Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 10242
SECOND DIVISION Docket No. 9564-T
2-B&M-CM-'85

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

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(The Boston and Maine Corp.

Dispute: Claim of Employes:

1. That the Boston and Maine Corp. violated the provisions of the controlling Agreements, namely Article VI of the National Mediation Agreement, Case No. A-9699, dated December 4, 1975, at Lowell yard beginning on July 18, 1980 and thereafter on a continuous basis.

2. That accordingly, the Boston and Maine Corp. be ordered to compensate Carmen: R. D. Good, R. Jackson, A. Proux, R. Rousseau, P. Camire, D. Patch, J. Brown and F. Howes beginning on July 18, 1980 and all subsequent dates for eight (8) or four (4) hours at the overtime rate of pay on account of Trainmen being used for inspection, maintaining and testing of air brakes, etc., on commuter trains departing Lowell, Mass.

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 employes 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.

The basic facts of the case are as follows:

By bulletin dated July 16, 1980, Carrier announced that it was abolishing three (3) Carmen positions at Lowell Yard, effective July 17, 1980. The Organization later filed a claim on behalf of several named Claimants on September 15, 1980 wherein it charged that Carrier inappropriately assigned work formerly performed by the abolished Carmen positions at Lowell Yard. Carrier denied the claims on September 19, 1980 and asserted as part of its rebuttal argument, that it had not violated Article VI of the Carmen's Controlling Agreement. The claim was progressed on the property, consistent with applicable grievance appellate procedures and submitted to this Division for dispositive determination.

In defense of its petition, the Organization contends that Carrier violated Article VI of the December 4, 1975 Agreement, which amended Article V of the September 25, 1964 Agreement, when Carrier abolished the three (3) Carmen's positions and assigned the work to train crews. It maintains that Carrier is precluded from discontinuing using Carmen from performing work such as testing, inspecting, and maintaining cars and trains at Lowell Passenger Station and avers that the Board's decisional law on this prohibition supports its claim. In particular, it argues that the principle enunciated in Second Division Award No. 8448 and reaffirmed in Second Division Award Nos. 8602 and 8767 governs in this instance and thus the claim is judicially supported. In Second Division Award No. 8448, the Board held in part:

> "In this instant case, carmen are employed by the Carrier, were on duty in the Memphis, Tennessee Train Yard, in which the train was made up, inspected, air brakes tested, air hose coupled, and departed, and accordingly, they were contractually entitled to perform the work. For the Carrier to assign this work to other than the Carman's Craft violated the quoted Agreement.
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> The Board finds:
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> 1. Carmen in the employment of the Carrier are on duty.
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> 2. The train tested, inspected or coupled is in a departure yard or terminal.
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> 3. That the train involved departs the departure yard or terminal."

Moreover, contrary to the Carrier's position that it was compelled to abolish the three (3) Carmen's positions because of declining and insufficient work, the Organization asserts that Carrier failed to properly notify the Organization and request a joint check.

Carrier argues that it properly abolished the positions, since the diminution of Carrier's work at Lowell Yard justified its actions. It asserts that the Organization has not complied with the dispute handling provisions of Article VI, Section (f) and as such, the claim lacks merit and Agreement support. It avers that prior to July 18, 1980 and also at present, it employed a Maintainer at Lowell Passenger Station, who inspects, maintains and tests passenger equipment. It asserts that the performance of air tests had never been the exclusive work of Carmen at the Lowell situs and maintains that Conductors and Trainmen had coupled hoses and tested brakes without complaint or challenge from the Organization.

In reviewing this case, we find that Article VI is relevant here. The question posed, however, is not work exclusivity but whether Carrier violated or failed to comply with the applicable provisions of this Article.

Admittedly, when the Organization filed its claim on September 15, 1980, it did not mention or refer specifically that Article VI was violated, but merely detailed the type of work it argued was improperly assigned to train crews. Carrier responded that it did not violate Article VI and the Organization first explicitly averred a violation of Article VI, when it answered on October 17, 1980, Carrier's denial letter of September 19, 1980. The question of justification under Article VI was not formally developed until Carrier noted in its December 9, 1980 appeals communication that insufficient work at Lowell Passenger Station, justified its action. The Organization responded that Carrier failed to notify the Organization promptly and request a joint check, consistent with Section (f). This Section reads:

> "(f) Any dispute as to whether or not there is sufficient work to justify employing a carman under the provisions of this Article shall be handled as follows:
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> > At the request of the General Chairman of Carmen the parties will undertake a joint check of the work done. If the dispute is not resolved by agreement, it shall be handled under the provisions of Section 3, Second, of the Railway Labor Act, as amended, and pending disposition of the dispute, the railroad may proceed with or continue its determination."

In considering this dispute within the context of the cited Second Division cases and the language of Article VI, the Board notes that the fact situations in Second Division Award Nos. 8448, 8602 and 8767 are different from the facts herein. In the cases cited, the claim incidents were one time violations where Carmen were employed at the work situs and the application of the criteria set forth in Award 8448 was more mechanical and routine.

In the case before us we are confronted with a distinguishable situation in that three (3) Carmen positions were abolished and the Carmen were not employed at the time the asserted violations occurred. Further there is evidence that employees of other Crafts performed similar work at Lowell Yard. Inasmuch as we believe that Carrier was obligated to insure that it didn't discontinue protected Carmen's work at the Lowell Passenger Station and reassign this work to other Craft employees because of the restrictive language of Article VI, Carrier was not barred from discontinuing this work, if work was not sufficient to justify employing a Carman. On this point, while Carrier might have been remiss by not indicating at the time the bulletin was issued on July 16, 1980, that insufficient work was the reason for its actions, it did state in its December 9, 1980 letter that it abolished the positions because of insufficient work. Further, since Article VI is the pivotal referent in this dispute, the Board cannot disregard the parties' mutual obligation under this Article. Section (f) requires the Organization to request a joint check, which once requested must be conducted. Carrier has the option of staying its decision or continuing its determination, pending disposition. In the Organization letter of December 18, 1980, it stated that Carrier should have promptly notified the Organization and requested a joint

check, but this is not what Section (f) requires. The General Chairman must initiate the request for a joint check. In view of Carrier's apparent failure to notify the Organization that it was discontinuing the Carmen's work at the Lowell Passenger Station at the time of the position abolishments and in view of the Organization's failure to request a joint check, particularly after December 9, 1980, the Board is constrained to deny the Organization's claim with respect to the period following December 9, 1980. Carrier's belated articulation of its reason does not moot the claim, since rights and obligations under Article VI could have been asserted when the claim was progressed under the application of this Article. The Board will sustain the controlling claim up until December 9, 1980 when the insufficiency of work argument was first clearly stated in the written appeals record. From this point on, the obligation to request a joint check shifted to the Organization and it was required to initiate the check. This is what Section (f) requires and we are not at liberty to rewrite by judicial interpretation a modified requirement.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of January 1985.