Award No. 5526
Docket No. 5344
2-NJ-OCAW-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

LOCAL UNION 8-182
OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION

NIAGARA JUNCTION RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

Whether or not the company had the right to remove the position of Car Inspector–Repairman from the bargaining unit.

EMPLOYES' STATEMENT OF FACTS: On May 2, 1966, a conference was held pertaining to the above dispute. On May 13, 1966, the company sent the Local Union a letter stating that the position of Car Inspector–Repairman was abolished.

It was further stated by the company that they intended to do the above work by non-bargaining unit employes namely supervisors and checkers.

POSITION OF EMPLOYES: That this job has been done by bargaining unit employes for at least twelve (12) years or more. The following bargaining employes performed on the job as follows:

1. Thomas Giles from 1954 to 1960.
2. John Bush from 1960 to 1965.
3. Richard Butler from 1965 to the abolishment.

Also during these periods of times, Mr. Frank Baldassare and Mr. Louis Adamo, who were blacksmiths, assisted on this work.

To further show that this job is still in existence the Union would like to point out that Mr. Arthur Briglio, who is classified as a Burner, has been used on the aggrieved job on the following dates:

June 23, 1966
June 24, 1966
June 27, 1966
June 29, 1966

The Union respectfully requests that the Board finds for the Union and rules that the company reinstate the job to its proper place, that being the bargaining unit and that the company be made to make whole any monies lost by employes because of its action.

CARRIER'S STATEMENT OF FACTS: The position of Car Inspector-Repairman has never been subject to the scope of the Agreement with the Organization party hereto or within the scope of any other organization's agreement.

Nothing in the Carrier's records or files indicates that at any time since at least 1936 Carrier received a written request from any employe in its Car Department to be represented by any union or employe organization. Nor did the Carrier receive written advice from any union or organization that it was authorized to represent any employe of the Carrier's Car Department.

The claim subject of this dispute does not include a monetary claim.

The Niagara Junction Railway is an industrial terminal switching railroad operating almost entirely within the corporate limits of the City of Niagara Falls, N. Y.

In the 1920's the Niagara Junction Railway entered into agreements with its connecting lines, the Erie Railroad and New York Central Railroad, presently two of three owner lines, providing for joint inspection and necessary repair of cars at the common interchange points by inspectors of Erie Railroad and New York Central Railroad at a specified monthly rate to be adjusted as needed. These agreements were formally cancelled on March 2, 1955.

In late 1936 the Niagara Junction Railway employed its first Car Inspector and on July 11, 1937 this position was reclassified as Car Foreman. The position of Car Inspector was assigned on February 27, 1938 to a Niagara Junction employe who prior thereto was employed as a track laborer and extra brakeman. The Car Foreman had supervision over the Car Inspector.

The above agreements between carriers and the employment of Car Inspector and Car Foreman referred to above antedated the initial contract schedule between the Niagara Junction Railway and authorized representatives of the Maintenance of Way employes dated December 1, 1943. This first contract schedule was superseded on March 12, 1945, June 7, 1946 and finally on September 1, 1949. The September 1, 1949 agreement is referred to later in this submission as Agreement No. 1.

On January 30, 1944, the title of the position of Car Foreman was changed to Car Inspector Foreman. On this same date the rates of pay of Car Inspector Foreman and Car Inspector were changed from a weekly to an hourly basis. Wage changes for these two positions have always emanated from management without any negotiations with any union.

On January 5, 1948, this Carrier's Engine House and Line Maintenance Department employes elected to be represented by the United Chemical Workers, CIO. On June 1, 1948 a contract was signed between the Niagara Junction Railway and employes authorized to represent the Engine House and Line Maintenance Department employes. This agreement is later referred to in this submission as Agreement No. 2.

Subsequent to January 30, 1944 and until April 13, 1966, this Carrier continued to employ in its Car Department a Car Inspector Foreman and a Car Inspector Repairman. A brief history of these two job classifications is contained in the attached Exhibit A.

