Award No. 3802
Docket No. 3292
2-CMStP&P-CM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James P. Carey, Jr. when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 76, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L., C. I. O. (Carmen)

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement the Carrier improperly upgraded Carman Helper J. Miller at Savanna, Illinois, to perform the duties of a carman on August 10, 13, 14, 15, 17, 1957, and again on August 20, 1957 upgraded Carman Helper Lawrence Green.

2. That accordingly, the Carrier be ordered to compensate Eugene T. Flack, Carman, at the applicable carman's rate of pay for eight (8) hours for each date of August 10, 13, 14, 15, 17 and 20, 1957.

EMPLOYES' STATEMENT OF FACTS: On August 10, 13, 14, 17 and 20, 1957, Carman Helper J. Miller held a regular assigned position as such on the 4:00 P. M. to 12:00 Midnight shift, Wednesday through Sunday, with Monday and Tuesday as rest days at Savanna, Illinois.

On August 15, 1957 Carman Helper Lawrence Green held a regular assigned position as such on the 12:00 Midnight to 8:00 A. M. shift, Sunday through Thursday, with Friday and Saturday as rest days at Savanna, Illinois.

Car Inspector Daniel Brkljacic, who held a regular assignment as such on the 4:00 P. M. to 12:00 Midnight shift at Savanna, Illinois, was absent from duty from August 6 to 24 inclusive, which was his vacation period. His rest days were Sunday and Monday.

Car Inspector P. Wilt, who held a regular assignment as such on the 12:00 Midnight shift to 8:00 A. M. at Savanna, Illinois, was absent from duty

time as it is changed by mutual assent. It is unnecessary, therefore, for us to concern ourselves with the technical terminology of the agreements.

AWARD

Claim denied."

In conclusion we submit the following:

1. The parties to dispute have heretofore, under the 1942 Emergency Agreement and under the June 4, 1953 National Agreement, recognized the carrier's right to advance or upgrade carmen helpers to fill vacancies (temporary or permanent) on carmen positions.

2. Article III of the June 4, 1953 National Agreement does not contain the prohibitory construction which the employes now allege or seek.

3. All rights of the carrier which it has not contracted away—and it has not contracted away the right to advance or upgrade carmen helpers to fill either permanent or temporary vacancies on positions of carmen—remain with it.

4. The evidence of record clearly and decisively supports the carrier's position in the instant dispute.

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.

The claimant, Carman Eugene Flack, was a regularly assigned Car Inspector at Savanna, Illinois in August 1957. His assigned working hours were from Midnight to 8 A. M., Saturdays through Wednesdays, with Thursdays and Fridays as rest days.

On six non-consecutive days beginning on August 10 through 20, 1957 the carrier upgraded a Carman Helper to perform the duties of a regularly assigned Car Inspector who had temporarily laid off. These Car Inspector assignments thus temporarily filled by the upgraded helper were such that claimant Flack could have filled them and was available to do so, as they were either outside his assigned hours or on his rest day. The organization maintains that Carman Flack should have been used to fill these temporary vacancies and paid therefore at the rate of time and one-half. It asserts that in upgrading carmen helpers under the circumstances, the carrier deprived

claimant of work which belonged to carmen and as Carman Flack was available and willing to work his claim is justified. Reference is made to Rule 32 of the basic agreement which provides that "none but mechanics or apprentices regularly employed as such shall do mechanics work as per special rules of each craft" and also to the seniority rule.

The carrier mainly relies on the provisions of an agreement dated June 4, 1953 and on a claimed past practice on the property to support its action in these instances. It contends that it has not contracted away its inherent right to advance or upgrade carmen helpers as was done in this case.

The agreement of June 4, 1953 between the Brotherhood of Railway Carmen and numerous carriers, including the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, was made in settlement of a dispute growing out of notices served on the carriers by the Brotherhood and certain rules changes proposed by the carriers.

The pertinent section of the said 1953 agreement reads as follows:

"Article III—Upgrading Carmen Helpers and Apprentices.

