NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19938
THIRD DIVISION Docket Number MW-19831

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Norfolk and Western Railway Company (Lake Region)

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

(1) That on August 24, 1970 Carrier violated the working Agreement dated April 1, 1951 when it failed and refused to allow Sectionmen to clean cars at Georgetown and Frankly" mines and allowed coal company employes to clean cars at both mines in lieu of Sectionmen Dominic Prescott, Donald E. Ruckman, Joseph Burdock, Fernando Brandi, Edward Soboleski, Thomas Stergies, Lester S. Porter, Frank Soboleski, Clado Ferry and Leo E. Bailey. (System File MW-BRS-71-3)

(2) That the Carrier compensate each of the above-named claimants eight (8) hours pay at their respective rates of pay beginning with August 24, 1970 up to the date said claimants return to their regular duties of cleaning cars at Frankly" mine and Georgetown Preparation Plant, also all overtime work performed by coal company employes on Saturdays and Sundays.

OPINION OF BOARD: For a significant number of years, Carriers' forces cleaned foreign matter from hopper cars at two locations. I" August, 1970, Carrier discontinued the service, and thereafter, the cleaning of cars was performed by employees of a mine company. As a result, the Organization alleges a violation of its general Scope Rule.

The Carrier resists the claim on a number of grounds, however, it framed a" issue - during the handling of the matter on the property - which is disposative of the case, without regard to other defenses. The Carrier advised the Organization:

> "The cleaning of hopper cars at...was inaugurated by the Carrier as service to the...Coal Company when that company began its operations...Being a service provided for the coal company gratuitously, the Carrier had the right to discontinue providing it at any time. This it did in August, 1971 /sic/ The Carrier was not only not required to clean such cars, but in certain respects had an obligation under ICC regulations to discontunue such service."

The ICC regulation referred to above reads as follows:

> "The Interstate Commerce Commission by this notice cautions the public and carriers of consignees' duty to completely unload rail cars received loaded with goods that have moved in interstate commerce subject to carload rates and charges."
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> "The Commission interprets Rules 14 and 27 of the Uniform Freight Classification to obligate consignees of carload freight to completely unload from such cars, at their expense, all dunnage, debris, or other foreign matter connected with the inbound shipment so as to return rail freight cars to the carrier in a condition for loading by another shipper without further unloading. The Commission reminds consignees that the attempted release as empty of a car which has not been completely unloaded or in which debris has been placed by a consignee is an unlawful solicitation of a trash removal privilege having the effect of a concession or discrimination forbidden by the Elkins Act and Section 6 (7) of the Interstate Commerce Act."
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> "The Commission expects all carriers by railroad subject to its jurisdiction to enforce Rules 14 and 27 of the Uniform Freight Classification to the extent that when a carrier becomes aware of the breach by a consignee of its duty to unload completely, the carrier is not to pull the car but to leave it at the consignee's tracks on demurrage or under special detention rules in accordance with applicable tariffs until the consignee has fulfilled its unloading obligation. Additionally, the Commission expects carriers, when they become aware that a consignee has put debris *into* a car released as empty, either to refuse the car and hold it on demurrage or under special detention rules, or to bill the consignee under applicable tariffs for the transportation of refuse."
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> "The Commission has directed its investigative and enforcement staff to police this matter and to take such enforcement action as individual circumstances warrant, including, but not necessarily limited to, the institution of prosecutions under the Elkins Act against either the consignee or the carrier, or both."

> "The Commission expects every common carrier by railroad subject to its jurisdiction to effect broad notice of this Commission interpretation among their consignees, especially those that are known to have violated Rules 14 and 27 in the past."

The Organization asserts that an ICC directive may not properly require removal of work from a labor Agreement (otherwise the contract would become worthless), and cites as authority Award 15028 (Dorsey). The Referee in the cited Award determined that this Board has exclusive jurisdiction of railroad-employee disputes growing out of the interpretation and application of existing collective bargaining agreements. Because the claim therein stated a violation of an "existing" agreement the Board rejected Carrier's defense that by operation of law it was enjoined from granting relief.

We do not disagree with the jurisdicational determination of Award 15028, nor has the Carrier suggested a lack of jurisdiction. But, in our view, Award 15028 does not suggest that an appropriate rule or regulation of a Federal Agency may not have a bearing upon the type and amount of work to be performed by a Carries. Considered in that light, the Award does not control the merits of this Claim.

This Board has permitted Carriers to alter their operations as long as the changes did not constitute a transfer of work in derrogation of a contractual limitation. In Award 14060, Referee Dorsey noted that the mere performance of certain work for a period of time by certain employees does not preclude the Carrier from eliminating a need for that work absent a specific prohibition in the Agreement.

In Award 10164 (Gray), the Board noted that a Scope Rule describes a class of work but it does not undertake to specify directly the inclusion of all such classes of work. See also 14169 (Hall), 5246 (Boyd), 8076 (Bailer), 9580 (Johnson), 9672 (Fleming), 13056 (Engelstein), and 13745 (Dorsey).

More simply stated, a Carrier may determine that it no longer requires certain work to be performed and, absent a specific agreement prohibition, it may eliminate same. That determination may be made independently or, of course, may result from certain regulations of Federal Agencies.

The record does not suggest that Carrier transferred work. Instead it determined to cease performing certain functions which it had done gratuitously for a coal company. In part, that determination was predicated upon a" ICC regulation which required the coal company to assume car cleaning.

For this Board to suggest that Carrier must continue to clean cars, when the duty and responsibility for same falls squarely upon the coal company, would imply that Carrier must perform a useless act, and to hold that the coal company was, in fact, doing the work on behalf of the Carrier is not only contrary to the record, but suggests a blatant disregard of the ICC regulation.

Two of the cases cited by the Organization stress the very point of this Award. In Award 10195 (Begley), the Board sustained a claim concerning cleaning of foreign material from cars, noting:

> ". . .It is the Carrier's obligation and responsibility to have such cars cleaned." (Underscoring supplied)

See also Award 10196 (Begley).

In the instant case, whether directed by ICC regulations or by independent determination, it was no longer Carrier's responsibility and obligation to see to the cleaning of the cars in question.

As noted above, the record fails to suggest that the coal company performed duties for and on behalf of Carrier. Were the record to the contrary, or if it showed that the Carrier had not eliminated jobs but had, in fact, transferred same in some manner then, of course, other issues would be joined, but the record here is devoid of any such suggestion.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 was not violated.

A W A R D

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 7th day of September 1973.