The Car Inspector Foreman and the Car Inspector Repairman each had the responsibility of physically inspecting cars moving in interchange service and making necessary running repairs in accordance with ICC and AAR regulations. Neither position was subject to the scope of any agreement although of his own volition the Car Inspector Repairman became a member of Oil, Chemical and Atomic Workers International Union, Local 8-182 (see Exhibit A). Each employe was an hourly paid employe on a five day work week. The Car Inspector Foreman's days off were Saturday and Sunday and the Car Inspector Repairman's days off were Monday and Tuesday. The hours of work were from 7 A. M. to 3:30 P. M. with one-half hour for lunch. On four days of each week only one employe was on duty who was solely responsible for inspection and repair of cars on such days. On the remaining three days of the week both employes were on duty and jointly responsible for inspecting and repair of cars and jointly participating in the same work. Each performed all the work necessary when the other employe was absent on his days off, vacations, sickness, and during absence for any other reason. In other words, each relieved the other when necessary and no other relief was provided. The Car Inspector Foreman's duties differed only in that he was responsible for a limited amount of paper work and, of course, having supervision over the Car Inspector Repairman. The relieving of these jobs, as described above, has continued to this date without exception (see Exhibit A).

Effective April 13, 1966 the Car Inspector Repairman left the employ of the Niagara Junction Railway to accept employment elsewhere. For some time the Carrier had felt that the volume of business did not warrant the service of two men to inspect and repair cars in interchange service and, therefore, on April 13, 1966, Carrier abolished the job of Car Inspector Repairman and the Organization was so notified.

It was necessary to inspect cars in interchange on a seven day basis and Carrier used the services of Car Inspector Foreman on Saturday and Sunday until it could find a qualified employe. Subsequently, the Carrier approached two employes of the Maintenance of Way Department, whom it considered to be qualified to do this work, to assume the duties of Car Inspector on Saturday and Sunday and to continue their work as trackmen on the other three days of the week, with two week days as their days off. Both of these employes declined Carrier's offer on the basis they did not desire to work on Saturday and Sunday.

At a meeting with the Organization's Committee on May 2, 1966, Carrier advised the Committee of the actions it had taken as described above and asked if any of the other employes they represented were interested in this work on a two-day basis. The answer was in the negative whereupon the Committee was notified that the job would be filled on Saturday and Sunday with other personnel in conjunction with their other duties. At this meeting the Committee at no time took exception to the Car Inspector Foreman performing this work on the sixth and seventh days. The Committee requested, however, that they be formally notified of the abolishment of the job which was done by letter dated May 13, 1966, copy of which is attached as Exhibit B.

Until May 7, 1966 the Car Inspector Foreman continued to work seven days per week inspecting and repairing cars. On this date, the Car Inspector Foreman agreed to work six days a week on a permanent basis, Sunday through Friday, inspecting and repairing cars as he did heretofore on a five day basis. On this same date, the inspection of cars at interchange on Saturday was assigned to a yard clerk, in conjunction with his other duties as interchange checker. He was compensated at the Car Inspector's rate for this day. The yard clerk position, as well as the position of Car Inspector Foreman, is not covered by the scope of any agreement. This yard clerk is one of a group of unorganized employes and, as heretofore stated, the Car Inspector Foreman is not a member of any organization.

On May 31, 1966 the Organization submitted their Grievance No. 2 reading as follows:

> "The union requests that the company is in violation when they abolished the job classified as Car Inspector Repairman. The union demands the job be reinstated into the bargaining unit and an hourly employe be placed on it." (Exhibit C.)

Carrier denied employes' claim by letter of June 3, 1966 (Exhibit D) and in subsequent correspondence attempted to obtain from the Organization an indication of which agreement and which rule were violated. The Organization was unable to cite a schedule rule violation (see Exhibits E, F, G, H, I, J, K and L, respectively).

Neither prior to December 1, 1943, the first known date of a contract with the Organization in this dispute, nor subsequent thereto, has any incumbent of the positions of Car Inspector Foreman or Car Inspector Repairman ever been carried on a seniority roster of any non-operating group of employes represented by any union. As an example see Carrier's Exhibits M-1, M-2 and M-3.

POSITION OF CARRIER:

I.

THE SECOND DIVISION, NRAB, IS WITHOUT JURISDICTION

The jurisdiction of this Board is limited by the Railway Labor Act which provides:

> "Sec. 3. First. (i) The disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * * "

Carrier will show hereinafter that the Agreements in effect on this carrier do not include the position subject of this dispute.

