Award No. 4312

Docket No. 3900

2-CB&Q-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. 95, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Carmen)

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the current agreement was violated on May 15 and 18, 1959 when the Carrier assigned cabinet makers to assemble stretchers, five each on CAR 5793-DR and CAR 2467-D.

2. That accordingly, the Carrier be ordered to additionally compensate Carmen Ed Schroeder and Ira Gaylord holding seniority on the Coach Shop' Seniority Roster, 10 hours each at the applicable pro rata rate, account being deprived of their contractual rights on the aforesaid dates.

EMPLOYES' STATEMENT OF FACTS: The Chicago, Burlington & Quincy Railroad Co., hereinafter referred to as the carrier employs in its Aurora Shops, Aurora, Illinois employes of the class and craft of carmen to perform the work specified as Carmen's work in Rule 75 of agreement effective October 1, 1953.

In the class or craft of carmen employed at Aurora, there is maintained separate seniority rosters captioned Coach Builders, Trimmers, Repairers and Miscellaneous Carpenters and Cabinet Makers, as evidenced by copies of 1959 seniority rosters.

Prior to May 15 and 18, 1959, the work of repairing and assembling stretchers used on baggage cars was always assigned to and performed by carmen holding seniority on the Coach Shop's Seniority Roster.

Carmen Ed Schroeder and Ira Gaylord hereinafter referred to as claimants, are regularly employed by the carrier as carmen holding seniority on the Aurora Division Coach Builders, Trimmers, Repairers and Miscellaneous Carpenters' Roster.

assembling these stretchers. Before the Board can require that payment to be made again to two retired employes who suffered no loss, it must find an express penalty provision in the contract. In this case, it cannot find one. See —

Second Division Award 3672, TMU v. P&LE, Referee Mitchell.

> "The claimant was fully paid for the work he performed, he lost nothing. The employes have not cited any rule of the Agreement to support the claims for penalty pay, in fact we think they have conceded same in their submission * * *.
>
> "In the absence of a rule in the agreement which would support the penalty claims, they will have to be denied."

Not only is there no express penalty rule in the agreement here, but the Brotherhood will have to resort to extreme, far-fetched implications to make an argument that the rules were violated. The penalties here demanded cannot be supported, in any event.

In summary, the carrier avers the claim should be denied for the following reasons:

1. The work involved in this dispute, assembling stretchers, was carmen's work performed by carmen under classification of work Rule 75.

2. The separate rosters for cabinet makers and coach builders at Aurora Shops does not give the latter an exclusive right to assemble stretchers.

3. Settlements on the property at Havelock and West Burlington prove that the agreement was not violated.

4. In any event, there is no provision in the agreement for the penalty pay here demanded, and it could never be awarded.

The 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 were given due notice of hearing thereon.

The Carrier maintains extensive shop facilities for the repair and rebuilding of passenger cars at Aurora, Illinois. Carmen there employed are divided into nine different seniority rosters, among them coach builders and cabinet makers. One item involved in the rebuilding of mail and baggage cars is making new stretchers for carrying disabled persons. Carmen on different seniority rosters have shaped the handles and cut the canvas. Thereafter, carmen on the coach builders roster have assembled the parts to finish the

stretchers. However, on May 15 and 18, 1959, carmen on the cabinet makers' roster were assigned to assemble ten stretchers. Since the handles, glue pots, and canvas were in the cabinet shop, the Carrier deemed it more convenient to have the work performed by cabinet makers rather than to bring coach builders from the coach shop into the cabinet shop.

The two Claimants, carmen I. Gaylord and E. Schroeder, who were on the coach builders' seniority roster at that time, filed the instant grievance in which they contended that the Carrier violated the applicable labor agreement by assigning carmen on the cabinet makers' roster to assemble the stretchers. They requested compensation in the amount of ten hours each at the pro rata rate. The Carrier denied the grievance.

