Award No. 5361
Docket No. 5197
2-MP-CM-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James E. Knox when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Missouri Pacific Railroad Company violated the controlling agreement, particularly Rules 117 and 118, when laborers were assigned to perform work on cars at Kansas City, Missouri. The Carrier also violated Letter of Understanding of May 1, 1940, when they arbitrarily transferred work from one craft to another.

2. That accordingly, the Missouri Pacific Railroad Company be ordered to compensate Carmen R. E. Collier, W. E. Vernasoie, John Loucke, C. W. Gimple and B. D. Osborne in the amount of eight (8) hours each at the punitive rate for September 20, 1965 and each work day thereafter (40 hours per week) as long as the violation continues.

EMPLOYES' STATEMENT OF FACTS: The Missouri Pacific Railroad Company, hereinafter referred to as the Carrier, maintains a large diesel shop and large transportation yard at Kansas City, Missouri, which includes spot repair track and repair track where they perform heavy work on freight cars and they also have two (2) yards across the river in Kansas City, Kansas. Carmen R. E. Collier, W. E. Vernasoie, John Loucke, C. W. Gimple and B. D. Osborne, hereinafter referred to as the Claimants, are employed by the Carrier at Kansas City, Missouri.

There are several large industries located at this point which are serviced by the Carrier — one of which is the Chevrolet Assembly Plant which is known as "Leeds" — and all are within the Kansas City Terminal.

On February 22, 1964, laborers were assigned to perform work on auto loader cars and this work at that time was being performed on the spot repair track. This work being transferred from carmen to laborers was a violation of the Letter of Understanding of May 1, 1940, which sets out

ployes have not been violated. For that reason, the claim is not supported by the agreement and is entirely lacking in merit, and must be denied.

All matters contained herein have been the subject matter of correspondence and/or conference.

Oral hearing is not requested.

(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 were given due notice of hearing thereon.

The Employes claim that the work of positioning tie down devices on bilevel and trilevel cars in preparing the cars for the loading of automobiles can be assigned only to carmen.

The Carrier denies that this work belongs exclusively to carmen and, in addition, contends that in any event the Employes' claim is barred by their previous unsuccessful presentation of the same claim.

It appears that the Employes presented a claim that this work belonged exclusively to carmen, failed to appeal the denial of this claim to the highest officer of the Carrier when they discovered the work was not being assigned to anyone because the automobile plant was shut down for the model change-over, and then re-presented their claim when the work commenced again with the re-opening of the plant. Rule 31(b) of the parties' agreement provides that the failure to appeal a denied claim precludes subsequently raising that same claim, but does not prevent raising "similar" claims. The question is thus whether each assignment of this work gives rise to a different claim. As an original matter, this would be a very close question. However, over the years such provisions have consistently been interpreted as barring the re-presentation of a continuing claim like that involved in this case. E.g., Award 2–4924 (Hall); Award 2–4554 (Williams); Award 2–2177 (Wenke); Award 3–10453 (Wilson); Award 3–10329 (Begley); Award 3–10251 (McDermott); Award 3–9447 (Johnson). Under the circumstances, the parties must be held to have adopted this long-standing interpretation of the language used in their agreement.. If the Employes wanted to preserve their right to have their claim determined by this Board, they should either have secured the Carrier's agreement to its withdrawal without prejudice or continued to process the claim even though the work had stopped.

There is no showing or even contention in the Carrier's submission to this Board that Rule 31 was raised as a defense in discussing the claim with the Employes. The only step in this direction is the reproduction of letters in which the fact of the previous claim was pointed out, but in which no con-

tention was made that the second claim was therefore barred. If Rule 31, or at least the concept it embodies, were not raised with the Employes, then the Carrier would probably not be permitted to rely upon Rule 31 as a defense because its previous failure to raise this defense would have deprived the Employes of an opportunity to show circumstances surrounding the abandonment of the first claim which would have justified re-presenting the claim. On the other hand, the Employes did not contend in their submission that the Carrier failed to raise Rule 31 as defense in discussing the claim with them. It may well be that since the waiver of a Rule 31 defense is a matter to be raised by the Employes, the Carrier does not have to negate waiver until the question is raised. However, since we believe that the claim is clearly without merit, we would rather decide this case on its merits than determine unnecessarily whether the Rule 31 defense is properly before this Board under these circumstances.

