**Award No. 5683**
**Docket No. 5488**
**2-NOPB-CM '69**

# NATIONAL RAILROAD ADJUSTMENT BOARD

## SECOND DIVISION

**The Second Division consisted of the regular members and in addition Referee A. Langley Coffey when award was rendered.**

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## PARTIES TO DISPUTE:

## SYSTEM FEDERATION NO. 99, RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L.-C. I. O. (Carmen)

## NEW ORLEANS PUBLIC BELT RAILROAD

DISPUTE: CLAIM OF EMPLOYES:

That the Agreement was violated when Painter M. G. LeBlanc was assigned to repair hand brake on Car No. 35 at New Orleans, La. on April 14, 1966.

EMPLOYES' STATEMENT OF FACTS: The New Orleans Public Belt Railroad, hereinafter called the Carrier, employes carmen who perform carmen's work for the Carrier. Carmen mechanics are assigned to cover Carrier's operations 7 days per week, 24 hours per day. On April 14, 1966 the hand brake on Carriers Car No. 35 was defective and a Painter, at the direction of the Carrier's supervisors, made repairs to the car. This is Carmen's work subject to being performed by Carmen mechanics.

A grievance was filed and was handled in accordance with the agreement and Railway Labor Act with all Carrier officers authorized to handle grievances with the result that all of them declined to adjust it.

The Agreement effective March 16, 1947 as subsequently amended is controlling.

POSITION OF EMPLOYES: It is respectfully submitted that the work involved in this dispute is the work of carmen and is not subject to being assigned to a painter who is not a carman and who does not qualify as a carman as provided for in Rule 77 captioned "QUALIFICATIONS" reading as follows:

> "Any man who has served an apprenticeship or who has had four (4) years' practical experience at carmen's work, and who with the aid of tools, with or without drawings, can layout, build or perform the work of his craft or occupation in a mechanical manner, shall constitute a carman."

The work is subject to being performed by carmen employed as such. The Carriers defended its assignment of carman's work to a painter on the basis of Article VII, Carrier's Proposal No. 23 of the September 12,

It is Carrier's position that Article VII, Carrier's Proposal No. 23, of Agreement dated August 21, 1954, is controlling in this case and that Carman Reuther is an improper claimant.

In view of the foregoing, Carrier respectfully requests your Honorable Board to decline this claim.

(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.

Carrier is a Class 1 Switching and Terminal Railroad at New Orleans, Louisiana. Carmen are employed and work all seven days in the week "around the clock."

M. G. Le Blanc, classified as painter (Rule 78), hiring date January 30, 1951, assigned to the Engine Terminal, is on the seniority roster for Shop employes. Carmen and Helper Apprentices are on a different seniority roster.

Mr. Le Blanc did the mechanical work of a carman at the Engine Terminal, as claimed, which is reserved by Rule 23 in the local Agreement, to mechanics or apprentices regularly employed as such, as per special rules of each craft. Carmen are not employed at the Engine Terminal.

Carrier's contention that the Engine Terminal is a separate "point" on this property, at which there is not sufficient work to justify employing a carman, has been sustained by a denial award in each of three prior cases.[1]

The dispute is again before the Board in a new and different posture.[2]

It is not made to clearly appear in the Board's earlier awards what consideration, if any, was given to the adoption of Article IV of the September 25, 1964 Agreement on the New Orleans Public Belt Railroad, said adoption amounting to the election of the Employes, at their option, not to retain existing rules or practices.

Article IV, supra, is, and has been since November 4, 1964, in full force and effect on the property, and is controlling in any dispute as to

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1 Award No. 5168, May 25, 1967
Award No. 5199, June 22, 1967 and
Award No. 5200, June 22, 1967.

2 On June 30, 1967 the Employes gave notice of intent to file ex parte the dispute which is here at issue in Dockets 5488, 5489, 5490, 5491, 5492.

whether or not there is sufficient work to justify employing a mechanic of each craft, at "points" involved, and how the dispute over the designation of the craft to perform the available work shall be handled.