The division of carmen into different seniority rosters is provided in Rule 15 (a) of the labor agreement. This case poses the question as to whether work customarily performed by carmen on one specific seniority roster can be assigned to carmen on a different roster for reasons of convenience. We are of the opinion that the answer is in the negative.

1. At the outset, the following issue requires decision:

Both Claimants have retired during the pendency of this case and are no longer employed by the Carrier. This fact does not, however, affect our jurisdiction over the instant dispute because the Claimants retired from service after initiating their claim for compensation for the alleged violation of their contractual seniority rights. The law is firmly settled that "the purpose of the (Railway Labor) Act is fulfilled if the claim itself arises out of the employment relationship which Congress regulated." See: Pennsylvania Railroad Company v. Day, 360 U. S. 548, 552; 79 S. Ct. 1322, 1324 (1959).

2. In defense of its action here in dispute, the Carrier argues that the separate seniority rosters provided for in the contractual seniority rules do not divide the work among carmen to the degree asserted by the Claimants. This argument lacks merit. While seniority does not guarantee permanent employment, it does, nevertheless, assure a worker of preference for jobs and work if and when they are available. The parties to the labor agreement must have had some aim in mind when they agreed upon nine separate seniority rosters for carmen. In the absence of any indication to the contrary, we believe that the parties' obvious intent and purpose were to assure the carmen on each roster that they would ordinarily perform all the available work falling in their specific seniority unit. See: Award 2174 of the Second Division. Our assumption is strongly supported by a letter dated November 5, 1946, from the Carrier's former staff officer B. B. Brown to former General Chairman E. P. Cottrill in which Brown stated "where separate seniority lists are maintained for a particular class within a craft, the service to be performed will be confined to the proper seniority group" (See: Organization's Exhibit "C"). Said letter demonstrates an explicit understanding between the parties to the labor agreement regarding the division of work among carmen in the various seniority units.

Applying the above principle to this case, we have reached the following conclusions:

1. It is undisputed that carmen on the coach builders' seniority roster have always assembled stretchers in the past, except in the instance under consideration, (see: Organization's Exhibit "B" and Carrier's Submission Brief, p. 6). It follows that such work has generally been recognized as work

falling within their seniority unit. Thus, carmen on that roster were entitled to the work in dispute. No emergency or other unforeseen circumstances existed which could possibly have justified the assignment of said work to carmen on a different seniority roster. Nor was the work performed by the carmen on the cabinet makers' roster of such trivial nature as to be disregarded under the **de minimis rule.** The assignment of the work to the latter was made for reasons of convenience. But mere convenience does not justify a violation of the Claimants' contractual seniority rights.

In summary, we hold that the Carrier violated the Claimants' seniority rights by assigning the assembling of the ten stretchers in question to carmen on the cabinet makers' roster.

2. The Carrier has called our attention to several previous instances in which the Organization allegedly withdrew comparable claims or failed to contest their denial. However, the record shows that the factual situations underlying the previous instances are distinguishable from the one before us. Hence, the prior cases are of no assistance in the disposition of the case at hand.

3. It is well established in the law of labor relations that a party to a labor agreement which has been found guilty of a violation of the terms thereof is generally subject to a penalty to insure compliance with the agreement even though the latter does not explicitly provide such remedy. See: Awards 1369 and 2222 of the Second Division. Arbitration Award in re International Harvester Company (Arbitrator: W. Willard Wirtz), 9 LA 894, 896 (1947), which contains a detailed discussion of the "penalty" doctrine; Frank Elkouri and 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 exception. See: Awards 936, 4194, 4200, and 4289 of the Second Division. Not every minor oversight or excusable misinterpretation of a contractual rule justifies a penalty. The record before us shows that making stretchers only occurs infrequently. As a result, we are satisfied that the Carrier's action was caused by a misinterpretation or misunderstanding of the Claimants' seniority rights 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. Claim 2 disposed of 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 3rd day of October, 1963.