Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7257
SECOND DIVISION Docket No. 7082
2-PATH-CM-'77

The Second Division consisted of the regular members and in addition Referee C. Robert Roadley when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada, AFL-CIO
(Port Authority Trans-Hudson Corporation

Dispute: Claim of Employes:

1. That under the current agreement, the Carrier improperly assigned other than Electricians to modify the independent door control switch on the new equipment known as PA-3's.

2. That accordingly, the Carrier be ordered to compensate Electrician D. Wright eight hours pay at the premium rate of pay.

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 issue is whether the Carrier violated the Agreement when it assigned certain work on new equipment known as PA-3s to a Car Inspector rather than assign the work to an Electrician. Claim is for eight hours pay at the premium rate of pay for Electrician D. Wright account of alleged violation.

The disputed work involved removing wires from the independent control switch on the subject car/s and then installing them on different terminals. The original claim, as submitted to the Superintendent, stated in part as follows:

> "We specifically think the work that was performed included the removal of terminal boards and fingers, replacing designated wires back on terminal board, and butt connecting specific wires together to carry current to master door control switch, which is a modification of equipment."

The Rule alleged to have been violated, Article I, Section (g) of the Agreement, reads as follows:

> "(g) Electrician - An employee who has completed an apprentice program or had four years experience in the trade and by his skill and knowledge is capable of performing and is qualified and assigned to perform, with or without drawings, electrical work, including installation, removal, assembly, disassembly, repair, servicing, operation, and testing of electrical (including armatures) and associated material and equipment and duties incidental thereto."

Carrier has averred that the challenged work is specifically within the definition of work that may be assigned to Car Inspectors, the Agreement Rule reading as follows:

Article I, Section (d):

> "(d) Car Inspector - An employee who has completed an apprentice program, or had four (4) years experience in the trade, and by his skill and knowledge is capable of performing and is qualified and assigned to perform the inspecting, testing, servicing and running repair work on cars and associated equipment, and duties incidental thereto."

Carrier bottoms his position by stating his submission, page 4:

> "By definition, a Car Inspector can be assigned work over which other mechanic crafts may have concurrent jurisdiction, since 'servicing' cars will always involve working in areas involving the work of Car Repairmen, Electricians or Machinists (the other mechanic crafts). If Car Inspectors were limited to inspecting cars, when the word 'servicing' would be meaningless, and it is an elementary rule of contract construction that a provision will not be interpreted so as to make a word meaningless."

During the appeal conference on the property the Carrier also asserted the applicability of the "incidental work" rule in the Agreement (Article II, Section 19) which reads as follows:

> "Employees shall be subject to perform all work assigned to them, regardless of location, <u>within their classification,</u> and such work <u>outside of their classification which is incidental to a project</u> upon which they are assigned to work." (emphasis added)

In this regard, Petitioner Exhibit "F" (letter from Carrier dated April 21, 1975) shows that Carrier concurred in the position of the Organization that Article II, Section 19 did not apply to this situation "since that rule only covers an employee performing work outside of his classification." It is of interest to point out that when the claim was initially denied by the Superintendent, Car Equipment Division, (letter to Claimant dated February 21, 1975) the denial was based solely on the grounds that the work was performed in accordance with Article II, Section 19 and "has been previously performed by Inspectors."

Having asserted that the work performed had previously been done by Car Inspectors the Carrier assumed the obligation of showing by substantial evidence that such was the fact. Other than assertions to this end the Carrier's only "evidence" consisted of a statement in its submission, and reiterated at the hearing, listing five items of work performed by Car Inspectors that were in the category of a "modification". It was the position of the Carrier at the hearing that the terms "modification" and "servicing" are synonymous since the word modification does not appear in the Rules at point.

At the close of the listing of items the Carrier added the following statement:

> "These are just some examples of 'servicing' (largely Electrical) which has been performed by Car Inspectors as part of their regular duties in the course of performing car inspection work." (emphasis added)

Petitioner has made no allegation that, in the performance of car inspection work, Car Inspectors have not on occasion performed servicing that could be catagorized as electrical work. The issue here is that the disputed work was not car inspection work belonging to Car Inspectors under the Rule but was, instead, electrical work belonging to Electricians.

We do not find that the evidence presented by Carrier is sufficiently persuasive to prove that the questioned work performed by Car Inspectors was based upon historical past practice, as asserted by Carrier.

