# Award No. 1224
# Docket No. 1251

## NATIONAL RAILROAD ADJUSTMENT BOARD

## FOURTH DIVISION

**The Fourth Division consisted of the regular members and in addition Referee William H. Coburn when award was rendered.**

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## PARTIES TO DISPUTE:

## DISTRICT 50, UNITED MINE WORKERS OF AMERICA, LOCAL NO. 13612

## THE TOLEDO, LORAIN & FAIRPORT DOCK COMPANY

**STATEMENT OF CLAIM:** Claim of employes for restoration of original job classification known as "Janitor" under "All Others" as per Schedule "A" in existing collective bargaining agreement between disputants, and to open said job for bidding by senior employes of the bargaining unit represented by this Union.

**EMPLOYES' STATEMENT OF FACTS:** An employe having retired from his job as Janitor at the Port of Lorain, Ohio, the Carrier, who is engaged in the transportation of property by water, on May 6, 1957, without the consent or agreement of the Union, eliminated the job classification of "JANITOR," which has been in effect for approximately nine years in the bargaining unit, under the catch-all classification of "ALL OTHERS," in the collective agreement, and assigned the duties formerly performed by the said retired janitor to a newly-hired, salaried employe not in the Employes' bargaining unit, instead of complying with the established procedure of putting up the job for bidding by senior employes of the bargaining unit.

**POSITION OF EMPLOYES:** The conduct of the Carrier as mentioned in the aforesaid Statement of Facts constitutes a violation of the existing collective agreement dated June 21, 1956, by and between the Carrier and the Union wherein "the parties hereto, desiring to stabilize employment, agree upon wage rates, conditions of employment and hours of work and do away with strikes, lockouts and stoppage of work, in the interest of harmony and efficiency between the Company and the Union, do hereby agree as follows:

**"ARTICLE I**

**"RECOGNITION**

**"Section 1.** The Company recognizes the Union as the sole and exclusive representative of all employes whose classifications are set forth in "Schedule 'A' " for the purpose of collective bargaining with

respect to rates of pay, wages, hours of employment and/or other conditions of employment.

"**Section 3.** It is the intent and purpose of the parties that the rules, rates of pay and conditions of employment set forth herein shall apply to employes engaged in the operation and maintenance of the coal and ore equipment at the Port of Lorain, Ohio.

"ARTICLE II

"RATES AND CLASSIFICATIONS

"**Section 1.** The basic rates of pay and job classifications for all employes covered by this agreement are set forth in "Schedule 'A' " attached hereto and made a part hereof."

An examination of "Schedule 'A' " which is attached to this submission as "Exhibit A" indicates the various job classifications in effect for an extended period of years, and includes the catch-all category "ALL OTHERS" under which the Job Classification of "JANITOR" has been carried all those years.

The employes' position further is that if the Carrier is permitted to eliminate this established job classification by transferring the work to persons not in the bargaining unit, then the words "stabilize employment" as voiced in the agreement would become empty and hollow, since the Carrier would be encouraged to undermine the job security of other classifications to such an extent as to make collective bargaining agreements useless and defeat the purposes of the Railway Labor Act, both in letter and in spirit. Section 2 of Title I of the Act under "General Duties" states:

"First. It shall be the duty of all carriers, their officers, agents and employes to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employes thereof."

The arbitrary action of the Carrier in eliminating the job classification and transferring the work tasks to persons not covered by union contract is a change in working conditions, and certainly could not be termed a "reasonable effort to make and maintain agreements" with the purview of the Act.

All data submitted herein supporting the employes' position have been presented to the carrier and made a part of the particular question in dispute.

It is affirmatively stated that the claim and dispute involved herein have been considered in conference and handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes.

Oral hearing is waived.

**CARRIER'S STATEMENT OF FACTS:** On May 1, 1957, the Carrier discontinued the bidding for the job classification entitled "Janitor." At that time, a new employe was hired at a salary of $275.00 per month.

