

Award No. 4514
Docket No. 4377
2-CMS tP&P-CM-'64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Joseph M. McDonald when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 76, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L - C. I. O. (Carmen)**

**CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC
RAILROAD COMPANY**

DISPUTE: CLAIM OF EMPLOYES: 1. That the Carrier on August 1st, 1961 augmented the Milwaukee Terminal force of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, at Milwaukee, Wisconsin to the detriment of Carman A. P. Waldera, in a manner contrary to the terms of the Agreement.

2. That accordingly, the Carrier be ordered to additionally compensate Carman A. P. Waldera, in the amount of eight (8) hours at straight time rate of pay, beginning August 1, 1961 and for all other days for which work is performed by others than the Claimant of the Milwaukee Terminal and continue thereafter, until this work is properly assigned at the Davies Yard seniority roster.

EMPLOYEES' STATEMENT OF FACTS: Carman Clement Kabacinski was classified as a carman car inspector by the Chicago, Milwaukee, St. Paul and Pacific Railroad Co., hereinafter referred to as the carrier, and carried on its Davies Yard Carmen's Seniority Roster in its Milwaukee Terminal, Milwaukee, Wisc. with a seniority date of 10/19/27. Prior to August 1, 1961, Carman Clement Kabacinski was regularly assigned to a so-called position of "Load Inspector" in the Milwaukee Terminal and had been for approximately thirty years.

Carman Kabacinski's duties as "Load Inspector" consisted of making mechanical inspection of cars prior to loading, making repairs necessary to meet AAR requirements, supervise the loading of cars and inspect the load to see that it is properly secured, measure the height and width of load to assure proper clearance on line of road and fill out form No. 3570 in accordance with AAR Rules. Carman Kabacinski was compensated on a monthly rate.

On August 1, 1961, Carman Kabacinski retired from the service of the

is most persuasive to the employes' position in respect to claimant being made whole.

The foregoing abundantly supports the employes' statement of claim and we respectfully request the honorable members of this division to so find.

CARRIER'S STATEMENT OF FACTS: With the exception of the claim dates, the instant claim is identical to a claim presently before your board which is identified as Docket 4246 and this will be evidenced by a comparison of the aforementioned statement of claim in this dispute and the following statement of claim from Docket 4246:

"1. That the Carrier, on the morning of March 20, 1961 augmented the Milwaukee Terminal force of the C.M.ST.P.&P. Railroad, at Milwaukee, Wisconsin, to the detriment of Carman A. P. Waldera, in a manner contrary to the terms of the Agreement.

2. That accordingly, the Carrier be ordered to additionally compensate A. P. Waldera, in the amount of 8 hours at straight time rate of pay for each of the dates, starting March 20, 21, 22, 23, 24,—27, 28, 29, 30, 31st and April 3, 4, 5, 6 and 7th, 1961 and for all other time any of the work is performed by others than the Claimant of this Milwaukee Terminal or the Davies Yard seniority roster."

The case covered by Docket 4246 involves the period March 20 through April 7, 1961 during which time Employee C. Kabacinski, the regularly assigned occupant of the loading inspector position with which we are here concerned, was absent on vacation and the carrier appointed Employee Fendrick to temporarily fill said position whereas the instant case involves the period commencing August 1, 1961, on which date Employee Kabacinski, the regularly assigned occupant of the loading inspector position involved, retired and the carrier appointed Employee Fendrick to permanently fill said position and this accounts for the aforementioned difference in claim dates between the instant case and the case covered by Docket 4246.

POSITION OF CARRIER: Inasmuch as the instant claim is, except for the claim dates, identical to the claim presently before your board and identified as Docket 4246, the carrier, in the interest of brevity, will not restate its position here, but instead wishes to merely direct your honorable board's attention to Carrier's Ex Parte Submission and Carrier's Reply to Employees Ex Parte Submission in Docket 4246, and take this opportunity to say that Carrier's position with respect to the question here in dispute is made quite clear.

The carrier wishes to point out also that there have been no lost earnings on the part of Claimant Waldera as he has been fully employed as a carman.

As the instant claim in behalf of Employee Waldera is wholly without foundation and merit we respectfully request that the claim 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 employee or employees involved in this dispute are respectively carrier and employee 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.

On August 1, 1961, Carman Clement Kabacinski retired from the carrier's service. For more than 25 years he had been the occupant of a monthly rated position of "Loading Inspector" with a seniority date of October 19, 1927 on the Davies Yard Carman's roster at the Milwaukee Terminal.

Kabacinski's position was filled by the Carrier with Carman Fendrick who is carried on the Freight Car Department's seniority roster at Milwaukee with a seniority date of November 13, 1943.

Claimant is employed as a Carman Car Inspector at Milwaukee and is carried on the Davies Yard Seniority Roster with seniority date of September 2, 1942.

Claimant contends that there has been a violation of the Bulletin Rule (rule 19) in that the vacancy never was bulletined, but arbitrarily filled by the Carrier. He also alleges a violation of Rule 85, the Classification of Work Rule.

Carrier contends that the position of "Loading Inspector" is an excepted position and not subject to the Agreement which Claimant relies upon, or any other agreement.

Our attention has been directed to Docket No. 4246 (Award No. 4403) of this Division where we considered a similar dispute involving the same Claimant and position at a time when Kabacinski was on vacation.

The form of that Claim, in addition to the vacation dates specifically set out, was also a continuing one reading in part as follows:

"* * * and for all other time any of the work is performed by others than the Claimant of this Milwaukee Terminal or the Davies Yard Seniority Roster."

The claim in Award No. 4402 was denied by this Division, and Carrier now asserts that the instant claim should be dismissed because our Denial Award in 4403 is determinative of this dispute as well, citing Section 3 First (m) of the Railway Labor Act which reads in part as follows:

"* * * and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. * * *"

It is noted however that Carrier vigorously disputed that any continuing claim was properly before us in Docket No. 4246. (cf. p. 6 et seq. of Carrier's submission in Docket No. 4246). Further, we did not find it necessary to determine that issue in our Award 4403 of Docket 4246.

Even so, the present dispute involves a different circumstance and alleged violation than that in Docket 4246. The Carrier's motion for dismissal must be and is, denied.

We have examined our Award 4403, and the Agreement here involved together with the file submitted, and the Awards cited by both parties. Nowhere in this record is there any valid support for the Claimant's position. Rules 1, 85 and 99 lend no support to the inclusion of this position under the

Agreement with which we are concerned. On the other hand, the position has been monthly rated for more than 25 years; it carries no assigned hours; it calls for a six day week and we must conclude that it is an excepted position from the Agreement, and therefore need not be bulletined according to the Agreement.

AWARD

Claim 1: Overruled.

Claim 2: Denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of May, 1964.