Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8282
Docket No. 7874-T
2-BNI-CM-'80

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

Parties to Dispute: (System Federation No. 7, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Burlington Northern Inc.

Dispute: Claim of Employes:

1. That the Carrier violated the Current Agreement, particularly Rules 27 and 83, when they assigned Carmen's work to the Brotherhood of Railway and Air line clerks laborers.

2. That accordingly the Carrier be ordered to compensate Brainerd Carmen C. L. Waner, C. B. Eide and R. C. Sims in the amount of eight (8) hours each at the straight time (1) rate plus C.O.L.A. for April 13, 1977 and six (6) hours each at the straight time (1) rate for April 14, 1977.

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.

This claim is based on an alleged improper assignment of work reserved to the Carmen under rule 83 to members of the BRAC Organization in contravention of that Rule. BRAC was properly given notice of this claim and has filed its submission herein.

Rule 83 reads as follows:

"Rule 83. CLASSIFICATION OF WORK

Carmen's work shall consist of building, maintaining, dismantling (for repairs), painting, upholstering and inspection all passenger and freight cars both wood and steel."

The question we must resolve is whether the activity complained of falls within the definition of dismantling for repairs under the rule.

The Carrier bases much of its defense on the grounds that the cars that were being dismantled were part of a test being run by the Carrier to determine the economic feasibility of the operation. While the activity was the same as would have taken place if the objective was merely to reclaim and repair the salvaged materials, the Carrier maintains that its objective in having the work performed must control.

We do not agree. The work performed is clearly covered by Rule 83. The dismantling for repair may have been part of a test but under the rule it is carmen's work nonetheless. The Carrier violated the Agreement by assigning the work to employees not covered by the Agreement.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 26th day of March, 1980.

DISSENT OF CARRIER MEMBERS

TO

AWARD NO. 8282, DOCKET NO. 7874-T

(Referee Franden)

Dissent to this award is required for several reasons, one of which is the Majority's patent disregard for and lack of understanding of the central facts in the record. Since the Majority did not state the facts, it is appropriate that we do so.

On April 13 and 14, 1977, two Carrier-owned cars were brought into its Brainerd Car Shop to be completely dismantled. It was proposed that both cars be dismantled as a part of a controlled test to determine the economic feasibility of salvaging any potentially reclaimable parts which the cars might contain. At the time, however, both the Carmen Craft and the Clerks Craft claimed the work involved. Following discussion between these two groups and Carrier's local management, an agreement was reached whereby each craft would be allowed to dismantle one car so that neither could claim a precedent to the work. It was also understood by all parties involved that no claims would be filed as a result of this assignment of the work. The Carmen Craft, nevertheless, breached the agreement when it filed the instant claim which the Majority now erroneously sustains.

The Majority premises its decision on Rule 83 and a finding that the work here involved consisted of dismantling for repairs. Such a finding, however, is improper and unwarranted for at least two significant reasons:

1. All of the parties concerned understood that the dismantling was a part of a test to be performed equally by both crafts; and
2. The petitioner has not met its burden of proof establishing that the activity undertaken was actually dismantling for repairs covered by Rule 83.

The Carmen's Local Chairman, in a letter to the Carrier's Director of Material, fully recognized the exact nature of the work accomplished:

> "The meeting convened by Mr. Fisher produced the following results.
>
> "1. The dismantling of cars in question was a test or survey." (Emphasis added)

The same understanding was also held by the BRAC Local Chairman, as was set forth in that Organization's submission to the Board:

> "*** While BRAC is unable to say what was understood by the Local Chairman of the Carmen, it was understood by the Local Chairman of BRAC that it was a test and no claims would be filed by BRAC." (Emphasis added)

Furthermore, the Petitioner has been unable to establish that the dismantling was for repairs or any other

purpose contemplated by Rule 83. No showing has been made that any of the parts involved were subsequently repaired or reclaimed. The burden of proof, however, as the Board held in Third Division Award No. 6359 (McMahon), properly rests on the propounder of the claim:

> "*** We must hold that the burden of proof is on the one who asserts the claim. Mere words that a violation has occurred are not sufficient without positive evidence to substantiate the allegations as made."

See also Third Division Awards 7362 and 7964.

The Petitioner has clearly failed to meet its burden of proof. The Majority's holding, therefore, "that the activity was the same as would have taken place if the objective was merely to reclaim and repair the salvaged materials," is most assuredly incorrect. Since no dismantling for repairs was involved, the work performed is not covered by Rule 83. Whereas "dismantling (for repairs)" may be carmen's work, neither the Carmen Craft nor the Clerks Craft enjoyed the exclusive right to dismantle the cars as a part of a test. Consequently, the net effect of the Majority's holding is to effectively frustrate mutual cooperation of the instant parties in future undertakings of a similar nature.

Adding insult to injury, the Majority ignores the Carrier's argument that the claimants were improper to begin with. Since they were at work on their regular assignments when the dismantling was performed, the claimants were not

available to perform the work and were not, therefore, damaged in any respect. Consequently, as the Board has held in Third Division Awards 11371 and 20921, no payment would be in order where no loss has been sustained. Claimants here, however, are unjustly enriched at the Carrier's expense. Such awards serve only to abuse the collective bargaining process and place yet another burden upon an industry that is already heavily and unjustly burdened, not only to its detriment, but similarly to claimants, other employees, the general public, and our country.

Accordingly, for the foregoing reasons, we must dissent vigorously from the Board's erroneous award in this matter.

D. M. Lefkow

J. W. Gohmann

P. E. LaCosse

J. E. Mason

P. V. Varga