



Award No. 4849

Docket No. 4695

2-CB&Q-CM-'66

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 95, RAILWAY EMPLOYES'
DEPARTMENT, AFL-CIO (Carmen)**

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement the Carrier was not authorized to use a Track Laborer, a Roundhouse Foreman and a Roundhouse Laborer to assist Carman Hayes from Hannibal, Missouri to change out two pair of wheels on Car No. GACX 44063 at Brookfield, Missouri, June 6, 1963.

2. That accordingly Carman C. E. Schultz be compensated ten (10) hours at time and one-half rate.

EMPLOYEES' STATEMENT OF FACTS: The Chicago, Burlington & Quincy Railroad Company, hereinafter referred to as the carrier, on June 6, 1963 at 8:30 A. M. sent Track Laborer Constable and Carman L. A. Hayes, who are regularly employed at Hannibal, Missouri, out on line of road to Brookfield, Missouri to change out two pairs of wheels on Car GACX 44063.

Upon arrival at Brookfield, Carman Hayes, assisted by Track Laborer Constable, Roundhouse Foreman Parker and a roundhouse laborer, performed the work necessary in the change of wheels and upon completion of the work Hayes and Constable returned to Hannibal, arriving thereat at 6:30 P. M.

Carman C. E. Schultz, hereinafter referred to as the claimant, is regularly employed by the carrier as a carman at Hannibal, Missouri. His assigned hours are 11 P. M. to 7 A. M., Friday through Tuesday, with Wednesday and Thursday as rest days. June 6, 1963 was one of the claimant's rest days and he was available for call.

This dispute has been handled with officers of the carrier up to and including the highest officer so designated by the carrier, who have declined to adjust the matter.

The carrier's defense in the instant claim may be summed up in the following manner:

1. There is no requirement in the current schedule agreement, and has not been for the past 43 years, to send two carmen out to perform the changing of wheels in road service.
2. The rules do not require that a helper be sent out to accompany a carman who changes wheels, unless there is no other help available at the point where the work is performed. Since other help was available at Brookfield, Missouri in this case, the rules of the schedule did not require a helper to accompany Carman Hayes.
3. In any event, the claimant, Carman Schultz, had no right to claim the work which was performed by the track laborer, roundhouse laborer, or roundhouse foreman at Brookfield, since the only work that they performed was that of a carman helper. The claimant is not a carman helper and had no right to perform this work.

For the reasons set forth herein, this claim must 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.

Parties to said dispute were given due notice of hearing thereon.

Carman Hayes was sent out from Hannibal in a truck driven by Section Laborer Constable to change two pairs of wheels on a car at Brookfield, where no carman was stationed. He was assisted by Section Laborer Constable, Roundhouse Foreman Parker, and Roundhouse Laborer Meyn, the latter two of whom are regularly assigned at Brookfield. The Claimant was a regularly assigned car inspector at Hannibal; this was his rest day, and he was available for call. Rule 81 reads as follows:

"Rule 81. When necessary to repair cars on the road or away from the shops, carmen, and helper when necessary, will be sent out to perform such work as putting in couplers, draft rods, draft timbers, arch bars, center pins, putting cars on center, truss rods, wheels, and other work of similar character."

The Carrier cites Rule 168 under the U.S. Railroad Administration in 1919, which provided as follows:

"Rule 168. When necessary to repair or inspect cars on the road or away from the shops, carman will be sent out to perform such work. Two carmen will be sent to perform such work as putting in

couplers, draft rods, draft timbers, arch bars, center pins, putting cars on center, truss rods, and wheels and work of similar character."

In 1921, Rule 168 was amended to read exactly like present Rule 81, except that the word "carman" was used instead of "carmen." The Carrier contends that the use of the plural form in Rule 81 was inadvertent, but offers no proof of that.

In answer the Organization points out that upon its certification on this property the parties assumed a prior agreement which contained no rule similar to either present Rule 81 or U.S. Railroad Administration Rule 168; that in 1940 a new agreement was adopted, which for the first time included this identical provision as Rule 74; that in 1944 contract it became Rule 81, and was so repeated in the 1953 agreement, with identical plural wording in all three contracts.

Thus there was no continuity between U.S. Railroad Administration Rule 168 and Rule 81; but if there had been, the presumption would be that the change was made advisedly, especially where the new wording was repeated in two subsequent agreements. When a statutory or contractual provision is readopted with an amendment, the reasonable and established presumption is that the change was intentional. Assuming that the presumption is rebuttable, the contention that the change was inadvertent would require evidence of that fact, which is entirely lacking here. Furthermore, if the 1940 wording had been inadvertent, it is incredible that the change would not have been questioned for about twenty-three years, during which it was readopted twice.

