Award No. 5242
Docket No. 5035
2-EJ&E-CM-'67

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee David Dolnick when award was rendered.

PARTIES TO DISPUTE:
SYSTEM FEDERATION NO. 20, RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L. - C. I. O.
(Carmen)

DISPUTE: CLAIM OF EMPLOYES: 1. That the Elgin, Joliet & Eastern Railway Company violated the current working agreement when the carrier official, Foreman A. D. Stephenson performed carmen's work on November 20, 1964 instead of assigning carman Mr. A. DiSalvo to perform this work.

2. That the Elgin, Joliet & Eastern Railway Company be ordered to compensate carman Mr. A. DiSalvo for four (4) hours at the punitive rate account the violation.

EMPLOYES' STATEMENT OF FACTS: The Elgin, Joliet & Eastern Railway Company, hereinafter referred to as the Carrier, maintains a Steel Car Shop at Joliet, Illinois, where it employs a large work force of substantial number of carmen, one of whom is Mr. A. DiSalvo, hereinafter referred to as the claimant.

On November 20, 1964, car foreman Mr. H. D. Stephenson performed work properly belonging to the carmen's craft of spreading sides on E.J.&E. Gondola car #33695, hooked up gondola car top cord and side straightener with the use of overhead crane and spread the sides of the car mentioned in order to install removed End back in place. This official was not instructing anyone at the time, but performed this work by himself. Upon being advised at the time by the Local Chairman, Mr. Peter Stipanovich, that he was violating the provisions of the working agreement in performing work which was not his by contract, Foreman Stephenson replied that "he did not think he had any carmen members who could perform this simple work."

The work outlined above as being performed on November 20, 1964, by carrier official, is work properly belong to the carmen's craft by contract, and carman DiSalvo should have been assigned to perform this work. He was available for the work and qualified to perform the work but the carrier's official performed it instead.

This dispute has been handled with all officers of the carrier designated to handle disputes, including the highest officer, all of whom declined to adjust it.

The Agreement reissued June 15, 1950, as revised, is controlling.

POSITION OF EMPLOYES: It is respectfully submitted that Carmen's Special Rule No. 127 is controlling in this specific case and claim:

exercise of their duties. Referee Howard A. Johnson, in rendering Second Division Award No. 4086 found as follows:

> "Under Rule 26 foremen are not prohibited from performing work in the exercise of their duties. Consequently, in order to establish their improper performance of the work of a craft it must be shown not to have been done in the exercise of their duties."

Award 4086 was rendered in a dispute between the Missouri Pacific Railroad Company and its Electrical Workers. The part of Rule 26 of the Missouri Pacific Agreement concerning foremen is identical to Rule 30 of this Carrier's agreement with the Carmen's Organization. In the instant dispute, the Carmen **did not** show that Foreman Stephenson was not performing the disputed work in the exercise of his duties.

Without prejudice to the Carrier's primary positions that the agreement was not violated, it is noted that part 2 of the Organization's claim requests compensation of four hours at the punitive rate. Your Board has ruled on numerous occasions that proper payment for work not performed is at the straight-time rate. (See Awards Nos. 3177—3272—3273—3256—3405—3406)

Furthermore, Part 2 of the claim is improper in that it presumes the Carrier would have called an off-duty Carmen to perform the few minutes of Carman's work which Foreman Stephenson performed on the claim date. If Mr. Stephenson had not considered this as work which he could properly perform, he certainly would have assigned it to one of the qualified Carmen who were on duty at the time in the Steel Car Shop. Under no circumstances would an off-duty Carman have been called and been paid four hours pay when a readily available on-duty Carman could have done it without additional compensation.

The Carrier respectfully requests an award denying this claim in its entirety.

All information and data contained herein has been discussed with the Organization either in conference or by correspondence. Any allegation to the contrary which the Organization may proffer in its rebuttal is without foundation. (Exhibits not reproduced)

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.

Foreman Stephenson performed a small amount of carman's work. The Carrier's position is that he properly performed it in connection with instruction of a carman, in accordance with Rule 30, which after providing that none but mechanics or apprentices shall perform mechanics' work except foremen at points where no mechanics are employed, adds in the second paragraph:

> "This Rule does not prohibit foremen in the exercise of their duties to perform work."

The claim as originally presented on the property stated that "Mr. Stephenson performed such work all by himself he was not instructing any carman member how the work should be performed."

However twice during the handling of this claim on the property, the facts were otherwise stated in letters to the General Chairman without challenge by him. The Superintendent Car Department stated to him in a letter of February 26, 1965 as follows:

> It is generally understood that a foreman, while instructing men in work, will from time to time do some minor part of work, in many instances a person has to be shown exactly the operation.
>
> "Since this involves a case of a foreman instructing a man about his work, there is no violation of the working agreement and your claim is respectfully declined."

Again in a letter of March 12, 1965 to him the Chief Mechanical Officer stated:

> "My investigation indicates that Foreman Stephenson was instructing a man in his work. The work that had been performed was done under Rule 30 which reads in part—
>
> > 'This rule does not prohibit foremen in the exercise of their duties to perform work.' "

Neither of these statements was challenged in the further progression of the claim as shown by the correspondence, and although the Employes' Submission repeats the original statement, the record contains no evidence to establish which version of the incident was correct. In this state of the record we have an unresolved issue of fact, and cannot therefore conclude that the foreman was not acting in accordance with Rule 30.

