Award No. 5483
Docket No. MW-5388

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Glenn Donaldson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD

STATEMENT OF CLAIM: (1) That the Carrier violated the agreement as of February 17, 1950, when it declared the territory of Section 69, Rotterdam Junction, New York abolished and rearranged the territory of Section 68, Scotia, New York to include the territory formerly identified as Section 69;

(2) That Section 68 and 69 be reestablished as they were on February 16, 1950 and the members of the two respective crews be restored to their former positions;

(3) That Tract Foreman N. Tartaglia be paid the difference between that received at the Trackman's rate and what he would have received at the Foreman's rate for all days subsequent to February 16, 1950, until the proper rearrangement is made;

(4) That Foreman N. Tartaglia and Trackman J. Friello, A. Peters and R. Durante be paid on the basis of one (1) hour at their respective straight time rate of pay, the time necessary to travel between their former headquarters at Rotterdam Junction, New York and headquarters of their present assignment at Scotia, New York, said compensation to be effective February 17, 1950 and to continue for each working day until proper rearrangement is made.

EMPLOYES' STATEMENT OF FACTS: Prior to February 16, 1950, the Carrier had established Sections at both Rotterdam Junction, New York and Scotia, New York. The Section at Rotterdam Junction was identified as Section No. 69 and the section at Scotia, as Section No. 68.

Prior to February 16, 1950, the Carrier retired approximately seven and one-half miles of single track. Approximately 50 per cent of the retired track was a part of Section No. 68 and the balance, a part of Section No. 69.

Including side tracks and switches, the total mileage maintained by the two sections before retirement of the portion mentioned above, was thirty-one (31) and a fraction miles, and at present, twenty-four (24) and a fraction miles of these two territories remains.

On February 10, 1950, Tract Supervisor W. S. Cooper issued the following instructions to Track Foreman Nick Tartaglia of Section No. 69 and Track Foreman Horace G. Kelly, of Section No. 68:

The final part of Petitioner's claim demands travel time of 1 hour each day for four (4) claimants alleging such time as "the time necessary to travel between their former headquarters at Rotterdam Jct., N. Y. and headquarters of their present assignment at Scotia, N. Y."

From the verbiage used here, one would assume that claimant assembled each morning at the old headquarters point, Rotterdam Jct., N. Y., travelled to Scotia, the present headquarters point of Section No. 68, performed their daily work, and then returned to Scotia, consuming, by the morning and night travel, a period of one (1) hour each day.

Carrier can assert, without fear of contradiction, that claimants do no such thing. Precisely where claimants reside has not been checked into by Carrier. Doubtless they all live within easy commuting distance of the headquarters point of Section No. 68. Be that as it may, there is no obligation on Carrier's part to pay claimants for travel time to and from their homes to the section headquarters point. Claimants elected to accept positions in the new section No. 68 with headquarters at Scotia, N. Y. Carrier does not attempt to dictate where its Maintenance of Way Employes shall live so long as they can perform the duties of their position. Whatever travel time claimants may consume in travel from home to headquarters, or return, is of no concern to Carrier. There is no rule justification for this part of the claim and it should be denied.

SUMMARY: Carrier has shown clearly that there is no merit to the claim in this docket because Petitioner invokes a small part of a memorandum without any consideration of its original intent, nor of the context in which it appears; even were the language to be taken literally, Carrier has not **re-arranged sections,** the physical facilities were sharply reduced on two sections, so much so that Carrier abolished one section and created a new section covering the same territory as the two old sections; Carrier asserts that the invoked provision of the Memorandum does not provide absolute veto power in the Organization hands; Petitioner has taken an arbitrary, uncompromising stand in his attempt to use his alleged veto power; Carrier's action was a proper one under the circumstances.

There is no merit in the entire claim and it should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Prior to February 17, 1950, Carrier maintained Section 68, headquartered at Scotia, N. Y., under a foreman and four trackmen, with a total trackage of 15.55 miles. A similar force maintained Section 69, having a total trackage of 15.92 miles, and were headquartered at Rotterdam, N. Y. After retiring some seven and one-half miles of double track, approximately one-half of which had been located in each of the two named sections, Carrier proposed to combine the two Sections into one to be numbered 68 and possessing a total trackage of 24.62 miles. Negotiations were entered into pursuant to a rule reading, in part, as follows: "(2) No rearrangement of sections will be made unless by agreement between the parties to this agreement." and "(5) The conditions mentioned above shall not be modified without thirty (30) days' notice of either party."

Agreement was reached upon some points through conference and letters during the period January 9 to 23, 1950. Carrier made certain counter proposals in its letter of January 23, 1950, concluding, "If you agree as above, will you please advise." Without waiting for a reply and apparently assuming that no agreement could be had, Carrier, on February 17, 1950, put its plan into effect.

Carrier's theory of the case is stated as follows:

"Carrier agrees that the language (of the quoted rule) was intended to prevent rearrangement of section limits, **within reason, provided there was**

no change in the physical facilities, unless such rearrangement was done by agreement between the parties." (Emphasis supplied.)

Carrier construes the Employes' non-agreement as the exercise of an unqualified veto which, it contends, is a power that the parties did not intend to vest under the quoted rule.

It is obvious from the above that the Carrier seeks to read into the rule the two conditions which we have emphasized in the above quotation from its submission. We find nothing in the record to carry those conditions into the rule through implication. Our function is merely to interpret the rules as we find them and the meaning of the rule before us is letter clear, the agreement of the Organization is a condition precedent to the rearrangement of sections.

