Award No. 2606
Docket No. 2362
2-B&M-CM-'57

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Curtis G. Shake when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 18, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

BOSTON AND MAINE RAILROAD

DISPUTE: CLAIM OF EMPLOYES:

That in conformity with the current agreement the Boston and Maine Railroad be ordered to compensate Carman Joseph H. Rogers in the amount of an 8 hour shift from 11:00 P.M. to 7:00 A.M. on April 12, 1955 due to having improperly assigned Carman Helper Hardy to perform carmen's work in the place of Carman MacDonald on said shift.

EMPLOYES' STATEMENT OF FACTS: The Boston and Maine Railroad, hereinafter called the carrier, through its Assistant Foreman Walter Hardy, at Mystic Junction, Massachusetts, elected on Tuesday, April 12, 1955, to call furloughed Carman Helper William J. Hardy at about 11:00 P.M. for the purpose of assigning him to perform carmen's work as of said date on the 11:00 P.M. to 7:00 A.M. shift by virtue of Car Inspector K. G. MacDonald holding a regular assignment on such shift, having reported off duty.

The carrier also regularly employed Car Inspector Joseph Rogers, hereinafter referred to as the claimant, in this same location on the 3:00 P.M. to 11:00 P.M. shift and he was there, on the ground, available, ready and willing on request of Assistant Foreman Hardy to have doubled over on the 11:00 P.M. to 7:00 A.M. shift Tuesday, April 12, 1955, instead of having wrongfully used furloughed Carman Helper Hardy as a carman to, and who did, perform carmen's work on that shift.

This dispute has been progressed with the officers of the carrier from the bottom to the top, including the highest officer designated thereby to handle such disputes and, consequently, he also declined to adjust it.

The agreement effective April 1, 1937, as it has been subsequently amended, is controlling.

6. The only motive for the petitioner in seeking a sustaining award in this dispute is for the purpose of acquiring punitive rates for mechanics wherever possible, and prevent carrier from calling in furloughed carmen helpers in accordance with Rule 21 of the agreement and setting them up in accordance with Article III of the June 4, 1953 Agreement.

Therefore, if a sustaining award was handed down in this dispute, it would result in this carrier's receiving absolutely nothing from the June 4, 1953, Agreement, but was obligated to equalize passenger and freight carmen's rates without any reciprocity whatsoever.

The carrier requests that your Honorable Board pay particular attention to Article III of the subject agreement reading as follows:

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

The carrier has proven conclusively that it has been permissive to set up helpers and apprentices to fill mechanics' vacancies temporarily without protest nor claim from the petitioner prior to the June 4, 1953, Agreement. Therefore, it must be conceded, then, that if there was any possibility of the carrier's losing that privilege, it would **not** then have accepted the June 4, 1953, Agreement. For the record, the only reason that the carrier accepted the June 4, 1953, Agreement was due to the fact that there was only one diversion from the present existing agreement which was in effect since June 23, 1941—and that was that under the old agreement, it was the obligation of the carrier to consult the local committees or general chairman in order to set up a helper or an apprentice to fill a carman's vacancy. However, the June 4, 1953, Agreement eliminated that necessity, but everything else remained unchanged. Therefore, the carrier accepted the June 4, 1953, Agreement for that purpose only.

Also, for the record, at no time did the carrier ever encounter any difficulty with the organization in acquiring its mutual agreement in the setting up of a helper or an apprentice to a mechanic's position on a temporary vacancy. Therefore, there is no justification for claim, and it 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.

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

Car Inspector McDonald was regularly assigned at Mystic Junction, Mass., with hours 11:00 P.M. to 7:00 A.M. Upon the completion of his assignment on the morning of April 12, 1955, he reported that he would be off duty from his shift commencing at 11:00 P.M. that night.

Claimant Rogers was a regularly assigned car inspector with hours from 3:00 P.M. to 11:00 P.M. and on the completion of his tour of duty on April 12, he was available, ready and willing to fill the ensuing vacancy on McDonald's position but, instead, the carrier called a furloughed carman helper.

The carrier's action would appear to have been proper under a Memorandum Agreement of June 23, 1941, which provided that "Regular and helper apprentices and mechanics' helpers may be temporarily advanced to mechanics' positions in the order named." However, the current agreement, dated June 4, 1953, provides:

> "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."

The organization contends that the agreement of June 4, 1953, abrogated the Memorandum Agreement of June 23, 1941, insofar as the matter in issue is concerned and that the carrier's action in the instant case was unauthorized by the current agreement.

The carrier asserts, on the other hand, that the part of the agreement of June 4, 1953, quoted above, was not intended to and does not disturb the practices permissible under the 1941 Memorandum; and that since the June 4, 1953 agreement became effective the parties have frequently and consistently recognized the carrier's right to temporarily set up helpers and apprentices to fill carmen's vacancies. A carrier's exhibit lists some 90 occasions between June 1, 1953, and November 24, 1955, when carmen's helpers were set up for temporary day to day assignments without protest. One of these instances personally involved the organization's local chairman.

In view of these facts it must be concluded that the parties have construed their contract as it pertains to the matter here in controversy and that they are bound by such construction until such 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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 11th day of September, 1957.

DISSENT OF LABOR MEMBERS TO AWARD NO. 2606

The findings of the majority are apparently based on a Memorandum Agreement, dated June 23, 1941, which was abrogated by an agreement of

June 4, 1953. Had the carrier wished to continue the Memorandum Agreement in effect it could have elected to do so by notifying the authorized employe representative on or before July 1, 1953, as prescribed in Article III of June 4, 1953 agreement:

> "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 employe representative on or before July 1, 1953."

Since the carrier did not do so, the fallaciousness of the findings of the majority are readily apparent.

The controlling agreement of April 1, 1937, prescribes in Rule 26 that "None but mechanics or apprentices regularly employed as such shall do mechanics work as per special rules of each craft . . ." Thus the carrier could not properly assign the instant work to other than a qualified carman (mechanic); to do so constituted a violation of the agreement. This is so even if the carrier is compelled to use a carman who is entitled to the work on an overtime basis, such as would have been the case in the present instance.

R. W. Blake

Charles E. Goodlin

T. E. Losey

Edward W. Wiesner

James B. Zink