

**Award No. 5426
Docket No. 5280
2-D&TSL-CM-'68**

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 103, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

(1) That the Detroit and Toledo Shore Line Railroad Company violated the current agreement by using furloughed painter R. Sorge to fill the position of carman instead of promoting carman helper Thomas Schmidt to fill such position.

(2) That accordingly, Carrier be ordered to compensate Thomas Schmidt eight (8) hours each day, January 1, 4, 5, 6, 7, and 8, 1965 at the Carmen's pro rata rate.

STATEMENT OF FACTS: At the time involved in this claim, Thomas Schmidt, hereinafter referred to as the Claimant, was an employe of the Detroit and Toledo Shore Line Railroad Company, hereinafter referred to as the Carrier, in the status of furloughed carman helper.

Carrier was in need of additional men to augment its force of carmen and in the absence of available qualified carmen, did, beginning January 1, 1965, assign furloughed painter R. Sorge to a position of carman, purportedly in the status of a promoted helper. Painter Sorge held no seniority in the classification of carman or carman helper.

The Claimant held seniority as carman helper and was listed on the Carman Helper Seniority Roster with date of September 23, 1963. Under date of January 7, 1965 Carrier directed letter to Claimant notifying him of his recall from furlough, to which notice Claimant immediately responded.

This dispute has been handled with Carrier officials up to and including the highest officer designated by the Company, all of whom have declined to adjust it.

The Agreement effective January 1, 1959 as subsequently amended and the Agreement dated June 4, 1953 are controlling.

POSITION OF EMPLOYES: It is respectfully submitted that the Carrier erred when on the dates of claim an employe classified and rostered as a

"This agreement supersedes agreement of April 11, 1934, and constitutes the entire agreement in effect as of January 1, 1959, between the parties hereto, and shall remain in force until revised in accordance with the procedure required by the Railway Labor Act, as amended."

The wording "constitutes the entire agreement in effect" also gives weight to Carrier's argument that no other agreements, not cited or included therein, have any effectiveness.

Subsequent to the instant case being progressed, the employees on the property have progressed a claim for another carman for August 28, 1966 account of a painter doing carmen's work, setting forth their position that the painter is not a carman and should not be used as a carman as he is on a separate seniority roster as a painter and should be used as a painter only. Conference was held on the property involving the above cited claim, on October 19, 1966, and as a result of the conference the employees' grievance committee agreed to drop the claim with the understanding that the committee would take up with its Grand Lodge a request for a dove-tailing of the various seniority rosters of employees covered by the carmen's craft and that the carrier was permitted to continue to use painters as carmen when they felt the need to do so, until the matter could be disposed of between the local committee and the Grand Lodge.

It can, therefore, be seen that the carrier's position with regard to the instant dispute is supported by the local grievance committee.

In summary the carrier has shown:

1—Letter of understanding dated December 1, 1947 and Mediation Agreement of June 1, 1953 no longer have effect or force on this property.

2—There are no rules in the effective agreement which provide for the upgrading of a Carman Helper to Carman.

3—The promotion to Carman is a managerial prerogative which is not restricted by Agreement.

4—Claimant Thomas Schmidt did not, and does not, hold seniority as a Carman and, therefore, cannot claim work in that classification.

Based on the above the Carrier requests this Board to find that the Agreement has not been violated and to deny the claims.

All data herein has been presented to, or is known by the Employees.

Oral hearing is waived unless it is requested and granted to the Employees.

(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 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.

This claim arose when an employee holding seniority as a painter was called from furlough to perform service as a carman. There was no carman furloughed or available for service. The claimant was furloughed as a carman helper and contends he should have been called for service. The carrier contended that the current agreement did not provide that carmen must be selected from the roster of carman helpers. In addition, the greater experience of the painter fulfilling the duties required was an exercise of management's prerogatives.

The current agreement dated January 1959, Rule 102, states in part,

"This agreement supersedes agreement of April 11, 1934, and constitutes the entire agreement in effect as of January 1, 1959, between the parties hereto * * *"

This agreement contained no rules whatsoever to cover situations involved here.

The claimant relied on Letter of Understanding dated 1947, which provided for the promotion of carmen helpers. In addition, a national agreement executed in June 1953, Article III entitled "Upgrading Carmen Helpers and Apprentices" was offered in support of the claimant's contention.

Article III reads:

"In the event of not being able to employ carmen with four years' experience who are of good moral character and habits, regular and helper apprentices will be advanced to carmen in accordance with their seniority. If more men are needed, helpers will be promoted. If this does not provide sufficient men to do the work, men who have had experience in the use of tools may be employed. They will not be retained in service as carmen when four-year carmen as described above become available.

NOTE: Helpers advanced as above will retain their seniority as helpers until they are qualified as carmen under the qualification rule and within thirty days thereafter shall make their choice whether to take seniority as carmen or retain seniority as a helper.

In the event of force reduction, in the absence of other existing arrangements, demotion shall be in the reverse order to that of upgrading.

This rule shall become effective August 1, 1953, except on such carriers as may elect to preserve existing rules or practices and so notify the authorized employee representative on or before July 1, 1953."

The question to be determined: Is the national agreement of June 1, 1953, still in force and effect?

We can dispose of the Memorandum of Agreement of 1947 by stating that it was superseded by the provision of Rule 102 of the current agreement, both agreements being between the parties to this dispute.

The national agreement of June 1953 was executed by the Eastern Carriers' Conference Committee, as pertains herein, and the Carmen Organization. In Article V of this Agreement, it was considered a separate agreement by each of the said carriers, jointly represented by the committee, and remains in effect until changed or modified in accordance with the provisions of the Railway Labor Act as amended. This agreement was never changed or modified as provided for.

In Third Division Awards 3813-11331, the final agreement was between the same parties at the local level. In the instant dispute, we have a national agreement executed on an industrial and geographical level which to change or modify would have to be accomplished as provided for or by agreement as was done in Rule 99 wherein a national agreement was incorporated into the current agreement.

In Second Division Awards 3748-4688, the principle is enunciated that the carrier has the right to select the best qualified employe within the craft or class wherein the employe holds seniority. This issue is not in dispute here.

In the instant claim the work was carman's work. The agreement of June 1, 1953, is still in force and effect. Article III provides:

"* * * if more men are needed, helpers will be promoted."

This was not done.

The Board is of the opinion that:

1. The agreement of June 1953 is still in force and effect.
2. The claimant helper was not called to do the work.
3. The agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 29th day of May 1968.