"In the event of not being able to employ carmen with four years' experience who are of good moral character and habits, regular and helper apprentices will be advanced to carmen in accordance with their seniority. If more men are needed helpers will be promoted. If this does not provide sufficient men to do the work, men who have had experience in the use of tools may be employed. They will not be retained in service as carmen when four-year carmen as described above become available.

"Note: Helpers advanced as above will retain their seniority as helpers until they are qualified as carmen under the qualification rule and within thirty days thereafter shall make their choice whether to take seniority as a carman or retain seniority as a helper.

"In the event of force reduction, in the absence of other existing arrangements, demotion shall be in the reverse order to that of upgrading.

"This rule shall become effective August 1, 1953, except on such carriers as may elect to preserve existing rules or practices and so notify the authorized employee representative on or before July 1, 1953."

This carrier did not elect to preserve its existing rules or practices mentioned therein and consequently Article III was effective on the dates involved in the instant claim.

The carrier correctly asserts that the so-called emergency agreement of March 16, 1942 with System Federation No. 76 insofar as it is in conflict with Article III of the June 4, 1953 agreement does not apply to this dispute. However, the organization contends that the 1953 agreement does not authorize the carrier to up-grade carmen helpers on a day-to-day basis, but that it may only do so if the workload has increased to such an extent that addi-

tional mechanics are needed, and carmen of four years' experience are not available for hire and regular and helper apprentices cannot be found.

The March 16, 1942 emergency agreement recognized a war-time shortage of mechanics of various classes and specified a variety of circumstances in which apprentices, helper apprentices and helpers of several crafts could be advanced to mechanics on a temporary basis. This agreement permitted apprentices or helpers on the conditions therein specified to be advanced to mechanics positions "when new jobs or vacancies occur due to an increase of forces, or mechanics leaving the service and are bulletined and no mechanics bid on the bulletin or are available for service." This agreement also provided that "mechanics will be allowed to work overtime on urgent or emergency jobs, and apprentices or helpers will not be advanced to take care of a single job or emergency work."

Thus it appears the basic contractual requirement that "none but mechanics or apprentices regularly employed as such shall do mechanics' work" was relaxed to a limited extent by the 1942 agreement, i.e., when new jobs or vacancies occurred due to an increase of forces or loss of mechanics. In either event the job opening was to be bulletined.

In the 1953 agreement quoted above, while bulletining a job opening is not specified, we think the more logical interpretation to be applied to the language used, considering the underlying significance of the mutually recognized importance of distinction between mechanics, apprentices and helpers, is that the contracting parties are not presumed to have intended to have authorized unilateral upgrading of helpers to perform mechanics' work at least in the circumstances shown in this case. If that result was intended it seems reasonable to say that the parties would have so provided in unmistakable terms. We are unable to imply it from Article III of the 1953 agreement. Nor are we justified in assuming that since the 1942 agreement specifically dealt with a "single job or emergency work" and the 1953 agreement did not use such terms, that in the latter agreement it was intended that upgrading of helpers in emergency situations such as in the instant case was authorized. As we have indicated, it was readily within the ability of the contracting parties, if they so desired, to have specifically permitted unilateral upgrading of a carman helper in circumstances shown of record in this case. The fact that they chose not to do so is significant.

The carrier's position with respect to an alleged past practice is sharply disputed by the employes. The carrier cites a number of instances in 1955, 1956 and 1957 in which helpers were upgraded to a temporary vacancy on a mechanic's position and contends that such practices were not challenged by the employes. The organization shows that the employes on various occasions during 1955, 1956 and 1957 protested the assignment of helpers to carmen mechanic positions where the mechanic was laying off for one or two days. We are unable to resolve this conflict on the basis of the instant record and in our view of this case it is unnecessary to do so. Resort to past practice by the contracting parties may be had for the purpose of ascertaining the practical interpretation given by the parties to a contractual provision which is otherwise vague, indefinite and obscure. As indicated above, we think the provisions of Article III of the 1953 agreement are sufficiently clear to indicate that the authority granted the carrier to upgrade carmen helpers did not extend to a temporary day on day off mechanic's vacancy such as is shown in the instant case. Accordingly we are of the opinion that this claim is meritorious.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Ilinois, this 27th day of June 1961.