**Award No. 4673**
**Docket No. 4379**
**2-FEC-CM-'65**

# NATIONAL RAILROAD ADJUSTMENT BOARD

## SECOND DIVISION

**The Second Division consisted of the regular members and in addition Referee J. Harvey Daly when award was rendered.**

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## PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 69, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

**FLORIDA EAST COAST RAILWAY COMPANY**

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement, the Carrier unjustly and improperly removed Hose Cutter Junious Jackson, Jr. from its service as a Hose Cutter at Buena Vista, Florida on March 6, 1962.

2. That accordingly, the Carrier be ordered to restore the aforesaid employe to his former position of Hose Cutter and compensate him for all wage loss and employment rights lost beginning March 9, 1962.

EMPLOYES' STATEMENT OF FACTS: Hose Cutter Junious Jackson, Jr., hereinafter called the claimant, was employed by the Florida East Coast Railway Company, hereinafter called the carrier, on December 13, 1947 as a hose cutter and the claimant continued on such assignment until the time of the carrier's action involved in this dispute.

The claimant was held by the Miami Police Department on a minor charge beginning February 22, 1962 and he informed his foreman of that fact. The foreman granted him permission to be off work.

The claimant was released on March 8, 1962 and when he returned home he was confronted with the letter and also a letter dated March 2, 1962.

The carrier refused the claimant his right to return to his position on March 9, 1962, after which the claimant wrote the local chairman on March 15, 1962.

The local chairman filed a claim with Mr. Smith by letter dated April 2, 1962.

Mr. Smith replied under date of April 9, 1962.

4. With the voluntary resignations on August 10, 1962, of the remaining Hose Cutters, appearing on Attachment "A" of the agreement becoming effective December 16, 1951, the agreement with that craft expired by its explicit terms. Consequently, subsequent to that date hose cutters have not been employed by the railway. However, on September 2, 1962, the claimant called at the office of terminal superintendent F. A. Smith to pick up a vacation allowance check paid under the provisions of Article 8 of the National Vacation Agreement as amended by Article IV, Section 2 of the August 19, 1960 Chicago Agreement, which reads:

> "The vacation provided for in this Agreement shall be considered to have been earned when the employe has qualified under Article 1 hereof. If an employe's employment status is terminated for any reason whatsoever, including but not limited to retirement, resignation, discharge, non-compliance with a union-shop agreement, or failure to return after furlough he shall at the time of such termination be granted full vacation pay earned up to the time he leaves the service including pay for vacation earned in the preceding year or years and not yet granted, and the vacation for the succeeding year if the employe has qualified therefor under Article 1. If an employe thus entitled to vacation or vacation pay shall die the vacation pay earned and not received shall be paid to such beneficiary as may have been designated, or in the absence of such designation, the surviving spouse or children or his estate, in that order of preference."

Assistant Vice President and Director of Personnel R. W. Wyckoff happened to be in Mr. Smith's office at the time the claimant called for his check and overheard Mr. Jackson remark to Chief Clerk R. J. Howard that he had been experiencing difficulties in obtaining employment in the Miami area. As a consequence, Mr. Wyckoff, being aware that a subsidiary company (the Florida East Coast Highway Dispatch Company) was employing drivers and helpers, offered Mr. Jackson this employment opportunity. Mr. Jackson flatly refused to even discuss the matter, sarcastically stating that he did not want to have anything further to do with the Florida East Coast Railway or any organization connected with it. In local handling the employes accused the railway of underhanded tactics and attempted coercion in offering the claimant employment with the subsidiary company. To refute the unfounded allegation Mr. Wyckoff furnished General Chairman Cooke a copy of a statement which he had prepared on the date of the occurrence solely because of the arrogant attitude displayed by the claimant.

For the reasons stated herein, the claim should 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.

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

The jurisdiction of the Second Division to consider this dispute has been challenged on the grounds that the provisions of Section 3, First (h) of The Railway Labor Act — as cited in pertinent part below — do not confer jurisdiction on this Division:

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employes, and railroad-shop laborers."

Prior to considering the jurisdictional question, it is advisable to set forth the essential background data of this dispute, so that the case may be presented and analyzed in its entirety.

The Claimant, Junious Jackson, Jr., a Carrier employe since December 13, 1947, was regularly assigned as a hose cutter and worked with the 7:40 A. M. Yard Engine Crew Thursday through Monday at the Carrier's Miami-Buena Vista-Hialeah Terminal.