Therefore, the parties hereto should first agree on the definition of "point" or "points" within the meaning of the new Rule. This should not prove to be any great problem for these knowledgeable parties. The expression is not foreign to them, for they use the word "point" prominently and expertly in Schedule Rules 5, 10, 20, 22, and 32 of the local Agreement. The National Rule might apply to some other and different "points" on other properties, but this is all the more reason why the parties to this dispute must adapt it to their use on the New Orleans Public Belt Railroad without regard to how it may or should apply elsewhere.

The grievance is over the interpretation or application of agreements covering rates of pay, rules or working conditions and, as stated, does not require the payment of money to an employee. A time claim, on behalf of a named claimant, was initiated, progressed on the property, and is argued in the submissions, but is not at issue before the Board. There is a distinguishable difference between a time claim and a grievance.[3]

In all the circumstances of this case, the parties should make a further effort to determine, adjust and settle their dispute in light of the approach taken in these findings.

## AWARD

Claim remanded to the property for the parties to meet, confer and agree, within 90 days, from this date, on a definition of the word "points" within the meaning of Article IV, supra, so as to implement and apply that Rule to a terminal and switching operation as distinguished from the operation of a linehaul carrier.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April, 1969.

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## CARRIER MEMBERS DISSENT TO AWARDS 5683, 5684, 5685, 5686 AND 5687

The action taken by the Division in adopting remanded awards 5683, 5684, 5685, 5686 and 5687 for the purpose of setting up conferences between the parties goes beyond the jurisdiction of this Board and these awards are without legal force. No matter how desirous it is to help the parties resolve their differences we cannot extend our authority beyond our jurisdiction as set forth by law.

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[3] Sec. 3 (First (m) and (o) Railway Labor Act.

These cases are clearly barred due to the parties failure to hold a conference on the property.

The pertinent provisions of the Railway Labor Act pertaining to the necessity of holding a conference between the parties to a dispute are contained in Section 2, Second and Sixth and Section 3, First (i) which are, as follows:

> "Second, All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees theref interested in the dispute.
>
> "Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rate of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held. xxx.
>
> "Section 3, First (i). The disputes between an employee or group of employees and a carrier or carriers growing out of grievance xxx shall be handled in the usual manner xxx." (emphasis ours)

Furthermore, the Rules of Procedure of the Board contained in Circular No. 1 provide that:

> "No petition shall be considered by any Division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act."

Furthermore, Rule 26 of the controlling agreement requires the Organization to seek a conference and the carrier to grant the conference with in (10) days of application.

The burden is upon the Organization to seek out a conference (see our Award 2642) but the facts of record reveal the carrier on May 1, 1966, and on May 22, 1966 wrote to the General Chairman offering a conference but not until August 29, 1966, did he respond then in the last letter from the General Chairman he was agreeable to a conference, if the carrier desired one. A conference was not held prior to receipt of the June 30, 1967 notice of intent to file a claim before this Division as required by law.

This claim is defective for it has not been given the required handling on the property as required by the Railway Labor Act by the procedure rule of this Board and by Rule 26 of the controlling agreement.

We have no authority to kiss away the requirements of law and other rules by remanding these claims for any reason. Neither the parties nor this Board can waive the requirement of law, thus these cases are barred by law and we have no jurisdiction to do other than dismiss the cases. See our Awards 514, 1275, 1433, 1675, 1680, 1718, 1720, 1721, 1725, 1733, 1746, 1748, 1820, 1840, 1852, 2110, 2642, 2864 and 4852 among many.

The crux of this claim is identical with that in previous claims. The Engine Terminal under the jurisdiction of the Master Mechanic and the Freight Car Repair Yard under the jurisdiction of the Master Car Builder are in fact and in custom two seperate points and it falls to the Organization to show by evidence otherwise. This was not done.

While it is irrelevant and superficial to respond to the findings we reiterate that the fundamental facts involved in these claims are substantially similar to those found in our recent better reasoned Awards 5168, 5199 and 5200 and their findings should be presuasive precedents. This Division has held many times that prior awards involving the same parties, agreement rules and comparable facts will be followed unless shown to have been glaringly erroneous.