Petitioner, on the other hand, submitted transcripts of appeal hearings held on the property involving the subject claim as well as a previously submitted claim (which is not before us as such) wherein unrefuted testimony by (1) an Electric Car Repair Foreman and (2) an Electrical Foreman, Car Equipment Division shows that, to their knowledge, Car Inspectors had never performed the work in dispute on the type of equipment involved. It is noted that the claim referred as not being before us was paid on the basis of time limits and therefore was not decided on its merits. The testimony in that hearing is cited as being illustrative only. Although this testimony, in and of itself, may not be controlling in the resolution of this dispute it is certainly persuasive when considered in conjunction with the reason given by the Superintendent in the initial declination of the claim at bar,

wherein he did not cite the Car Inspector rule as being controlling but rather the Incidental Work rule. Certainly one can logically assume that a Superintendent of the Car Equipment Division would, or should, be thoroughly knowledgeable of the work of the various crafts even though the ultimate interpretation of Agreements is usually the responsibility of others.

Carrier pointed out at the hearing that the word "servicing" was deliberately added to the language of Article I(d)-Car Inspector, during the negotiations that produced the rule, so that the work of "servicing" could be assigned to Car Inspectors regardless of craft lines, as a prerogative of management. It is of interest to note that the word "servicing" appears in each of the mechanical classification of work rules in the Agreement. If the degree of management latitude in work assignments was intended by the negotiators of the Agreement to be as broad as the Carrier has implied then one might well ask why, when the word "servicing" was added to the Car Inspector Classification rule, was the word "servicing" not deleted from the Work Classification rules of the various crafts? The answer to that question appears to be obvious. A literal reading of Article I, Section (g) Electrician, makes it clear that the work of "servicing" is as much an integral part of that work function as are the other duties enumerated in the Rule. Stated a different way, the Rule says that the work covered by the Rule is Electrical Work, which includes among other work that of "servicing", and closes with the phrase "and duties incidental thereto"--duties incidental to electrical work.

There can be no dispute that the subject work was electrical work; whether one calls it modification or servicing the work fell under precise duties enumerated in the Rule. To say, under these circumstances, that in spite of the language in the Rule employees of another craft could be assigned to perform the Duties of an Electrician, without Rule support, based upon the premise of a management prerogative is a degree of latitude greater than the Agreement provides. It should be added, however, that this determination is limited to the subject claim and the work covered thereby and is not intended to be construed as a precedent to be applied to other disputes with different circumstances extant. It is our view that until such time as the parties, through the process of negotiations, make a successful effort to more clearly define duties appearing in the work classification sections to their mutual satisfaction they will continue to be faced with disputes over work assignments.

Insofar as that portion of the claim relating to compensation is concerned, it is noted that Article III, Section 12(e) states:

> "No grievance shall be presented seeking a money award in excess of actual wages lost."

The record shows that if the subject work had been assigned to an Electrician it would have been so assigned during normal working hours, not at the premium rate, and not necessarily to the Claimant. There is no showing in the record that Claimant suffered any loss in wages; nor do we find any provision under which a penalty could be assessed. (See Awards 6438, 6261, 6357 and others)

Based upon a careful review of the record and testimony presented at the hearing and for the reasons stated herein we find that the Carrier did violate the Agreement as alleged and we will sustain Part 1, of the claim. However, we will deny Part 2, of the claim for the reasons stated herein.

A W A R D

Claim sustained, re Part 1, per FINDINGS.

Claim Denied, re Part 2, per FINDINGS.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 29th day of March, 1977.

SECOND DIVISION AWARD NO. 7257
LABOR MEMBER'S CONCURRING AND DISSENTING OPINION

The Majority correctly found that the Agreement was violated when Car Inspectors were assigned to perform work covered in the Electrician's Classification of Work Rule; that servicing as found in the Classification of both classes of employes does not extend to crossing Craft lines.

The Majority is in serious error when it refused to sustain the claim for recovery. The issue of damages was not a matter of dispute in the handling given by the parties on the property. The Carrier, for the first time in its rebuttal,raised the question of Claimant's availability and use if the work had been properly assigned. It was not a proper issue for consideration by the Board.

This Board has long held that when Carrier violates rules a penalty is proper to insure compliance with said rules. (Second Division Award Nos. 3405-4317-4332)

See Second Division Award No. 7106, where the Board held in part:

> "...when the work in question was wrongfully assigned to signal maintainers, the Telephone Maintainers of the Electricians Craft lost work they were contractually entitled to. It is appropriate that there be a remedy for lost work; and that it be paid to the Claimant." (Emphasis added)

Second Division Award No. 7107 holds in part:

> "If no damages were required in the situation of a contract violation involving the work of a monthly rated employee, this Board would be setting up a situation which would allow Carrier, at its whim, to avoid its contractual obligations."

Award No. 7257 is diametrically and erroneously opposite to the above awards and many others.

Where there is no cost to Carrier, there is no way to enforce rules of agreement. An unenforceable agreement is no Agreement at all. We dissent to that portion of the Award.

C. E. Wheeler
Labor Member

Labor Member's Concurring and Dissenting
Opinion to Award No. 7257