At the end of his tour of duty on February 22, 1962, the Claimant requested and received permission from the Chief Caller to lay off from his assignment for a period of ten days.

The Claimant was held by the Miami Police Department on a contempt of court charge from February 22, 1962 until March 8, 1962. Following his release from police custody, the Claimant reportedly found, at his home, two letters from the Carrier. One letter dated March 2, 1962, denied the Claimant a 60-day leave of absence request and advised him "to report for service on or before March 5, 1962, to protect your seniority with the Railway". The Claimant in a letter dated March 15, 1962, stated that "Someone requested a sixty day leave of absent (sic) for me for I was in no position to do so myself".

The other letter dated March 6, 1962, informed the Claimant, in part, that "For your absence from duty without proper authority, you have forfeited your seniority with the Florida East Coast Railway Company, and severed your employment relationship".

The Organization's principal contentions are that:

1. The 10-day leave of absence the Carrier granted the Claimant did not include his rest days; therefore, the Claimant's leave of absence did not expire until March 9, 1962;

2. The Claimant was ready and willing to return to work on March 9, 1962, but was not permitted by the Carrier to do so;

3. "the Claimant's absence from work was the result of circumstances beyond his control;

4. "the proper way to handle this situation * * * was for the Carrier to hold an investigation to determine the facts surrounding a clear and concise charge";

5. The Carrier is fully aware of the practice of holding investigations before removing employes from service;

6. The Carrier was arbitrary and capricious in its action against the Claimant.

It is particularly significant to note that the Organization never once, either on the property or in its Ex Parte Submission, charged the Carrier with violating any existing agreement rule.

The Carrier's principal contentions — aside from the jurisdictional claim — are that:

1. The Claimant's 10-day leave of absence was up on March 5, 1962, and he should have reported to work on that date;

2. Leaves of absence have always been granted on a calendar day basis and this practice is of long duration, well known to and consistently followed by both the Organization and the Carrier;

3. The Claimant was not disciplined, therefore, there was no basis for an investigation;

4. In "agreements with all crafts * * * absence without proper leave results in automatic * * * termination of employment relationship * * *";

5. The Brotherhood of Railroad Trainmen Agreement is controlling and not the Agreement between the Carrier and System Federation No. 69 of the Railway Employes' Department.

Equally necessary to the developmental background of this dispute is a brief review of the Organization's and the hose cutters' relationships with the Carrier.

In July 1929, the Trainmen were relieved from coupling and uncoupling hoses at the Carrier's Miami Terminal; and laborers were hired, given the job title of hose cutters, and assigned the work of coupling and uncoupling cars. The hose cutters were a special group of employes who worked with yard crews but were not covered by or included in any existing Labor Agreement.

On August 27, 1934, System Federation No. 69 was certified by the National Mediation Board to represent hose cutters. The first Labor Agreement between System Federation No. 69 and the Carrier became effective November 19, 1935. That Agreement covered machinists, boilermakers, blacksmiths, sheet-metal workers, electricians, carmen, and the apprentices of those crafts. It is significant to note that hose cutters were not covered by that Agreement.

In 1941, the United Transport Service Employes of America sought to represent the Carrier's hose cutters. On January 30, 1942, the National Mediation Board reaffirmed System Federation No. 69 as the hose cutters' duly designated representative.

On February 1 and 15, 1943, an interchange of letters between General Chairman R. G. Smith and General Superintendent C. L. Beals occurred. The contents of this correspondence pertained to rates of pay, hours of work, overtime, grievance representation and method of handling grievances.

On December 7, 1951, certain portions of the agreement contained in the letters mentioned above were amended by the Messrs. Smith and Beals.

The letter agreements of February 1 and 15, 1943, and December 7, 1951, constitute the sole and only Labor Agreements covering the hose cutters.

In support of its position the Organization cited Second Division Award No. 1406. A trenchant analysis of the entire record in that case, significantly

reveals the fact that the question of jurisdiction was never raised and, therefore, that dispute is not germane to the present case.

The job classification of the Claimant is that of hose cutter. Section 3, First (h) of the Railway Labor Act does not cover that job classification nor does it cover any job classification within the Trainmen's craft. Consequently, it cannot be successfully argued that hose cutters come within the scope of this Division's authority.

Therefore, this Division lacks jurisdiction and, without prejudice to the merits of the dispute, must dismiss the claim.

AWARD

Claim dismissed on jurisdictional grounds but without any disposition as to the merits of the case.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: William B. Jones
Chairman

E. J. McDermott
Vice-Chairman

Dated at Chicago, Illinois, this 26th day of February, 1965.