For the reasons offered, we dissent.

**P. R. Humphreys**
**H. F. M. Braidwood**
**F. P. Butler**
**H. K. Hagerman**
**W. H. Harris**

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## MAJORITY OPINION TO AWARDS 5683, 5684, 5685, 5686 AND 5687

Dissent by Carrier members to the above Awards, on the grounds that the awards are "without legal force," usurps the powers, duties, authority and functions of the full Board. We respect the right of respectable and respectful dissent, but the dissident forces, as they are presently constituted, go beyond the bounds of propriety when they declare the awards of this Board are "without legal force." We except.

The Carrier members were in the minority when the awards were adopted. They still are. They do not speak for this Board. They are still welcome to state their views, as they have, but "without legal force."

The tormentors of this Board and the parties, have spoken with reckless abandon outside and beyond the law, the contract, and the facts, in the respectful opinion of this Board.

Amended Rule 26, Time Claims and Grievances, effective August 4, 1948, was deleted from the Agreement in its entirety and a new Rule 26 substituted March 10, 1964. In addition to the express terms of the new Rule, provision is made therein that "the August 21, 1954 National Agreement shall apply to all claims and grievances." Rule 26 on the property and Article V of the National Agreement provide for the filing of grievances in writing, and for presenting the written grievances in an orderly manner through successive steps to the highest officer designated by Carrier to handle claims and grievances, and for appeal of all unsettled claims and grievances, that have been timely filed and handled on the property, to this Board. The Employes complied.

Carrier did not contend in its submission that the above Rule has not been complied with. The Carriers' members undertake to fill the void by

their dissent, when they charge that the Employes have not complied with Rule 26, an obvious reference to the old Rule that is no longer in effect.

The Employes affirmatively stated in their ex parte submission that:

> "All matters herein referred to in support of the Employes' Position have been the subject of correspondence or discussion with the management."

The Employes further say in their submission that:

> "A grievance was filed and was handled in accordance with the agreement and Railway Labor Act with all carrier officers authorized to handle grievances with the result and all of them declined to adjust it."

The handling on the property is further in evidence on the basis of what we find in the Employes' submission wherein they state the reasons given by the Carrier's officers for opposing the grievance. For example, the Employes say at page 2 of their submission that, "the top officer of the Carrier continued to rely on a Rule (Article VII of the September 12, 1955 Agreement) which he knew was not controlling".

Carrier's rejoinder at page 4 of its answering submission is that, "all data contained herein has been furnished the Organization".

The submissions were referred by the Division to a Committee of Messrs. Wertz for the Organizations' members and Humphrey for the Carriers' members.

The Organizations' member on the Committee proposed the Board find:

> "This Division of the Adjustment Board has jurisdiction over the dispute involved herein."

And, thereupon, proposed that the Board's award read, "claim of Employes sustained".

Carriers' member on the Committee proposed the same jurisdictional findings and that the Board's award read, "claim denied".

Accordingly, the dispute was deadlocked on the merits and the submissions were docketed with others on a list of deadlocked cases to be handled on the merits by a Referee. The Referee reviewed the dockets in question with the members of the Committee and listened to their arguments. The question of jurisdiction was not even raised, must less argued.

The dissident forces are guilty of grievous error, according to what this Board sees in the dissent. They apparently overlook the fact that Rule 26 from the "controlling Agreement" provides only that, "all conferences between local officials and local committees to be held during regular working hours without loss of pay to committeeman."

Section Sixth of the Railway Labor Act, pertaining to holding a conference in case of a dispute between Carrier and its Employes, arising out of grievances, etc., does not make it the duty of the Organization to seek out a conference, in the opinion of this Board.

Award 2642 is not a valid precedent in this case, (if it ever was) for imposing conditions on the current Agreement of these parties, or for enlarging upon the provisions of the Railway Labor Act.