His right to do so under that rule was not disputed on the property or in the Employes' Submission. However, in their rebuttal before this board they say for the first time:

> "*** the Carrier quotes what it asserts is Rule 30 knowing full well that this Rule was superceded by Article III of the September 25, 1964 Agreement. There is no such 2nd paragraph as quoted by the Carrier. That language was deleted and eliminated from the Agreement as shown in Article III."

Article III of the September 25, 1964 Agreement is as follows:

> **"ARTICLE III — ASSIGNMENT OF WORK — USE OF SUPERVISORS —**
>
> "None but mechanics or apprentices regularly employed as such shall do mechanics' work as per the special rules of each craft except foremen at points where no mechanics are employed.
>
> "However, craft work performed by foremen or other supervisory employes employed on a shift shall not in the aggregate exceed 20 hours a week for one shift, 40 hours a week for two shifts, or 60 hours for all shifts.
>
> "If any question arises as to the amount of craft work being performed by supervisory employes, a joint check shall be made at the request of the General Chairmen of the organizations affected. Any

disputes over the application of this rule shall be handled as provided hereinafter.

"An incumbent supervisor who assumed his present position prior to October 15, 1962, at a point where no mechanic is employed, may be retained in his present position. However, his replacements shall be subject to the preceding paragraphs of this rule.

Article III does not purport to revoke or supersede Rule 30. It merely supplements the Rule by placing a limit on the amount of craft work to be performed by supervisory employes at points where no mechanics are employed; but it makes no reference to the provision of Rule 30 which recognizes the right of foremen to perform work in the exercise of their duties, and contains no provision inconsistent therewith. All rules must be read together and be given full effect except as prevented by inconsistencies. Consequently, assuming but not deciding, that the issue whether Rule 30 was superseded by Article III of the September 25, 1964 Agreement is properly before this Board, the contention cannot be sustained.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 21st day of July, 1967.

LABOR MEMBERS' DISSENT TO AWARD No. 5242

The claim was that the carrier violated Rule 127 of the current agreement on November 20, 1964. Rule 127 reads as follows:

"Carmen's work shall consist of building, maintaining, dismantling * * * painting, upholstering and inspecting all passenger and freight cars, both wood and steel, planing mill, cabinet and bench carpenter work, pattern and flask making and all other carpenter work in shops and yards, * * * carmen's work in building and repairing motor cars, lever cars, hand-cars and station trucks, building, repairing and removing and applying locomotive cabs, pilots, pilot beams, running boards, foot and headlight boards * * *."

When Car Foreman H. D. Stephenson performed work covered by the above-quoted rule the Local Chairman's letter dated December 10, 1964 (Carrier's Exhibit "B"), addressed to the General Chairman read in pertinent part:

"On November 20th-64 you violated shop craft agreement carmens special rule #127, you improperly assigned Car Foreman H. D. Stephenson, to spread sides on E.J.E. gondola car #33695, this violation was performed in the steel car shop track #5 east of crossing. Mr. Stephenson hooked up gondola car top cord and side straightener with the use of over head crane and spread sides on car mentioned above in order to install removed end back in place * * *."

The General Foreman's reply, dated December 14, 1965, (Carrier's Exhibit "C") reads in pertinent part:

"* * *

"Since the end in car mentioned was applied in the Steel Car Shop on Track #K4 east of crossing under the supervision of Car Foreman O. R. Burroughs, the alleged violation you claim could not have taken place; therefore, time claim denied."

The Local Chairman's letter dated Dec. 28-64 (Carrier's Exhibit "D"), addressed to the General Foreman reads in pertinent part:

"* * *

"At the time when car Foreman H. D. Stephenson was performing such work my attention was called by our carmen members in regard to this violation. I my self took notes of track the violation was performed on and it was track #5, east crossing, same time I asked Mr. Stephenson, if he realized that he was performing carmens work, he replied to me that he did not think he had any carmen that could perform such work. I disagreed with him this type of work any carman member could perform its simple work.

"* * *

The superintendent's letter dated February 26, 1956 (Carrier's Exhibit "F"), addressed to the General Chairman, reads in pertinent part:

"* * *

"It is generally understood that a foreman, while instructing men in work, will from time to time do some minor part of work, in many instances a person has to be shown exactly the operation.

"Since this involves a case of a foreman instructing a man about his work, there is no violation of the working agreement and your claim is respectfully denied."

It is significant to note that the records in this dispute show that in handling this case for more than three months the carrier used other excuses for denying the claim. Evidently the Superintendent in his letter of February 26, 1965 discovered a better excuse for denying the claim since the referee also used it in his denial award.

O. L. Wertz
D. S. Anderson
C. E. Bagwell
E. J. McDermott
R. E. Stenzinger

REFEREE'S REPLY TO LABOR MEMBERS DISSENT TO AWARD NO. 5242

This Board must accept the record as made on the property. Both the Superintendent and the Chief Mechanical Officer denied the claim, stating that the Foreman was instructing a man in his work, and therefore was acting in the performance of his duties under Rule 30. In the absence from the record of any denial of those statements on the property, the Board would not be entitled to disregard or reject them.

Howard A. Johnson
Referee

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.