Award No. 4289

Docket No. 3902

2-D&RGW-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO.10, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Carmen)

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That rules of the current agreement were violated, especially Rule 36(e) at the Roper, Utah Train Yard October 4, 1959, at approximately 9 A.M. when Lamar Burkinshaw, Yard Car Foreman, removed the blue flag from local train east, Engine 5401, that had been placed on the train by carmen for their protection.

2. Accordingly, you are requested to order the Carrier to issue instructions to supervisors to not place or remove blue signals on trains or cars the car inspectors (workmen) have worked on or are about to work.

3. Accordingly, you are also requested to order the Carrier to compensate C. L. Clements, Carman, available for overtime work, four hours for other than carmen having performed the Car Inspectors' (workmen) duties required under applicable rules.

EMPLOYES' STATEMENT OF FACTS: October 4, 1959 Local Train East, Engine 5401 was called for 8 A.M. from track 28 in the Roper, Utah Train Yard of the carrier. Blue signals had been placed as required under the provisions of Rule 36(e) on the engine and on the rear end of train by Car Inspectors so they could perform their work. At approximately 9 A.M., Yard Car Foreman Lamar Burkinshaw removed the blue signal from the engine and later the blue signal from the track at rear end of train.

Mr. Burkinshaw was not in, on, under or about cars of the train when the workmen began work on it. Nor was he in, on, under or around train while workmen were working on it. He made his appearance in a carrier vehicle shortly before 9 A.M. All he did then was climb from vehicle at front and rear of train and remove blue signals from the train. He was not even around train 5401 to supervise the work the workmen performed on it.

Other cars must not be placed on the same track so as to obstruct the view of the blue signals without first notifying the workmen, and then only after the workmen have removed the blue signals."

Rule 36 (e) as it appears in current Agreement effective September 1, 1940 and reissued January 1, 1959 has been quoted in this submission at beginning of carrier's position.

Employes are laying great stress on what they consider a mandatory contract requirement that under the provisions of Rule 36 (e) **only** the individual workman or workmen placing the blue flags have the right to remove them. In actual practice this rule is not and never has been interpreted in the narrow, strained manner the employes are now attempting to enforce for the first time. A train may arrive just before change of shifts and the carmen and inspectors soon to go off duty place the blue flags and commence the inspection, being relieved at the end of their shift by other carmen and inspectors coming on duty who complete the inspection and remove the blue flags. The workmen in that case going off shift are not held on duty on an overtime basis so that the identical workmen placing the blue flags also remove them. That bears out Management's contention that the intent of the rule is that the blue flags placed by car forces will only be removed by car forces and not by some other class of workmen such as trainmen, enginemen or yardmen.

The train yard foreman is just as much a part of the working team (or workmen) on train yard inspections as any individual carman. He is responsible not only for his own safety but the safety of the group of men working under his supervision. Just like the carmen, he is required in the performance of his duty to be under and about cars and there is no provision in the agreemen prohibiting him from removing the blue flag after he has satisfied himself that all other workmen are in the clear.

With respect to item 3 of employes' claim. Even if it were held that removal of the blue flag was the exclusive duty of the contract employes who placed same, another carman (contract employe) would not be called out to do the work. The carmen inspectors working the train would have been used to remove the blue flag. Therefore, the employes have proved no loss of work that would justify invoking a penalty. (See Second Division Award No. 2722).

The entire claim 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 waived right of appearance at hearing thereon.

At about 9:00 A. M., October 4, 1959, Yard Car Foreman L. A. Burkinshaw removed blue flags from the engine of a train and from the rear end of the train in the Carrier's Roper train yard, Salt Lake City, Utah. These blue flags had been placed by carmen so that they could perform their work safely.

The Claimant, C. L. Clements, who has been employed as a carman at said yard filed the instant grievance in which he contended that Burkinshaw's action violated the applicable labor agreement. He requested that the Carrier be ordered to issue instructions to its supervisors not to place or remove blue signals on trains or cars on which carmen have worked or are about to work. He also asked for compensation in the amount of four hours at the pro rata rate. The Carrier denied the grievance.

In support of his claim, the Claimant primarily relies on Rule 36(e) of the labor agreement, which reads, as far as pertinent, as follows:

> "Repairmen, inspectors, and other workmen working in, on, under or about cars, or other equipment, shall protect themselves against movement of such equipment by a blue flag, or flags, by day, and a blue light, or lights, by night, placed at one or both ends of an engine, car or train . . . **Workmen will place such blue signals and the same workmen are alone authorized to remove them . . .**" (Emphasis ours.)