## DISSENT OF LABOR MEMBERS TO AWARD 4673

By its decision in this case, the majority of the Board has usurped the authority, and repudiated a decision, of the National Mediation Board. It has decided that "hose cutters" are not a part of the craft or class of carmen and thus are not subject to the jurisdiction of the Second Division. It reaches this conclusion despite the findings of the National Mediation Board, in Case No. R-778, that the carrier established the positions of hose cutters "the duties of which called only for the performance of that part of carmen's work consisting of coupling and uncoupling of air and steam hoses" and further that "these particular duties at the other terminals of this carrier continue to be performed by carmen and in the industry generally are performed by carmen." Furthermore, the Mediation Board stated that it could not find that "the hose cutters in question constituted a separate craft or class * * * within the meaning of the Railway Labor Act" and that "a dispute of representation cannot therefore be said to exist among any properly constituted craft or class of which the hose cutters are properly a part." It is abundantly clear that the Mediation Board found the work of the hose cutter to be that of carmen. It necessarily follows that this Division has jurisdiction over the claim involved in this case.

The decision of the majority in effect finds that these employes are not carmen. It thus purports to decide the scope of the carmen's craft or class, a function reserved exclusively to the National Mediation Board by the Railway Labor Act, and, furthermore, it overrules the decision of the Mediation Board with respect to the craft or class status of these employes. The majority has exceeded its jurisdiction in so doing.

While it is true that the jurisdiction of the various Divisions of this Board is determined by the craft or class of which the employes are a part and not necessarily by the organization which represents them, it is equally true that craft or class lines are determined on the basis of the nature of the work performed and not by payroll classifications established by the carrier. The majority states that Section 3 First (h) of the Railway Labor Act does not cover the job classification of "hose cutter" and, therefore, that it cannot be successfully argued that hose cutter comes within the scope of this Division's authority. This Board knows, or should know, that numerous payroll classifications not enumerated in Section 3 First (h) of the Act exist in a number of crafts or classes, yet the Division of the Board having jurisdiction of the crafts or classes of which such employes are a part, clearly have, and have exercised, jurisdiction over the claims of such employes. For example, there is no payroll classification of "telegraph and telephone linemen" listed in the jurisdiction of this Division, but as was pointed out in Second Division Awards 784, 789 and 978, such employes are considered to be a part of the electrical workers craft or class and subject to the jurisdiction of the Second Division. Just as here the hose cutters, by virtue of the fact that their duties are confined to carmen's work, must be considered to be carmen and subject to the jurisdiction of this Division. They perform the work of no other recognized craft or class. It is absurd to say that this Division has no jurisdiction over any employe whose payroll classification is not specifically identified among those listed in the jurisdiction of the Second Division under Section 3 First (h) of the Act. To so hold would permit the carrier by the mere device of changing payroll classification to defeat the entire purpose of the Act in creating separate Divisions of the Adjustment Board.

It is also significant that the majority, while deciding that hose cutters are not a part of the carmen's craft or class, have not suggested any other craft or class with which the hose cutters are or could be affiliated. The Mediation Board has clearly held that they do not constitute a separate craft or class and it necessarily follows that in order to be entitled to representation under the Railway Labor Act — which can only be on a craft or class basis — they must belong to some craft or class. The record is clear that the carrier has bargained with the claimant System Federation with respect to the rates of pay, rules and working conditions of these employes and with no other representatives. The System Federation has been certified to represent the hose cutters by the National Mediation Board. The only craft or class represented by the System Federation of which these employes reasonably could be said to be a part is that of carmen.

Furthermore, the decision of the majority is contrary to the consistent administrative policy of this Board, without exception over a period of many years, to assume and exercise jurisdiction over employes engaged in the work of hose cutters. Its jurisdiction in this respect has never before been challenged by any member of the Board or by any party submitting a case to it. The claimant was entitled to rely on the long established recognition by the Board of its jurisdiction over hose cutters. To deny the claimant of his right to have his claim heard on the merits under these circumstances is improper and completely unfair and inequitable. While the majority professed that its decision is "without prejudice to the merits of the case, " it is obvious that because of time limit rules this claimant's rights have been effectively disposed of on the merits by the majority decision.

Both from a legal and equitable standpoint, this case should have been determined on its merits.

**E. J. McDermott**

**T. E. Losey**

**C. E. Bagwell**

**R. E. Stenzinger**

**James B. Zink**