Agreements of this type, where one of the parties is expressly forbidden to do any act without the agreement of the other, would be rendered meaningless if the application of such provisions were to be subject to an unwritten rule of reason, as contended for by the Carrier. Clearly what may seem reasonable to one party might be considered highly arbitrary and dictatorial by the others. The Organization has a right to insist that the Agreement be carried out as written (Awards 4386, 705). We possess no authority to reform it.

Carrier cites Award 3251 which concerned the farming out of work within the Scope of an Agreement. The dictum of that award, in which the Carrier finds solace, relates to impossibility of performance, a condition which is not present here. Award 1320, Second Division, is clearly not applicable here.

We are asked to reestablish the sections and restore the crews to their former positions. We dislike to do so wherever such an order can be avoided. These parties have upon several occasions resolved similar problems in the past. Progress had been made on settlement of the instant dispute. We trust that negotiations will be resumed and, assisted by the rulings herein contained, accord can be had. However, if agreement is not had within 60 days after the date hereof, the conditions existing prior to February 17, 1950 shall be restored.

The claimants are entitled to travel time as claimed. True, the rules provide that employes will not be allowed time for traveling between their homes and designated assembly points or for other personal reasons. But here Carrier improperly changed the designated assembly point from Rotterdam to Scotia and thereby, without warrant, inflicted expense and inconvenience upon claimants for which they should be compensated even in the absence of a specific rule. We ruled in Award 5186 that this Board would fail in its objective of settling disputes if there is not implied in the broad purposes of the Act the authority of the Board to enforce its awards by an appropriate finding of damages, if any exist, and direct the payment thereof. For similar reasons, the improperly displaced track foreman is entitled to the difference between what he received at the trackman's rate and what he would have received at the foreman's rate for all days subsequent to February 16, 1950, until the proper rearrangement is made. He was not compelled by Rule 33-b, or otherwise, to recognize the Carrier's unauthorized act in rearranging sections and obligated to exercise his seniority, thus incurring useless expense and inconvenience in doing so. Claimants were entitled to rely upon Carrier's obligation to conform to a clearly stated rule which Carrier chose to ignore.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement has been violated and the resultant damages are compensable.

AWARD

Claims sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 27th day of September, 1951.

DISSENT TO AWARD NO. 5483—DOCKET NO. MW-5388

Early in 1950 Carrier obtained authority to retire some seven and one-half miles double track, about one-half of which was located on Section 68 and one-half on Section 69, following which Carrier proposed to combine Sections 68 and 69.

The proposed change in sections was discussed with the General Chairman on January 9 and again on January 16, 1950. As the General Chairman refused to agree to the change, the Carrier proceeded, some 38 days after the first discussion with the General Chairman, to combine the two sections effective February 17, 1950.

Regardless of the retirement of physical facilities on both sections and regardless of the fact that on five occasions between December 1942 and February 1950 the Carrier had abolished sections, extended sections, and created new sections temporarily, the Opinion holds the action of the Carrier was in violation of the Agreement.

With respect to disputes involving provisions relating to "mutual understanding" and "mutual agreement," attention is directed to Second Division Award 1320. There, after failure to reach agreement, the Carrier proceeded, after some 19 days, to issue notice effecting change in bulletined hours.

The claim was denied with Finding reading:

> "The carrier's proposed changes in working periods were first presented to the local Federated Committee and other committee members representing the affected work point on March 16, 1948. A further joint meeting was held on March 30, 1948. The notice effecting a change in bulletined hours was posted April 3, effective April 6, 1948. This constitutes a reasonable opportunity to reach mutual understandings. In view of the nature of the claims asserted by the employes a longer period of negotiations would have served no purpose."

In the dispute covered by Third Division Award 5483 the provision read:

> "2. No rearrangement of sections will be made unless by agreement between the parties to this agreement."

After the change was first discussed with the General Chairman, some 38 days elapsed before the Carrier combined the two sections.

Awards 1320 and 5483 both involved the Boston & Maine Railroad and in each dispute Mr. Donaldson served as Referee. The Opinion in Award 5483 simply holds Award 1320 is clearly not applicable here.

In the dispute covered by Award 1320 the Carrier afforded the Organization an opportunity for conference and showed a reasonable justification for its proposed action. The Award held the action of the Carrier was not in violation of the Agreement, whereas on an identical issue, the Referee here holds a rule using the words "by agreement" confers veto power.

The result is in Award 5483 the Referee accorded the Petitioner the very veto power that he held was not the intent of the rule involved in Award 1320.

It is the function of Management to arrange its work, within the limitations of the Agreement, in the interest of efficiency and economy. It is the function of this Board to interpret or apply Agreements made by the parties. This Board has no authority to prescribe the number of sections Carrier shall maintain nor to prescribe the amount of force to be assigned to each section.

The Carrier has the right to change assembly points and no provision of the Agreement provides for pay for travel time under the circumstances here involved.

Allowance to the Foreman of the difference in wages between the Trackman's and Foreman's rates is in utter contravention of the well accepted theory of mitigation of damages.

We are in complete disagreement with this Award.

(s) R. H. Allison
(s) A. H. Jones
(s) R. M. Butler
(s) C. P. Dugan
(s) J. E. Kemp