There are in effect between the parties to this dispute two separate agreements covering rates of pay and working conditions applicable to Maintenance of Way employes under one agreement and Engine House and Line Maintenance employes under the other agreement. Copies of these agreements, dated September 1, 1949 and June 1, 1948, respectively, are submitted herewith. Also submitted are Supplemental Agreement dated June 1, 1948 covering employes

in the Engine House and Line Maintenance groups and Memorandum of Agreement dated September 1, 1949 establishing 40-hour work week for employes in the Engine House and Line Maintenance groups. To simplify reference to the basic agreements the agreement with Maintenance of Way employes is designated as Agreement No. 1 and the agreement with Engine House and Line Maintenance employes is designated as Agreement No. 2.

It is the Carrier's position that the Organization has no jurisdiction over the position in dispute. The position is not subject to the scope of Agreement No. 1 which provides on page 1 in part:

> "Whereas the union has been certified as the proper collective bargaining agency for Maintenance of Way employes of the Company as hereinafter defined, and * * *."

Article I, paragraph 2, page 2 of Agreement No. 1 reads:

> "'Maintenance-of-Way employes' as used in this agreement shall mean those employes of the Company having the following job titles: Track Laborer, Track Walker, Track Foreman, Truck Driver, Blacksmith, Acetylene Burner, Painter and Gas Track Jack Operator. Wherever the word 'employes' is hereafter used in this agreement it shall mean such Maintenance-of-Way employes."

It is noteworthy that the job title of Car Inspector Repairman did not and does not appear in the above quoted scope rule.

The position is outside the scope of Agreement No. 2 which provides under Article I, Section 1:

> "The Company agrees to bargain with the Union as the sole and exclusive bargaining agency for all employes in the Engine House, including Line Maintenance group."

Such employes are listed under Article XI, Section 1, as Engine House Repairman, Engine House Repairman Helper, Hostler, Lineman, Lineman Assistant and Lineman Laborer. **It is again noteworthy that the job title of Car Inspector Repairman likewise did not and does not appear in the above quoted scope rule.**

Since 1948 Agreements No. 1 and No. 2 **have been amended not less than six times** to provide for changes in pay and working conditions. None of these amendments contains any provisions to include the position of Car Inspector Repairman within the scope of either contract (see Exhibits E through L).

Employes holding the position of Car Inspector Repairman since 1958 voluntarily joined the union. Although the scope of Agreements No. 1 and No. 2 remained unchanged since June 1, 1948 employes holding the position of Car Inspector Repairman prior to 1958 were neither requested to nor required to join the union.

Your Board has recognized that it is without jurisdiction to decide disputes of employes which are not covered by an agreement and is without authority to include a position under a Scope Rule of the Agreement.

In the Second Division, Award No. 1783, with Referee Carter, it was stated in part in the Findings:

> "It is fundamental that the rights of claimant must grow out of contract provisions. In the absence of contract, employes may be hired and discharged at will. The burden of proof is upon the claimant to show that an agreement to which he is a party has been violated. None has been shown. * * * This Board is limited by the provisions of the Railway Labor Act and has no authority to adjust grievances not founded upon contract provisions of collective agreements. The claimant having no contractual right to be reinstated under the proofs presented, this Board is compelled to hold that the claim has no validity. Claimant has simply failed to establish by proof that an agreement existed which supports his claim."

In Second Division Award No. 3205, without referee, wherein Carrier's Statement of Facts showed that the position involved was not covered by a collective bargaining agreement, the Findings read:

> "The petitioner does not show that he is an employe within the jurisdiction of the Second Division of the National Railroad Adjustment Board as provided in 3 First (h) Second of the Railway Labor Act. The case is therefore dismissed for lack of jurisdiction."

In Third Division Award No. 8797, with Referee Daugherty, it was requested that Carrier designate that certain positions be covered by the Scope Rule of the applicable Agreement. The Opinion of Board read, in part:

> "* * * The Board finds that the question of whether the position of Assistant to Auditor of Disbursements is subject to the Scope Rule of the Agreement is a matter to be determined by Carrier, in the first instance, and, if Carrier is willing, by negotiation between the Parties, in the second instance; it is not a question for decision by this Board. The Board is without authority to include or exclude new positions under the Scope Rule of the Agreement."

