Award No. 13656
Docket No. MW-13471

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ILLINOIS CENTRAL RAILROAD

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement and past practices thereunder when —

(a) On October 31, 1960, instead of calling and using Section Foreman H. L. Ward and Section Laborer Wilson Higgins to attend to and remove heaters from Car FGEX 59612 in Paducah Yards, it assigned or otherwise permitted the work to be performed by a car foreman and by a yard clerk.

(b) On December 1, 1960, instead of calling and using Section Laborers Paul Nichols and Wilson Higgins to close vents of perishable freight cars in the Paducah Yards, it assigned or otherwise permitted the work to be performed by a yardmaster and a yard clerk.

(c) On January 18, 1961, instead of calling and using Section Foreman F. Martin and Section Laborers C. Wardlaw and A. G. Wadley to ice cars, it assigned or otherwise permitted the work to be performed by roundhouse forces.

(2) As a consequence of the aforestated violations —

(a) Section Foreman H. L. Ward and Section Laborer Wilson Higgins each be allowed pay on a minimum call basis at their respective rates of pay because of the violation referred to in Part (1) (a) of this claim.

(b) Section Laborers Paul Nichols and Wilson Higgins each be allowed pay on a minimum call basis because of the violation rereferred to in Part (1) (b) of this claim.

(c) Section Foreman F. Martin and Section Laborers C. Wardlaw and A. G. Wadley each be allowed one (1) hour's pay at their

respective time and one-half rates because of the violation referred to in Part (1) (c) of this claim.

EMPLOYES' STATEMENT OF FACTS: For more than thirty years section forces have serviced all refrigerator cars passing through the Paducah and Louisville Yards when such cars required service thereon. When such service was required during overtime hours, the section forces would be notified accordingly, and they would perform the servicing work involved.

This work method prevailed until late 1960, when instructions were issued by Trainmaster C. E. Bartholomew to Yardmaster L. W. Broughton, which read:

> "For your information and guidance, it is permissible to use Carmen on duty for installing and removing heaters from cars rather than using Section Laborers at penalty rate. Arrangements should be made in order that carmen do this when necessary with the least possible delay to trains involved. Please instruct all concerned accordingly."

There never has been any question as to the right of section forces to perform work of the subject character at the instant locations until the aforequoted instructions were issued, arbitrarily and unilaterally, changing the recognized and well established method of performing the work in question.

The section forces were available and willing to have performed this work.

The Agreement in effect between the two parties to this dispute dated September 1, 1934, and amnded September 1, 1949 and Novmber 1, 1950, respectively, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The Carrier's defense against the instant claim has been the allegation that "the work consisting of checking on heaters in cars of perishables, removal of heaters or placing of heaters in cars, also checking on ice in refrigerator cars and icing of cars, is not work assigned exclusively to any craft of employes, and is not covered by any scheduled rule or agreement with your organization; therefore, I can see no basis for the claim, and same is respectfully declined."

On August 4, 1956, Trainmaster Clayton of the East St. Louis Terminal issued instructions which read:

"Mr. C. Faulkner
Mr. C. Tobin
Mr. L. L. Englehart
Mr. L. H. Ross
Mr. B. A. Hatch
Mr. R. E. Douglas
Mr. R. N. Bagwill
Chief Clerks, Yard Department
Chief Clerks, Agents Department:

> Effective at once, at night and on Saturdays, Sundays and holidays, the handling of section men to help and assist the banana messengers and service the banana cars, will be handled as follows:

ify, add to, take from, or write rules for the parties to a dispute. Should the request of the Employes be sustained, your Board would go beyond the function of interpreting existing provisions in the agreement between the parties as delegated by the Railway Labor Act, and in effect, write a new rule into the agreement. The Board is referred to First Division Awards 7057 and 14566, Second Division Award 1474, Third Division Awards 389, 871, 1230, 1609, 2612, 2622, 3407, 4763, 5079, 6828, 7498, 8219 and 9198, and Fourth Division Award 501 as evidence of such findings.

There is no basis for the claims, and they should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The Organization presents three separate claims to this Board, consolidating all three into one case. The three claims arose on October 31, 1960, December 1, 1960 and January 18, 1961, at the Paducah Yards. Carrier assigned work to be performed on these days to other crafts; said work allegedly belonging to the Claimants of the Maintenance of Way craft. The work referred to in the three claims: removal of car heaters from refrigerator cars, closing vents of refrigerator cars, and icing cars which contain perishable commodities.

The Organization contends that the Agreement and past practices reserves the work referred to in the three claims to the section forces and Carrier violated the Agreement by assigning the performance of this work to others than the Claimants.

Carrier contends the work outlined above is that of providing perishable protective service and is of a type that is not performed or assigned to any specific class or craft. The three types of work in dispute are performed as the need arises at various locations on its system and has not been exclusively assigned or reserved to the employes of the Maintenance of Way organization, or is such work covered by the terms of the Agreement. No specific rule in the Agreement was cited by the organization to support the three claims.

The Scope Rule of the Agreement is general in terms and the terms do not specify the work reserved to such employes. The Board has interpreted the Scope Rule between these same parties in Awards 12298, 11832, 11784, holding to the principle established by prior Awards of this Division that when the Scope Rule of the Agreement is general in form, the Petitioner has the burden of proving that the work is of a kind that has been historically, customarily and exclusively performed by the Carrier's section forces. Performance alone does not give the Claimants exclusive right to the work.

The Organization submits evidence of instructions issued by the Trainmaster on August 4, 1956, to show assignments of section men to the kind of work involved in this dispute. Also, evidence of instructions issued in late 1960 by the Trainmaster, giving permission to the Yardmaster to use carmen on duty to remove heaters, rather than using Section Laborers, at the penalty rate. In Award 6168, it was held that instructions are not part of any agreement and they can be followed by the Carrier, or disregarded at any time without penalty.

Award 7031 relates in part:

". . . nor is the fact that work at one point is assigned to one craft for a long period of time of controlling importance when it appears that such work was assigned to different crafts at different points within the scope of the agreement."

Many of the awards cited by the organization tend to support their position; however, they do not represent the majority of Board Awards which only grant exclusivity to the Organization if the practice is system-wide. See Awards 12787, 10615, 11605, among others. From the factual assertions, it appears that this work has been assigned to different classes, at different locations in the system, and we do not find that said work was exclusively the organization's at Paducah. Award 11441, cited by the Employes, between the same parties, although a different issue, allegedly shows that section forces serviced refrigerator cars in the East St. Louis Yard.

The organization, when the Scope Rule of the Agreement is general in terms, must prove that the work is of a kind that has been historically, customarily, exclusively performed and assigned to the Carrier's section forces. Where the Agreement is system-wide, the Employes must also show the work involved is performed exclusively by the Maintenance of Way craft throughout the system. Mere assertions of having serviced all refrigerator cars "for more than thirty years" is not prima facie in meeting the burden of proof. Such assertion alone does not shift or meet the burden as alleged by the Petitioner.

The Board notes conflict between the factual assertions of both parties, but absent proof by the Petitioner, we must deny the claim.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to the 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 a violation of the Agreement has not been shown.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of June 1965.