The disputed work of positioning the tie down devices does not belong exclusively to the carmen. The work consists of placing ratchets and idlers with attached chains in channels running the length of the cars and moving them to positions in the channels where they will be under the axles of the automobiles when they are loaded on the cars. In positioning these devices, an attempt is made to utilize only workable equipment and any defective unit is not re-used. The moving parts of the ratchets are oiled in the course of positioning the tie down devices. No tools (except perhaps a hammer to knock a wedged device loose) or special skills are required to perform this work.

In a series of awards by this Board it has been recognized that such non-skilled work in preparing cars for loading does not belong exclusively to the skilled mechanics who maintain and inspect the cars. In Award 2–33, this Board denied the claim of carmen that only they could prepare cars for the loading of melons. In that case the disputed work consisted of removing protruding nails, nailing temporary laths between the permanent boards on the cars, boarding up doors, and installing temporary bulkheads. In Award 2–808 (Blake), carmen were denied the exclusive right to wind doors on cars that were being serviced for loading. In Award 2–1933 (Stone), carmen were denied the exclusive right to remove windows to permit the loading of stretcher passengers. In Award 2–2797 (Smith), carmen were denied the exclusive right to install a temporary wooden floor to permit the loading of a heavy piece of equipment. And, finally, in Award 2–4827 (Johnson), the removal of slope boards from gondola cars was held not to be exclusively carmen's work.

There is no inconsistency between these awards and the awards holding that maintenance work on these automobile racks belongs to carmen, e.g., Award 2–4515 (McDonald); Award 2–4598 (Daly); Award 2–4865 (McMahon); Award 1 of S.B.A. No. 597. In those awards, the work required the skill of mechanics, and the function of the work was truly maintenance. In Awards 2–4598 and 2–4665, the tie down chains were being permanently welded to the rack. In Award 1 of S.B.A. No. 597, it appears that the tie down devices themselves were being repaired. The insertion, removal, and positioning of materials which are not permanently attached to the cars in the day-to-day preparation of the cars for loading is not maintenance, but operation or handling.

Of all the disputed work, the only portion which even comes close to maintenance is the oiling of the ratchets. Even if it were assumed that such

lubricating, viewed in isolation, could be characterized under some circumstances as maintenance work which belongs to carmen, it has not been shown that this work is anything other than incidental to the work of positioning the tie down devices. As stated in Award No. 2–4962 (Johnson), "it has long been held that the performance of such minor incidental work, even though allied to or included in the work of another craft, is not a violation of an agreement."

The Employes seek to establish their claim by the fact that the work was originally assigned to carmen. There is no indication for how long a period such assignments were made. The Carrier, in response, points out that everywhere else on its system this work is performed by employes of the shippers. There is no indication whether the circumstances are such at these other locations that the work could be assigned to others even if it were carmen work. The burden of establishing their claim is, of course, upon the Employes. E.g., Award 2–3246 (Hornbeck). If an element of proof of their claim is past practice, the Employes have the burden of establishing that such practice was significant and system-wide. E.g., Award 2–5151 (Harwood); Award 2–4971 (Johnson); Award 3–10615 (Sheridan). This burden has not been met in this case.

In any event, the assignment of the disputed work to carmen would not necessarily be inconsistent with its assignment to others. No rule or proposition has been cited which would prohibit the assignment to mechanics of non-mechanic work, particularly in those situations where such work is incidental to other work within the mechanics' craft. Rule 26, which deals with the assignment of mechanics' work, is silent on the assignment of non-mechanics' work. Nor does the Carrier's letter of May 1, 1940, answer this question. That letter, which has been found by this Board to be "not an agreement, but a statement of policy", Awards 2–4465 (McDonald), is concerned with the arbitrary transfer of work from one craft to another. Not only has there been no showing that the use of laborers instead of carmen for the disputed work is arbitrary, but it does not appear that this work, which has been found not to be craft work, is within the contemplation of this statement of policy.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 30th day of January, 1968.

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