Award No. 2361
Docket No. 2136
2-CUT-CM-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 150, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

THE CINCINNATI UNION TERMINAL COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement the Carrier improperly assigned Bridge and Building employes to perform Carmen's work by building stock bin in Section "B" of the Stores Department on February 23 or 24, 1954 and improperly assigned Bridge and Building employes to paint this bin on February 26, 1954.

2. Accordingly the Carrier be ordered to compensate Carman W. Poff in the amount of eight hours' pay at the applicable overtime rate for February 23 or 24 and Carman Painter W. B. Wyandt four hours at the applicable overtime rate for February 26, 1954.

EMPLOYES' STATEMENT OF FACTS: The carrier maintains a force of fifty-four (54) carmen employed on the first shift shown on the force statement, with working hours 7 A. M. to 3 P. M., one job from 8 A. M. to 4 P. M. with twenty minutes for lunch. This includes fifteen (15) regular relief assignments with five days of work and two consecutive rest days to do work on rest days of seven day assignments, three (3) five day assignments with no relief, two (2) six day assignments that are relieved one day, thirty-four (34) seven day assignments with two consecutive rest days. The carrier also maintains one carman painter on the first shift seven days per week.

The carrier assigned bridge and building employes to build a stock bin in Section "B" of the stores department on February 23 or 24, 1954. This bin is portable and is in no sense a part of a building, bridge or structure.

Carman W. Poff and Carman Painter W. B. Wyandt hereinafter referred to as the claimants, were available to perform this work if called on their rest day.

POSITION OF EMPLOYES: The employes contend that the work involved in this dispute is carmen's work covered by the Classification of Work Rule No. 73(a) applicable part reading:

> ". . . planing mill, cabinet and bench carpenter work, pattern and flask making and all other carpenter work in shops and yards

reflect an intent and understanding between the parties that the work in question was properly assignable to such employes. In that situation it cannot be said there has been a violation of the agreement. It follows negotiation is required to effect a change."

In Second Division Award 1691 (Referee Wenke) it said in part "It is fundamental that a practice once established remains such unless specifically abrogated by the contract of the parties."

In Second Division Award 1764 (Referee Carter) it said in part, "We think the long practice is rather conclusive of the meaning intended to be given to Rule 158 by the parties. The Board has said many times that when uncertainty of meaning exists that the interpretations given to the questioned provision by the parties over the years affords a safe guide in determining what the parties had in mind when the agreement provisions were made. The organization is in no position at this late date to have the provision construed more favorable to them. By their acquiescence in the application of the rule for more than thirty years they have fixed its meaning and removed any uncertainty growing out of the language used."

Before this case is decided by the Second Division the Brotherhood of Maintenance of Way Employes should be made aware of the fact that the carmen are endeavoring to take work away from them, which they have been performing for 21 years.

The carman painter was not used for the painting of these platforms as it was not work under the "supervision of car and locomotive department" as stated in Rule 73 and has no merit.

The employes are claiming punitive time and this is without merit as there are many awards denying such claims at punitive rate of pay for work not performed and pro rata rate was allowed.

Carrier has shown that the work in question has always been performed by B & B forces for 21 years and the carmen are endeavoring to exploit the work after having acquiesced to the practice for 21 years. Even though the agreement has been revised and many memorandum of agreements have been consummated over the period of 21 years, no proposal has ever been received from the employes to change the rule or to change the practice.

A practice of 21 years standing certainly had the acquiescence of all parties concerned and the carmen by neglecting to take the proper action in opposition to the practice have implied consent thereto, consequently practice should remain in effect.

The present claim is without merit and should be denied 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.

The parties to said dispute were given due notice of hearing thereon.

The claim is that carrier improperly assigned to and had performed by bridge and building employes the work of building and painting stock bins in

Section "B" of its Stores Department when, under the provisions of Rule 73(a) of carrier's controlling agreement with System Federation No. 150, it belonged to carmen.

The work actually performed by B&B employes, for which this claim is made, was the construction of three (3) platforms for storing heavy material in the storeroom that could not be properly placed in bins or on shelves, and the painting thereon. Each platform was fifteen (15) feet long, four (4) feet wide and six (6) inches in depth. They were built on February 24, 1954 and painted on February 26, 1954.

Rule 73(a) provides, insofar as here material, that:

> "Carmen's work shall consist of * * * planing mill, cabinet and bench carpenter work, pattern and flask making and all other carpenter work in shops and yards, except work generally recognized as bridge and building department work; * * * painting with brushes, varnishing, surfacing, decorating, lettering, * * * and removing paint * * *; all other work generally recognized as painter's work under the supervision of the locomotive and car departments, * * *."

As to the work of building these storage platforms we think it falls within the same category as the repairing of wooden lockers, which we dealt with in our Award 2360 on this same carrier, since the record shows that B&B forces have been doing this same type of work for many years, and prior to and at the time the controlling agreement of the parties became effective.

As to the carmen's right, under Rule 73(a), to painting we think it relates to the work which carmen are thereunder entitled to perform and, since we have held they did not have the exclusive right to build these platforms, we do not think they had the exclusive right to paint them.

In view of the foregoing we have come to the conclusion that the claim here made is without merit.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December, 1956.

DISSENT OF LABOR MEMBERS TO AWARDS Nos. 2360 and 2361

The reasoning of the majority in the findings in Awards 2360 and 2361 is fallacious and is based in both instances upon the same error, that is, on the exception in Rule 73(a) rather than on the settled construction of the terms "all other carpenter work in shops and yards." This language was construed in principle in Dockets 1088 and 2201, Railway Board of Adjustment No. 2, to mean all carpenter work except that in connection with the erection and repair of buildings. The Second Division recognized and applied this correct interpretation of the language in Award 1656.

In Award 2360 the majority attempts to use the carrier's allegation of "practice" to support its reasoning. It has been repeatedly held by this Division, as well as the other Divisions of the Board, that even though a record

shows evidence of practice, practice does not change a plain unambiguous rule —such as is Rule 73(a).

We are constrained to dissent from the instant findings and awards of the majority inasmuch as the plain language of Rule 73(a) of the controlling agreement assigns the work involved to carmen.

George Wright
R. W. Blake
C. E. Goodlin
T. E. Losey
Edward W. Wiesner