positions which have been abolished in accordance with the provisions of the working agreement by the carrier. The Second Division, National Railroad Adjustment Board is powerless to grant the relief requested without exceeding its jurisdiction.

Any order or award of the Board granted in excess of this authority is void and has no force and effect. The Second Division, National Railroad Adjustment Board is powerless to make or grant the relief requested in a valid award or order. Accordingly, the carrier requests that the entire claim be denied.

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, deny each and every, all and singular, the allegations of the organization and employes in alleged unadjusted dispute, claim or grievance.

For each and all of the foregoing reasons, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, respectfully request the Second Division, National Railroad Adjustment Board, deny said claim, and grant said railroad companies, and each of them, such other relief to which they may be entitled.

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.

Prior to July 16, 1955 there were three (3) shifts of carmen working at Denison, Texas. On July 15, the carrier abolished all those jobs and bulletined a group of new positions with five (5) new and different starting times.

The employes claim that Rules 2(a) and (d) have been violated. Rule 2(a) states:

> "There may be one, two or three shifts employed. The starting time of the shifts **shall** be arranged by **mutual** understanding between the local officers and the employes' committee based on actual service requirements."

The carrier, in agreeing to the above provision, established a procedure limiting itself in the exercise of its management prerogative. In this docket

it appears that the management decision was made unilaterally without any attempt to meet the mandatory requirement of mutual understanding set forth in the rule.

The carrier letter of October 5, 1955 to the carmen erroneously contends that "actual service requirements" override the "mutual understanding" provision and "impels the agreement of the organization" and that "to make an agreement such as stated in Rules 2(a) and (b) is no agreement at all," and then finally concludes, "under such an interpretation * * * the second sentence * * * would be of no force * * *."

This Division does not agree with the above contention. It is presumed that the parties bargained in good faith before Rule 2(a) was written to express their agreement. The language is clear and not ambiguous. After establishing the possibility of one, two or three shifts, the rule imposes a duty on both the local officer and employes' committee to arrange the starting time of the shifts by mutual understanding.

As a practical matter the carrier in most instances can reasonably be expected to be responsible for proposing the anticipated changes. The limitation of the rule does not permit the carrier to by-pass the committee without attempting to reach an arrangement by mutual understanding. Neither is the carrier justified in concluding, without such effort, that actual service requirements nullify the mandatory provisions of the rule.

However, there are practical considerations which confront the parties when occasions require the operation of the rule. Evidently the reasons underlying the rule were the possible conflicts between the demands of the service which concern the carrier, and the personal dislocations of the employes which are a matter of moment to the brotherhood. Under the rule neither the carrier nor the organization may arbitrarily take a positive or negative, adamant or immovable position. Each should approach their joint problem in good faith and should make more than a token effort to reach understanding. Both parties thus bring their experienced assistance to the solution of the problems of continued operation which is their only reason for being.

If after conference no agreement is reached, then and only then, may the management exercise its retained prerogative and assert its responsibility to function by initiating the changes required by actual service. It follows that the employes retain the right to challenge the carrier's action on the ground of poor faith bargaining, at which time the organization's good faith or lack of it will necessarily be demonstrated.

In this docket no such effort was made by the carrier and the rule has been violated. This Board finds that the violation should be corrected and that the affected employes are entitled to be returned to their former positions and hours until there has at least been an effort made to reach understanding on the contemplated changes. It is therefore ordered that the affected employes shall be restored to their former assignment of hours until there has been compliance with the rule as herein outlined.

There is no rule cited nor are there any facts contained in the record which would support any claims for compensation, which this Board finds therefore are without merit.

AWARD

Claim sustained in part as per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December, 1957.