According to the Railway Labor Act, as we view and understand it, either party to the dispute may give notice one to the other of a desire to confer in respect to such dispute. The law does not say that it is the duty, obligation, or a requirement made of the "Organization to seek out a conference."

The dissident forces mistake and misstate the record in paragraph 2, page 2 of their dissent. On May 1, 1966 the General Chairman wrote the Master Car Builder offering a conference, and on May 22, 1966 the General Chairman wrote the Master Mechanic offering a conference, and on August 29, 1966 the General Chairman wrote the Chief Clerk to General Manager that he was agreeable to a conference if the Carrier desired one. Carrier did not desire one from all that appears in the record. Therefore, we take no heed of what Carrier says on page 2 of its rebuttal to the Employes' rebuttal, to-wit:

> "As can be readily seen, no conferences were held on this property to discuss this claim."

The dissent on file herein "is no authority to kiss away" the record.

In connection with the record, this Board has not overlooked Carrier's contentions that:

1. The Employes did not raise or discuss the proposition that Article IV of the September 25, 1964 National Agreement replaced and superseded Article VII of the August 21, 1954 National Agreement, at any time while progressing the dispute on the property.

2. Reliance upon Rule 86 was raised for the first time in the Employes' submission to the Board.

It is true that, as Carrier says, neither Rule is the subject of correspondence between the parties. However, Article IV of the September 25, 1964 Agreement and its adoption by these parties on November 4, 1964 is in the record before this Board by an exhibit attached to the Employes' ex parte submission. Rule 86 was also cited in the same submission. Carrier's objection was first raised in its rebuttal to the Employes' rebuttal. Therefore, the Employes were not privileged to answer and give their position as surrebuttal. This Board thinks it would have been better if Carrier's objection had been raised in the answering submission, but the objection was not ignored. The awards remanding the claims allow some recognition for Carrier's position without depriving the Employes of an opportunity to answer.

This Board is not impressed, at this late date, with the suggestion that a dismissal award would have been a proper disposition of these cases. Carriers' member on the committee had proposed an outright denial, not a dismissal. A time claim was not at issue before this Board. The dispute involved a continuing disagreement over the effect of changes that had been made in the Agreements on the property. A dismissal would have left the dispute unresolved and as an open invitation for the parties to return again to get a decision.

The parties by this time must have been weary of the effort. Three prior Board awards had not served to settle the dispute and five separate submissions were still pending. As to those pending, this Board was of the opinion and still is that the dispute should be settled on the property. Accordingly, we outlined the basis for a settlement and remanded the dockets.

A remand is proper, in the opinion of this Board, at any time the submissions are incomplete and need to be handled again on the property before a final decision, or if it appears likely that the parties can resolve their own dispute without the Board's further intervention after setting up guidelines for their consideration. We do not thereby relinquish jurisdiction. If the parties do not adjust and settle their dispute, this Board can and will decide said dispute without a needless requirement that they start over with a new submission.

Moreover, this Board's action in referring the dispute back to the disputants upholds the spirit and intent of the law, in our opinion. Accusations that this Board has violated the law, if taken seriously by the parties, could defeat the ends and purposes we had in mind and will, therefore, defeat the spirit and the manifest intent, purposes and objects of the Railway Labor Act, in our further opinion.

Finally, the dissent refers to "better reasoned Awards 5168, 5199 and 5200 as persuasive precedents". They no doubt are persuasive, in the perview of the Carriers' members, on the basis that they are denial awards.

(The Referee has no desire nor does he wish to make history or undertake to establish precedents for the handling of disputes on an ad hoc basis. It has been his experience that the members who represent the railroads never point to sustaining awards and the members who represent labor never point to denial awards when a Referee's assistance is needed).

CONCURRING:

/s/ A. Langley Coffey
A. Langley Coffey, Referee

/s/Oren Wertz
Oren Wertz

/s/ D. S. Anderson
D. S. Anderson

/s/ E. J. McDermott
E. J. McDermott

/s/Edward H. Wolfe
Edward H. Wolfe

/s/ R. E. Stenzinger
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