Award No. 3595

Docket No. 3380

2-CofG-CM-'60

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION No. 26, RAILWAY EMPLOYES' DEPARTMENT, A.F. of L.—C.I.O.—(Carmen)

CENTRAL OF GEORGIA RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier violated the controlling Agreement on March 12, 1958 when it assigned derrick laborer Lige Lowe to clean 13 passenger train cars at Macon, Georgia.

2. That accordingly the Carrier be ordered to additionally compensate Coach Cleaner Clifford Freeman, who holds Coach Cleaners' seniority at Macon, Ga. in the amount of six (6) hours at the time and one-half rate.

3. That the Carrier be ordered to desist from improperly assigning Coach Cleaners' duties to other than Coach Cleaners at Macon.

EMPLOYES' STATEMENT OF FACTS: The Central of Georgia Railway Company, hereinafter referred to as the carrier assigned derrick laborer Lige Lowe to sweep out, dust the seats, arm rests and windows, replenish paper cups and towels, replenish toilet paper and otherwise clean the following Central of Georgia passenger cars numbered 665, 531, 505, 629, 650, 652, 524, 529, 506, 522, 651, and 373 on the passenger station tracks at Macon, Georgia between the hours of 9:00 A. M. to 11:00 A. M., and from 12:30 P. M. to 4:30 P. M. on Wednesday, March 12, 1958.

Coach Cleaner Clifford Freeman, hereinafter referred to as the claimant, holds coach cleaners' seniority at Macon, Georgia, lives in Macon, Georgia and was home on her rest days this Wednesday in question and was available for this work had she been called.

This dispute has been handled with all officers of the carrier designated to handle such disputes including the highest designated officer of the carrier, all of whom have declined to make satisfactory adjustment.

The agreement of September 1, 1949 as subsequently amended is controlling.

In **Third Division Award 4086**, Referee Parker said:

> "If it is desired to have the practices abolished they should have been made subjects for negotiations and agreement. When a contract is negotiated and long existing practices are not abrogated or changed by its terms, such practices are deemed to have been within the contemplation of the parties and approved. Indeed, there is sound precedent for giving them the same force and effect as if they had been incorporated with the terms of the contract itself."

In **Third Division Award 4493**, Referee Carter stated:

> "The Board has repeatedly held that where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself. Awards 2436, 1397, 1257. We are obliged to say, therefore, that the Carrier could not properly modify or abrogate the practice except by negotiation."

In **Third Division Award 2436**, Referee Carter said:

> "Where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself. See Awards Nos. 507, 1257 and 1397."

The claim is obviously for a new all-exclusive rule in favor of coach cleaners. Carrier urges that the Board does not possess the authority to write rules, and the Board has consistently so held. The Board's holding are based on the Railway Labor Act which clearly restricts the Board's authority to deciding:

> "* * * disputes between an employe or groups of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * *"

See Section 3 First (i) of the Act.

It is well settled that the freedom of action of a carrier is restricted only by statutory enactment or by the terms of an effective agreement. There is no statutory enactment involved here. Certainly the latter (agreement) does not prohibit the act which is the subject of this claim nor does it require payment of the penalty demanded. There is no justification whatsoever for this carrier to be saddled with this unnecessary and unneeded position or expense. The instant claim is without any semblance of merit, and it should be denied in its entirety.

In this ex parte submission, carrier has clearly shown that this improper and unavailable claimant is not entitled to that which the employes are here demanding. There is no basis or support for the claim of the employes. Carrier, therefore, respectfully urges the Board to deny the claim 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.

Parties to said dispute waived right of appearance at hearing thereon.

A derrick laborer, Lige Lowe, was assigned to do certain work on thirteen cars of a train returning empty from Savannah to Columbus, Georgia. Employes of the coach cleaner classification were employed at both Savannah and Columbus, but had been furloughed at Macon, Georgia where the dispute arose. The coach cleaners contend that the carrier cleaned the cars at Macon to evade overtime at Savannah or Columbus.

The carrier maintained that the work done by Lowe was not coach cleaning, but merely a sweep-out job such as may be performed by many different classifications of employes. The carrier showed no operational need for the cleaning and such other work as was done. There was no immediate anticipation of passenger use. The cars had been in a littered and depleted condition in Savannah and might have remained so until they arrived in Columbus.

While laborers, porters, maids and others perform similar work, they do so in terms of the operational needs that gave rise to their assignments. On the other hand, the basic cleaning of coaches preparatory for operational use of the cars is recognized as coach cleaners work and is done at recognized and equipped shop points. Such coach cleaners work may not be diverted into the assignments of other classes or crafts of employes.

The Board holds that the carrier illegally assigned a derrick laborer to do coach cleaners work on the special "Mains" train while it was in Macon, Georgia.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 9th day of November 1960.

DISSENT OF CARRIER MEMBERS TO AWARD NO. 3595

The dispute involved herein resulted from the assignment of a laborer to sweep heavy accumulation of waste paper from thirteen empty passenger cars and replenish paper towels, toilet paper and drinking cups as needed, on the cars at Macon, Georgia, on March 12, 1958, where coach cleaners were not employed. The cars had been used in movement of military personnel and their families from Columbus, Georgia, to Savannah, Georgia, and were cleaned by coach cleaners at Columbus prior to departure of the special train. On the return movement of the empty cars from Savannah to Columbus, they laid

over at Macon about six hours, and it was during this period that the services of the laborer were utilized.

The applicable agreement contains no classification of work rule for coach cleaners. The record shows that coach cleaners on the Carrier involved have never had the exclusive right to any and all cleaning of coaches. In the absence of a rule in the applicable agreement granting to coach cleaners the exclusive right to the work in question, the claim should properly have been denied. The question of "operational need for the cleaning and such other work as was done" is not the determining factor, but the absence of any agreement provision granting to coach cleaners the exclusive right to any and all cleaning of passenger cars is the determining factor.

The conclusion of the majority that —

> "There was no immediate anticipation of passenger use. The cars had been in a littered and depleted condition in Savannah and might have remained so until they arrived in Columbus."

is simply conjecture and has no support in the record. Whether the Carrier desired to have the cars swept out at Macon, drinking cups replenished, etc., was a matter for its determination. The only question for determination by the Division was whether the action of the Carrier resulted in a violation of the applicable agreement. There is nothing in the record to show that the work performed at Macon by the laborer constituted "the basic cleaning of coaches preparatory for operational use of the cars."

While the majority has concluded that "the carrier illegally assigned a derrick laborer to do coach cleaners work on the special 'Mains' train while it was in Macon, Georgia," it has failed completely to cite any provisions of the applicable agreement that the Carrier violated. The reason for such failure is obvious.

The error of the majority is further compounded in sustaining the claim for pay at time and one-half rate for work not performed. The correct rule which has been applied in awards of this Board too numerous to require citation is that time for work lost is the pro rata rate of the position. (Interpretation No. 1 to Award No. 3285, Referee Carey.) There is no reason why the general rule applicable in cases such as this should not have been applied in this docket.

The award is erroneous, and we dissent.

P. C. Carter

D. S. Dugan

H. K. Hagerman

D. H. Hicks

M. E. Somerlott