1. A careful examination of the above underlined clause of Rule 36(e) can leave no doubt that it clearly and unambiguously prescribes that "workmen" are exclusively authorized to place and remove blue signals. The Carrier defends Burkinshaw's action on the following grounds:

First, the Carrier contends that a train yard foreman is just as much a "workman" on train yard inspections within the purview of said Rule as any individual carman. We disagree. In a literal sense, anybody who works for a living, from the president of a company down to a laborer, is a "workman." However, the realities of industrial life dictate that words and phrases used in a labor agreement be construed in the light of the parlance commonly used in the trade or industry to which the agreement applies as well as of the aim and purpose attached to them by the parties. Any other approach would nullify the reasonable expectations of the parties to the agreement and thus deprive it of its vitality as a device to insure constructive and peaceful labor relations. See: Arbitration Awards in re Republic Oil Refining Co., 36 LA, 320, 324 (1961); Interstate Bakeries Corp., 36 LA 1412, 1416 (1961) and cases cited therein.

Applying that principle to this case, it becomes clear that the term "workmen" as used in Rule 36(e) can reasonably be construed only as referring to non-supervisory employes and not to foremen or other supervisors. This conclusion is corroborated by the instructions issued by General Car Foreman Martin in June, 1958, in which he stated: "Blue flags will not be handled in any case by train yard foreman effective immediately" (see: Organization's Exhibit "B"). Accordingly, we hold that the Carrier's contention is unjustified.

Second, the Carrier argues that a strict interpretation of the phrase "the same workmen are alone authorized to remove (blue signals) . . ." appearing in Rule 36(e) would compel it to keep the employes of one shift at overtime rates if their shift ended before the blue signals could be removed and thereby subject it to unwarranted expenses. This argument is besides the point because the Claimant has explicitly admitted that the term "the same workmen" only applies to employes of a specific craft, such as carmen, and not to employes of a particular shift (see: Organization's Exhibit "G").

Third, the Carrier asserts that Burkinshaw removed the blue flags only after proper arrangements had been made with the carmen working on the

train in question. This argument lacks merit. The law of labor relations is well settled that the terms of a labor agreement cannot be changed, modified or abrogated by an agreement with individual workers covered thereby but only through negotiation between the parties to the agreement. See: J. I. Case Co. v. N. L. R. B., 321 U. S. 332; 64 S. Ct. 576 (1944). This principle is also reflected in Rule 104 of the labor agreement which explicitly reserves the negotiation of local rules or the interpretation of any provision of the agreement to the proper officers of the Carrier and the General Chairman of the Organizations who are signatories thereto.

Fourth, the Carrier relies on past practice. In support of this defense, it has submitted several affidavits of supervisors intended to demonstrate that they have customarily removed blue signals in the past. The Claimant has denied the existence of such a practice and has submitted several affidavits intended to evidence that no such customer or practice has existed. As a result, we are of the opinion that the evidence on the record considered as a whole is inconclusive and thus does not permit a finding to the effect that a consistent and long-continued practice well-known to and generally accepted by all interested parties has existed at the Carrier's property under which foremen or other supervisors were generally permitted to place or remove blue signals.

In summary, we hold that Rule 36(e) of the labor agreement was violated when Burkinshaw removed the blue flags under consideration.

2. The Claimant has requested that the Carrier be ordered to issue instructions to its supervisors not to place or remove blue signals on trains or cars on which carmen have worked or are about to work. The record seems to indicate that supervisors no longer perform such tasks (see: Carrier's Exhibit "A", affidavits of R. H. Berrett, L. A. Burkinshaw, H. R. Walker, Jr., and F. J. Weisser). This fact poses the question as to whether the Claimant's request has become moot. However, we do not reach that question because Section 3, First (i) of the Railway Labor Act does not confer authority upon us to issue an order as requested by the Claimant. For this reason, we deny the Claimant's request. See: Award 4264 of the Second Division.

3. The principle is well established that a party to a labor agreement which has been found guilty of a violation of the terms thereof is generally subject to an appropriate penalty. See: Frank Elkouri & Edna A. Elkouri, **How Arbitration Works,** Rev. Ed., Washington, D. C., BNA Incorporated, 1960, pp. 236-237 and cases cited therein. Yet this is not a hard and fast rule permitting of no exceptions. See: Awards 936, 4194, and 4200 of the Second Division. In the instant case, we are satisfied that Burkinshaw's action was caused by a misinterpretation or misunderstanding of Rule 36(e), rather than by an intentional disregard therefor. Under these circumstances, we disallow the claim for compensation without prejudice to other or future claims of the same nature.

AWARD

Claim 1 sustained. Claims 2 and 3 disposed of in accordance with the above Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

OPINION OF LABOR MEMBERS CONCURRING IN PART TO AWARD 4289

We concur with the present findings and award with the exception of the paragraph numbered "2." There is no need or reason for Section 3 First (i) to confer authority to issue an order since the Railway Labor Act not only confers exclusive jurisdiction on the Second Division to handle the present type of dispute but Section 3 First (o) and (p) deals with the issuance of orders. To the extent that a carrier violates an agreement, as was done in the present instance, this Board may by an appropriate award and order remedy the wrong done to employes.

/s/ C. E. Bagwell

/s/ T. E. Losey

/s/ E. J. McDermott

/s/ R. E. Stenzinger

/s/ James B. Zink