Also see Third Division Award No. 12302 wherein it was recognized that the Board does not have authority to extend agreement coverage.

II.

EMPLOYES CITE NO RULE TO SUPPORT CLAIM

In their Grievance No. 2, dated May 31, 1966 (see Exhibit C) the employes cite no rule to support their claim. Through subsequent correspondence the Carrier attempted to obtain from employes a statement of specific rules violations. Employes' claim and responses are vague, indefinite, inaccurate and without merit (see Exhibits E through L).

Notwithstanding, Carrier's evidence that the position here in dispute is not subject to the rules of any agreement, Carrier further submits there is no rule in the agreements attached hereto covering Carrier's non-operating employes which limited its right to abolish positions.

Your Board has stated in many awards that Carrier maintained all rights not contrary to law or waived by contract. Excerpts from a few such late awards are cited.

SECOND DIVISION AWARD 4844 (Johnson)

"It has long been recognized that in the performance of its service the Carrier has all powers not forbidden by law nor relinquished by contract, and that it necessarily has the right to determine in good faith the qualifications of its employes."

SECOND DIVISION AWARD 3630 (Carey)

"It is a fundamental principle of the employer-employe relation that the determination of the manner of conducting the business is vested in the employer except as its power of decision has been surrendered by agreement or is limited by law. Contractual surrender in whole or in part of such basic attribute of the managerial function should appear in clear and unmistakable language [sic]."

Your Board has held in many awards that a claim will have to be denied when not supported by a rule. In Award No. 3672 with Referee Mitchell, it was stated in part in the Findings:

"In the absence of a rule in the agreement which would support the penalty claims, they will have to be denied."

Management's right to create or abolish the position in question is without limitation. Its right to control direction of its work force is complete except to the extent it limits that right by agreement. There is no such limitation on any of the jobs covered by the subject agreements. Certainly there can be no such limitation on jobs outside the scope of any agreement such as is the fact in the instant case.

CONCLUSION

Carrier submits that:

Carrier has shown that the position in dispute does not come within the scope of any schedule agreement or agreements with the employes and therefore is outside their jurisdiction.

Carrier's right to control its work force in accordance with sound economic principles is without question and is limited only by specific agreement with its employes. No such agreement exists.

The claim is without sound basis and merit and should be denied.

(Exhibits not reproduced.)

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 waived right of appearance at hearing thereon.

In the Organization's submission of this claim before the Board, it alleges that the Carrier did not have the right to remove the position of Car Inspector–Repairman from the bargaining unit. The Organization in its brief submission of the claim and in support of its position did not allege or cite any Rule or Article of the Bargaining Agreement that was violated.

Carrier's position is that the position of Car Inspector–Repairman is not and has never been subject to or within the scope of any agreement with the Organization; that the Organization failed to cite a schedule rule violation; that the Board is without jurisdiction because the position in question is not included in the agreement in effect governing this Carrier; that the abolishing of an unnecessary job is exclusively the function of management.

A close examination of the record reveals that the Organization failed to cite a specific rule or provision of the two agreements governing Engine House and Line Service Employes and Maintenance of Way Employes that Carrier is supposed to have violated in this instance. In fact, Carrier through its Superintendent, Evan Maulis, Jr., on two occasions requested by letters, dated October 7, 1966 and October 14, 1966, addressed to the local president, Constantino D. Matorazzo, to be advised which specific rule in either of the two agreements was violated. Finally, after failing to specify a rule that was violated in either of the two agreements, the local president replied by letter, dated October 26, 1966, that the position in question was not found in either agreement but that the job was brought into the bargaining unit as verbally agreed to by the Carrier's Superintendent and other officials and the Organization's representatives.

No evidence was adduced by the Organization in support of its contention that an oral agreement was consummated bringing the position in question within the purview of either of the two agreements covering Maintenance of Way Employes and/or Engine House and Line Service Employes. Mere allegations without proof are of no probative value.

The burden is on the petitioner to specify the rule or rules that are allegedly claimed to have been violated. Failing to do this, we therefore cannot adjudicate the merits of the claim and are compelled to dismiss the claim.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 25th day of September, 1968.

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