Award No. 3061
Docket No. 2530
2-NYC-CM-'58

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Dudley E. Whiting when the award was awarded.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 103, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

THE NEW YORK CENTRAL RAILROAD COMPANY (Western District)

DISPUTE: CLAIM OF EMPLOYES:

1. That the current agreement was violated when the carrier on July 14, 1954 abolished the position of Carman Painter in the Signal Department in Elkhart, Indiana, and immediately turned this work over to other than Carmen to perform.

2. That Carman Painter, Mr. Beckham Wells, be compensated at the prevailing rate of pay for time lost since July 14, 1954 until such time as he is restored to this position.

EMPLOYES' STATEMENT OF FACTS: There is an agreement which reads as follows:

"Agreement

between

New York Central Railroad
Michigan Central Railroad
Boston and Albany Railroad

and all that class of employees represented by

System Federation No. 103
Railway Employee Department
A. F. of L. Mechanical

erally recognized as carmen's work; and all other work generally recognized as carmen's work." (Emphasis added.)

As indicated by the emphasized portion of the above quoted rule, the jurisdictional scope of a carman painter is limited to "painters' work under the supervision of the locomotive and car departments".

The signal department does not come under the supervision of either the locomotive or car departments, but falls within the jurisdiction of the maintenance of way department, a separate and independent department, which would perform only painter's work coming under the scope of the signalmen's agreement. Since July 14, 1954 there has been no work performed in the signal department of the nature "generally recognized as painters' work under the supervision of the locomotive and car departments". Therefore, the claim has no basis in fact and should be denied.

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.

The carrier objects to the filing of the employes' rebuttal because the rules of this division do not permit a surrebuttal so that action is a violation of the agreement of March 23, 1945. That agreement in part is as follows:

> "We agreed that our submissions, when they go to the Board, should tell the whole story with all the facts and all the arguments of the parties included to the end that there should be no necessity thereafter for either party to submit additional facts or evidence at a hearing before the Board.
>
> We agreed that this can and should be done by the parties by the simple device of exchanging positions until both sides have said all they want to say about the case."
>
> * * * "Neither party should seek advantage of the other in preparing cases for submission to the Board and both parties should expedite the handling as much as possible.
>
> When all this has been done there should not be much to do at a hearing before the Board. If a hearing is had the parties will be there to answer questions of the Board Members and to point out particular points in the facts or argument appearing in the submission.
>
> Of course, if in any particular case some new or additional facts or evidence come to light after the case has been submitted to the Board, and either party desires to submit such new or additional facts or evidence to the Board at the hearing, then that party should first advise the other party as far in advance as possible and give such statement of new or additional facts to the other party that he may answer the same."

On August 12, 1949 the parties executed an agreed interpretation thereof, which is in part as follows:

> "In every case in which a joint submission has been prepared and filed with the Second Division further written new or additional evidence or argument may be filed with the Second Division by either party only after said party has mailed a copy thereof to the other party fifteen calendar days before the date of hearing."

It is perfectly clear that any attempt to file new or additional evidence or argument in a form which cannot be answered by the other party, under our rules, is seeking advantage of the other party in violation of that agreement.

In any event the only new argument set forth therein is that the Scope Rule and Rule 154 "give the carmen painters all painting with brushes, varnishing, surfacing, decorating, lettering and cutting of stencils, and removing paint in all departments wherein such work is performed." It appears that the portion of Rule 154 relied upon was interpreted, while the National Agreement with the U. S. Railroad Administration was in effect, as being modified by the following language so that carmen were entitled only to such work under the supervision of the Locomotive and Car Departments. That appears to be the subsequent application because it is incontestible that painters of other crafts in other departments paint with brushes, so that contention is not sustainable.

Prior to July 16, 1944 the carrier maintained maintenance of way shops at Elkhart. On that date they were discontinued and the work was transferred to Ashtabula and Collinwood, except the work of one carman painter in the paint shop north of the signal shop. Arrangements were made that he thereafter work under signal department supervision, with no change in duties or rights under the carmen's agreement. The carmen's general chairman agreed with the understanding that when that occupant vacated the position it would be filled from the carmen's craft.

On February 18, 1950 the occupant of that position retired and it was filled by a carman painter. That position was abolished July 16, 1954 because the carrier decided that, by reason of changing work requirements, it no longer needed a carman painter at that point and it appears that only signal department work has been performed at that point since that date.

Such action is not a violation of the letter agreement establishing such position nor of Rule 154, so the claim cannot be sustained.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 8th day of December, 1958.

DISSENT OF LABOR MEMBERS TO AWARD No. 3061

It is readily apparent that the majority here was mislead by following the carrier's assertion that the employes' rebuttal was a surrebuttal. It is true that the rules of the Second Division do not permit a surrebuttal for that would in effect be the presentation of new evidence in support of the party's original submission. However, the rules of the Division do permit rebuttal and it is customary for either or both parties to make a rebuttal—as was done by both parties in the instant case. Rebutting evidence is evidence given to explain, repel, counteract, or disprove facts given in evidence by the adverse party in its original submission. A reading of the employes' rebuttal discloses that it was written for that purpose and contained no new evidence.

Even though the rules of the Division do not permit presentation of new or additional evidence to supplement a party's original submission, the carrier under its agreed to interpretation of August 12, 1949 could have had no legitimate objection had that been done since under that interpretation it was agreed that further written new or additional evidence or argument might be filed with the Second Division by either party after said party had mailed a copy thereof to the other party fifteen calendar days before the date of hearing. The record shows that the employes' rebuttal in the instant case was mailed to the carrier and the carrier, having made no rebuttal to the original submission of the employes, then wrote what is tantamount to a surrebuttal since it was based on the employes' rebuttal rather than on the original submission.

The error of the majority' statement that "carmen were entitled only to such work (painting) under the supervision of the Locomotive and Car Departments," is shown by the fact that the painting involved had always been under the supervision of the Maintenance of Way Department, wherein carmen painters hold their seniority.

The majority upholds the carrier in its unilateral abolishment of the carman painter's position and assigning work formerly performed by him to a signalman. This is a clear-cut violation of the letter agreement establishing this position, wherein it is shown that the carman painter had been carried on the Maintenance of Way carmen's seniority roster prior to the time he was put under the supervision of the Signal Department, which falls within the jurisdiction of the Maintenance of Way Department. This award is in reality further upholding violation of the current agreement governing carmen painters in the Maintenance of Way Department.

/s/ James B. Zink

/s/ R. W. Blake

/s/ Charles E. Goodlin

/s/ T. E. Losey

/s/ Edward W. Wiesner