The Carrier makes this further argument, which is quite different:

"The plural form as used in the rule at present indicates only that it has reference to employes in the classification of carmen, and not any specified number. It includes one carman as well as several as the occasion demands."

"At present" is not justified, since the rule never provided otherwise. Furthermore, no authority or principle is cited for the argument, and it is negatived by the fact that in the rule, the plural word "carmen" is immediately followed by the singular word "helper." Since the parties have adopted the identical provision three times, retaining the plural form for one class of employe and the singular form for the other, we cannot ignore the essential difference. If in fact the parties' intention were otherwise or the use of the plural inadvertent, this Board lacks the equitable power to reform the contract.

The Carrier argues that "Rule 81 has always been construed to permit the use of one carman", rather than two or more "carmen." It cites as "positive proof" eight instances in which similar claims were made on behalf of a carman and a helper, rather than two carmen, when carmen's work at outlying points had been performed by employes of other crafts. One of these claims was initiated at Alliance, Nebraska, in 1958, and the other seven at Lincoln, Nebraska, five of them in 1960 and two in 1962. [Eight instances at two points during four years out of a span of twenty-three are not sufficient to establish practice over a large railway system, assuming that the rule is sufficiently ambiguous to require interpretation.]

The Carrier does not allege that the eight instances cited are the only ones arising throughout the system since the Rule was adopted, and we cannot reasonably assume that the question never arose elsewhere than at Alliance or Lincoln, nor in any other of the twenty-four years.

At the referee hearing the Carrier argued that the evidence of these eight instances outweighs the Employees' failure to cite any instances at all. But the Carrier cited them in support of its defense that established practice constituted an interpretation that "carmen, and helper when necessary" meant, "a carman and helper when necessary." As noted above they are insufficient to establish that defense, and no evidence was necessary to establish a practice in accordance with the actual wording of the rule.

Although the Carrier sent Carman Hayes out from Hannibal to perform work at Brookfield under Rule 81, it contends that under Rule 14 (e); seniority is confined to the point at which employed, and that Claimant therefore "has no claim to the work which was performed by either Section Laborer Constable, Roundhouse Foreman Parker or Roundhouse Laborer Meyn."

But, as the Organization points out, Rule 81 is a special Carmen's rule, relating to a special circumstance, and under it Claimant had the same right as Carman Hayes to perform carmen's work at Brookfield; in other words, Rule 81 necessarily expands a carman's seniority beyond his home point under the circumstances to which it refers.

The carman was assisted by three men, one of whom, the track laborer, was sent out with him, instead of another member of the carmen's craft.

It is obvious that the work in question required more than one carman, i.e., it required "carmen"; consequently, under Rule 81, carmen should have been sent out. This is true whether the work is considered as being performed by two carmen working together, or by one carman assisted by another. As the employees state, this Division has repeatedly held, "that a journeyman mechanic is the master of his trade and accordingly may perform any work of the craft. It, therefore, follows that the enumeration of carmen helpers' work in Rule 77 does not confer exclusive jurisdiction upon helpers to perform any work of the carmen's craft to the exclusion of carmen * * *." Certainly carmen may work together, which means that they may help each other.

Under Rule 81, and also under Rule 27 (a), which in general limits the work of a craft to members of that craft, Claim 1 must be sustained.

Claim 2 demands ten hours' pay at time and one-half rate because this was Claimant's rest day. Carman Hayes was called out at 8:30 A. M., and returned to Hannibal at 6:30; consequently, he was paid eight hours at straight rate and two hours at time and one-half; but the record does not show when he actually started and completed his work at Brookfield.

In Award 1702, this Division stated the measure of compensation for work lost as:

"the pro rata rate of the position, that is, the rate which the occupant of the regular position to whom it belonged would have received if he had performed the work. This would eliminate all traveling and waiting time but would entitle claimants to be paid at the

rate of their position for all time paid Wrecking Engineer Frank Walters, either pro rata or overtime, while he worked with outfit No. 95008 at Armourdale. See Award 1362 to the same effect."

Claim 2 should be allowed to that extent and remanded to the property to determine the hours worked by Carman Hayes at Brookfield and Claimant should be compensated for that period at straight time.

AWARD

Claim 1 sustained.

Claim 2 sustained to the extent stated in the Findings, and remanded to the property for determination of the time for which he is to be paid at straight time rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 15th day of March, 1966.