Award No. 3172
Docket No. 2445
2-MP-FT-'58

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Harry Abrahams when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.—C. I. O. (Federated Trades)

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the controlling agreement Rules 52, 88 and 117 the rebuilding and repairing of station trucks operated by the Carrier is Shop Crafts Employes' work.

2. That the Carrier violated provisions of the controlling agreement when on or about January 15, 1955, Bridge and Building employes at Compton Avenue, St. Louis, Missouri, and Bridge and Building Employes at State Line Freight House, Kansas City, Missouri, were assigned to rebuild and repair station trucks.

In Award No. 2972, the Division held:

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 issue involved herein is whether rebuilding and repairing of Station Trucks operated by the Carrier is Shop Craft Employes' work. The work in this instance had been assigned to the Bridge and Building Employes.

The request by the Carrier that notice be given to the Bridge and Building Employes under Section 3 First (j) of the Railway Labor Act was not set out in the record in so many words but was brought up by the Carrier Members of this Division during the oral argument with the Referee present. Notice had not been given to the Bridge and Building Employes under the Railway Labor Act. It was apparent from reading the employes' statement of claim, as set out in the record, that claim of the employes was that the rebuilding and repairing of Station Trucks was Shop Craft Employes' work, and that the said work had, on or about January 15, 1955, been assigned to the Bridge and Building Employes.

The request made by the Carrier during its oral argument that due notice of the hearings be given to the Bridge and Building Employes was not a matter that would come as a surprise from a reading of the record. It was apparent from the record that the Bridge and Building Employes were involved in this dispute. The fact that those involved in the dispute are entitled to notice under Section 3 First (j) of the Railway Labor Act can be brought up at any time by the Carrier Members of the Board during the hearings.

The Court in the case of Kirby vs. Pennsylvania Railroad Co., 188 F. 2d 793 at Page 799 said:

> "* * * The Board's authority to act is based upon the statute. Until the statutory requirements are met, it has no more standing to produce legally effective orders than any voluntary group of citizens. Anyone to be affected by the purported order can raise the point that it has no legal foundation. We conclude that defendant carrier may raise the point that employes involved in the dispute had no notice or knowledge of the hearing, and no opportunity to be heard before the Adjustment Board. A party is entitled to an award that will protect it in the event that it complies."

The Court in the case of Hunter vs. Atchison, Topeka & Santa Fe Railway Co., 188 F 2d, 294 at Page 300 said:

> "It is not necessary for an employe to be named as a party to the proceeding before the Board to be involved in the controversy within the meaning of the law."

This Board holds that notice of the dispute must first be given under the Railway Labor Act to the Bridge and Building Employes as they are involved in this dispute prior to an award being entered on the merits.

The subject of third party notice was discussed in our Award No. 2970. Accordingly, notice as set out in Section 3 First (j) of the said Act should be given to the Bridge and Building Employes.

AWARD

Consideration of and decision on the merits herein is deferred pending due notice by this Division to the Bridge and Building Employes to ap-

pear and be represented in this dispute in accordance with Section 3 First (j) of the Railway Labor Act.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 13th day of October, 1958.

LABOR MEMBERS' DISSENT TO AWARD 2972.

The majority's refusal to decide this case on the merits renders the Division vulnerable to the stalemating of any case simply on the suggestion of a carrier that a third party is involved. The erroneousness of the majority's holding that consideration and decision on the merits should be deferred pending due notice by the Division to the Bridge and Building Employes is readily apparent since the statutory jurisdiction of the Second Division does not include such employes nor does the governing agreement include said employes.

The majority should have adherred to the rulings of Second Division Awards 340, 1359, 1628, 2315, 2316, 2359 and 2372 and awards of other Divisions, such as Award 8079 of the Third Division, that notice to third parties is not required where the employes' rights, if any, are not controlled by the agreement of the claimant organization or where the employes are members of a craft whose disputes are referrable to other Divisions of the Board and over which the Second Division would have no jurisdiction.

/s/ R. W. Blake

/s/ Charles E. Goodlin

/s/ T. E. Losey

/s/ Edward W. Wiesner

/s/ J. B. Zink

Thereafter, notice was given the Brotherhood of Maintenance of Way Employes and upon receipt of the following information from that Brotherhood, the case was considered on its merits.

Please be advised that the contractual rights accruing to the class or craft represented by Brotherhood of Maintenance of Way Employes on this property are predicated solely upon the provisions of an agreement between the carrier and our organization dated August 1, 1950, together with such amendments as are pertinent thereto, and that the specific dispute as identified by the above listed docket number is not one arising out of the application of these contractual provisions. Furthermore, this dispute has never been considered in conference by representatives of the carrier and this Brotherhood as provided in Section 2, Second, of the Railway Labor Act, and accordingly, it would be impossible for us to submit supporting or documentary evidence as required by the Rules of Procedure of the Adjustment Board, issued October 10, 1934, in attempting to substantiate any position we might deem it advisable to take.

In the event application of the Maintenance of Way Agreement was a subject of controversy between our Brotherhood and the carrier, it is our understanding that the procedural provisions of Section 3, First, (h) of the Railway Labor Act, would require that the dispute be referred to the Third Division of your Board.

