Award No. 3451

Docket No. 3384

2-AT&SF-EW-'60

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Francis B. Murphy when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 97, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.—C. I. O. (Electrical Workers)

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (Coast Lines)

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current Agreement, the Carrier erred when they failed to fill the position, Car Lighting and Air Conditioning Inspectors position at San Diego.

2. That accordingly the Carrier be ordered:

(a) To fill this position with a Car Lighting and Air Conditioning Inspector.

(b) To pay Mr. T. S. Shupe for all time from the date of August 6, 1957 and until position is filled, as provided by rules of the Agreement.

EMPLOYES' STATEMENT OF FACTS: The Atchison, Topeka and Santa Fe Railroad, hereinafter referred to as the carrier, for many years prior to August 6, 1957 employed at San Diego, California, a car lighting and air conditioning inspector, whose duties consisted of maintaining, inspecting and making repairs to passenger trains in the San Diego terminal. Said car lighting and air conditioning inspector was compensated on a monthly basis under the provisions of Rule 14.

On or about August 6, 1957, the car lighting and air conditioning inspector employed at San Diego, California, retired leaving the position vacant.

Subsequent to August 6, 1957 the carrier has required Electricians R. D. Rupert and G. V. Hinds, who are employed in its diesel shop at San Diego to perform the work formerly performed by the car lighting and air conditioning inspector in addition to their duties in the diesel shop.

MEMO No. 1: Any line and pole work which is to be handled by Mechanical Department forces will be done by electricians and helpers."

It will be observed that the rule makes specific reference to "axle lighting", involving the generation of electricity for use in lighting and air conditioning, as being the work of electicians.

In the general chairman's appeal letter to Assistant to Vice President Comer, he made the statement: "We have no knowledge of the abolishment of the position." The carrier submits that it is not the practice nor is it required to notify the general chairman when positions are abolished. Consequently, the general chairman's statement has no bearing on or support for the claim.

In conclusion, the carrier respectfully reasserts that the claim of the employes in the instant dispute is entirely without merit or support under the agreement rules, and should for reasons stated hereinabove 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.

Prior to August 6, 1957 a position of Axle Light and Air Conditioning Inspector had been maintained at San Diego. The Carrier notified the two electricians on June 27, 1957 by letter that upon the retirement of Mr. Gleason (the Axle Light and Air Conditioning Inspector at San Diego) that this position would be abolished and his duties turned over to them.

These two shop electricians whose work had previously been confined to locomotives thereafter performed all electrical work on the cars that had formerly been done by the axle light and air conditioning inspector.

The carrier contends that because of changes made in train scheduling there was not sufficient work for a Axle Light and Air Conditioning Inspector at San Diego.

Mr. Troy S. Shupe made application for this position of Axle Light and Air Conditioning Inspector on September 3, 1957 in response to a notice posted under the provisions of paragraph (j) of the Memorandum of Agreement No. 5, but he was not assigned. The carrier contended that Management has the right to decide if a position is to be continued.

With the carrier's contention this Board agrees so long as the carrier has not qualified or limited their prerogative by their agreement.

We must decide what is the work of an "axle light and air conditioning" Inspector and does such work still exist at San Diego. We feel that it is

so described as to relate to the inspection and repairing of equipment used for the purpose of generating of electricity by means of axles as a source of power when the electricity, so generated is to be immediately used for lighting and air conditioning, or stored in batteries to be later used for those purposes.

The carrier does not deny nor does the record show that these duties do not exist at San Diego. In fact the carrier's letter to the two shop electricians, whose work had previously been confined to locomotives, assigns Mr. Gleason's duties to them. It may be that a portion of the work, caused by rescheduling, has been eliminated but we feel that the evidence in this case warrants and requires a finding in favor of the claimant.

We find that the carrier violated the agreement by assigning the duties of the Axle Lighting Inspector to the shop electricians and that claimant Mr. Shupe should be paid the difference between what Claimant Shupe has been paid at his hourly rate as an electrician and what he would have been paid under the monthly rate applicable to the position of Axle Light and Air Conditioning Inspector since September 3, 1957, which is the date that he made application for this position.

AWARD

Claim sustained in accordance with the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 21st day of April, 1960.

DISSENT OF CARRIER MEMBERS TO AWARD NO. 3451

The arbitrary character of this award is self-evident in the findings and the following excerpts therefrom and comments thereon are put forward to prove this conclusion:

> "The Carrier contends that because of changes made in train scheduling there was not sufficient work for an Axle Light and Air Conditioning Inspector at San Diego."
>
> ". . . the Carrier contended that management has the right to decide if a position is to be continued."
>
> "With the Carrier's contention this Board agrees so long as the Carrier has not qualified or limited their prerogative by their agreement."

The work complained of in this case is by common consent embraced by Rule 92 of the controlling agreement covering the Classification of Work of employes in the electrician's craft and can therefore be performed by any mechanic of that craft. The question to be answered by this Division is whether the carrier is required to fill a job vacated by an electrician retiring because of age when **before** and **after** such retirement a full complement of work was not available on the job vacated as measured by the con-

trolling agreement. This lesser amount of work has since been satisfactorily performed, when needed, without overtime by two electrician craftsmen also working at San Diego.

The controlling agreement does not obligate the carrier (and the petitioner cites no rule to this effect) to maintain a level of employment higher than actually needed for its operations, so the carrier has neither **qualified** nor **limited** its managerial prerogative in this respect. The record made by the respondent Carrier clearly established that it had three electrical workers on its payroll at San Diego with but work enough for two.

There are two principles so well established there is no occasion for citing awards supporting them that must be given consideration in determining the rights of the parties under the confronting facts. The first is that except insofar as it has restricted itself by agreement (and the carrier here has not done so) the assignment of work necessary for its operation lies within the carrier's **discretion.** The second is that in the absence of any rules of the agreement precluding it from doing so (there are none here) it is the prerogative of management to abolish a job if a substantial part of the work thereof has disappeared, and turn the remainder over to other employes entitled to perform it under the Agreement rules. That is exactly what occurred in this case and the Referee agreed thereto in the portion of the findings quoted above.

After finding in the carrier's favor, however, the Referee in the same findings reversed himself citing neither reason nor rule, by saying:

> "It may be that a portion of the work, caused by rescheduling, has been eliminated but we feel that the evidence in this case warrants and requires a finding in favor of the claimant."

The Referee whether by design or not overlooked or disregarded that part of the Memorandum of Agreement No. 5 to the controlling agreement reading:

> "(i) New positions or vacancies of Axle Lighting Inspectors of thirty (30) days or more duration, **if to be filled,** shall be filled by selecting the senior electrician qualified to perform the work who has application on file with the Mechanical Superintendent on whose territory the vacancy exists, requesting assignment to such positions." (Emphasis ours)

This rule speaks for itself and when, as occurred here, there is a substantial disappearance of work there is no contractual reason compelling the carrier to fill the job vacated by the retiring craftsman.

The issue in the last analysis is met only by unsupported conclusions of the petitioner, which did not meet the burden of proof resting upon it. When referees write opinions or findings which have the effect of creating new rules, the Adjustment Board is acting beyond its statutory authority. We dissent.

M. E. Somerlott
P. C. Carter
D. S. Dugan
D. H. Hicks
R. P. Johnson