In addition, we do not believe that our interests can be benefited or adversely affected as a result of any award which your Board may render in connection with this dispute, inasmuch as Section 3, First, (m) of the Railway Labor Act, specifically provides that "* * * awards shall be final and binding upon **both** parties to the dispute * * *." (Emphasis ours.) Quite obviously, **both** or the **two** parties to this dispute are the Missouri Pacific Railroad Company and the Federated Trades of System Federation No. 2, Railway Employes' Department, A. F. of L.-C. I. O.

EMPLOYES' STATEMENT OF FACTS: At Sedalia, Missouri, a point 188 miles west of St. Louis, Missouri and 94 miles east of Kansas City, Missouri, the carrier maintains a large car shop and a large reclamation plant where in addition to reclaiming material, repairs are made by mechanics and helpers in all crafts to all kinds of equipment.

The rebuilding and repairing of station trucks has been performed by shop craft employes in the reclamation plant at Sedalia, Missouri, and through consolidation the shop craft employes in the reclamation plant and back shop are all on one seniority list.

This work on station trucks has been performed in the reclamation plant at Sedalia since 1926 by shop craft employes. This work was transferred to Compton Avenue, St. Louis, Missouri and State Line Freight House, Kansas City, Missouri, about January 15, 1955, and performed by bridge and building forces.

The dispute was handled with carrier officials, who declined to adjust the matter.

The agreements effective January 16, 1939 and September 1, 1949, as subsequently amended, are controlling.

POSITION OF EMPLOYES: The carrier has never denied that the work was transferred, nor have they ever denied that this work was performed in the reclamation plant at Sedalia, Missouri since 1926 by shop craft employes. At this late date the carrier contends the work involved is not shop craft employes' work, which contention is not supported by the facts nor the agreements.

Rule 19 of the agreement effective January 16, 1939, reads as following:

> "Work generally recognized as that coming under the individual crafts covered by this agreement will be classified as such so far as conditions will permit. When there is not sufficient work to justify employing a mechanic or helper of each craft, the mechanic, mechanics or helpers shall, so far as capable, perform the work of any craft that may be necessary."

Rules 52, 88 and 117 of the agreement effective September 1, 1949, read as following:

Work to be performed in the reclamation plant is nowhere defined, but when material or equipment is sent to the reclamation plant, any work required to be performed in connection therewith is governed by the following rule:

> "ASSIGNMENT AND CLASSIFICATION OF WORK: Rule 19. Work generally recognized as that coming under the individual crafts covered by this agreement will be classified as such so far as conditions will permit. When there is not sufficient work to justify employing a mechanic or helper of each craft, the mechanic, mechanics or helpers shall, so far as capable, perform the work of any craft that may be necessary."

Thus it is clear that the work here in issue is nowhere mentioned in the reclamation plant agreement, and as has been seen, has never been recognized as belonging to any craft or class of employes.

We believe the employes recognize this, because during conferences on the property the reclamation plant agreement was never mentioned by them and it is clearly established in this record that these floats have never been repaired in carrier's shops and roundhouses, and the only time they have been repaired at the reclamation plant is when, in the exercise of managerial judgment, they are shipped to the reclamation plant for overhauling and rebuilding. This practice has never been changed.

Furthermore, the work here involved has never been recognized as carmen's work because such repairs have always been performed in the same manner as at present. The only time carmen have performed any work on floats is when they are removed from service and shipped to the reclamation plant for overhaul or rebuilding.

Since the work of maintaining and repairing these "floats" or "flat wagons" is nowhere mentioned in the rules of the reclamation plant agreement, there can be no basis for the instant claim. In view of the fact the carrier determines in all instances **what** equipment and material will be sent to the reclamation plant and **when** the necessity to do so arises, there can be no basis for the instant claim. There has been no change in more than 30 years of practice.

There being no basis for this complaint in the agreement nor in more than 30 years of practice, 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.

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

The carrier on January 15, 1955 assigned Bridge and Building employes to repair station trucks at St. Louis and Kansas City, Missouri. The employes claim: that said work under the Shop Crafts Agreement should have

been assigned to Shop Crafts employes; that the work on the said trucks would then have been done by the Shop Crafts employes if said trucks had been sent to the Reclamation Plant at Sedalia, Missouri.

The carrier contended: that for over 30 years, repairs on the said trucks were made at the place where the said trucks were in daily use by any class or craft of employes to keep the trucks operating; that general repairs were made at the said Reclamation Plant if so determined by the carrier; that the said trucks were not assigned to or used in the Maintenance of Equipment Department, and that the decision as to whether repairs are to be made to said trucks at the place where they are being used or at the Reclamation Plant, is and always has been, a managerial prerogative.

The employes cited Rules 52, 88 and 117 of the September 1, 1949 Shop Crafts Agreement. The scope rule in said agreement reads as follows:

> "It is understood that this Agreement shall apply to those that performed the work specified in this agreement in the Maintenance of Equipment Department."

When work on the said trucks was done at the Reclamation Plant, the Agreement covering the employes in the Reclamation Plant at Sedalia, Missouri, applied. The scope rule in that Agreement reads as follows:

> "These rules govern the hours of service and working conditions of all employes herein named in the Reclamation Plant at Sedalia, Missouri."

The work done on said trucks was not done in the Maintenance of Equipment Department, nor in the Reclamation Plant at Sedalia, Missouri. Neither of the said agreements therefore applied to the work that was done on said trucks on January 15, 1955 at either St. Louis or Kansas City, Missouri. The carrier, in following its past practice of many years in assisting employes of any craft or class at the place where the trucks were in daily use, did not violate the said agreements cited by the employes.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 9th day of April, 1959.