**POSITION OF CARRIER: I. THE JANITOR'S JOB IS NOT COVERED BY THE AGEEMENT BETWEEN THE PARTIES.**

In accordance with the above "Employes' Statement," the Union is apparently basing its claim upon the fact that the Janitor classification is covered by the existing collective bargaining agreement between the parties. This averment is difficult to understand primarily because the Janitor's job as such is not and never has been set forth in any agreement between the Carrier and the Union. To support this position, the Board is referred to Schedule "A" of the present agreement which as far as the Janitor classification is concerned has remained the same ever since the Union was officially designated as the bargaining unit for the employes at the Lorain Dock. In addition, the Janitor's job as such was not established until 1948. Prior to that time, the miscellaneous classification "All Others" had been included in all agreements negotiated between the parties. This miscellaneous classification was not only expressly provided for in those agreements immediately preceding 1948, but was included in agreements going back as far as 1937. Thus, it seems that the mere fact that the classification "All Others" is included in the present agreement does not justify the allegation by the Union that the Janitor job is automatically included therein. Furthermore, there have been no parol agreements on this point altering or modifying to the slightest extent the collective bargaining agreement now existing.

Logically, then, if the agreement does not expressly provide for the Janitor's job and the miscellaneous classification "All Others" was not specifically set up to provide for the inclusion of the Janitor's job and there was no parol agreement on this point between the parties, the Union's basic premise loses it significance.

**II. EFFECTIVE ADMINISTRATION REQUIRED THE CHANGE.**

The Carrier does not deny that, for a period of years prior to 1957, the Janitor's job was placed upon bid. The bidding during this period of time was conducted the same as that for the other jobs covered by the agreement. This was accomplished as a matter of convenience. There was no obligation on the Carrier to do so. However, after experience with this procedure, it was ascertained that a change in approach was necessary. This change was necessitated for several reasons. Experience showed that on many occasions the employes did not bid the job and, after they did bid on, a short time later they would bid off. It was, therefore, necessary continually to publish bids for the job along with the time-consuming procedure connected therewith. It was also necessary, if no bids were received, to assign certain employes to the job. This established a situation where the Carrier was not only placed in an unfavorable position from an administrative point of view, but, also, the duties of the Janitor classification were not being properly performed. This situation became particularly untenable in 1956 when failure to bid, bidding off, assignments, etc. became the rule rather than the exception. In addition, those employes who did perform the Janitor's job in 1956 earned, as a result of performing these functions, a combined total in excess of $8,500.00. This was brought about by Union insistence that the Janitor's earnings had to be tied in with the earnings of the operating crews. In other words, all the overtime premiums, etc. paid to the crew were also automatically paid to the Janitor.

The factors reported above contributed to an intolerable situation; hence, the change on May 1, 1957.

## III. THE AGREEMENT DOES NOT REQUIRE THE CARRIER TO TREAT THE JANITOR'S JOB AS A CLASSIFICATION COVERED BY THE CONTRACT.

As previously expressed, the applicable agreement is silent on the subject of the Janitor classification. Nothing in the agreement either requires or prohibits the Carrier from acting as it did in this case. This claim is not predicated on any specific provision of the applicable agreement. It is in essence a dispute involving a matter which is not covered by the agreement.

It is the Carriers' position that a dispute involving a matter not covered by the agreement is not a "dispute" within the meaning of Section 3, First, Subsection (i) of the amended Railway Labor Act, nor is it a question over which the National Railroad Adjustment Board has jurisdiction. The Railway Labor Act, in Section 3, First (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." Since the instant case is not a dispute growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions," it is, therefore, not a "dispute" within the meaning of the Railway Labor Act. Furthermore, the National Railroad Adjustment Board is empowered only to decide disputes in accordance with the agreement between the parties; it must follow that the Board is not empowered to decide the instant dispute.

Moreover, to entertain the claim of the employes in this case would require the Board to change the present agreement—no provision of which applies to this case—and impose upon the Carrier certain obligations that were never agreed to, which would have the effect of expanding the agreement to include the matter involved in the instant dispute.

The National Railroad Adjustment Board has repeatedly held that it is without authority to revise, change, modify, rewrite or expand agreements, as is evidenced by the following Third Division Award which is representative of this holding:

**Award No. 4763—(Referee Charles S. Connell)**

> "This Board is without authority to revise or expand the Agreement between the parties, but must construe and apply agreements as the parties enter into them, and it has no authority to change them to avoid inequitable results. Awards 1248, 2612, 2765, 4259. This Agreement does not restrict the assignment of the employes as set forth in this claim, and it will be denied."

See also Fourth Division Award 930.

It is submitted that the Board cannot construe and apply the applicable agreement here involved as the parties entered into it, since the instant dispute is not covered by such agreement or for that matter by any agreement between the parties.

In **Award 6728, Third Division, Referee J. Glenn Donaldson,** the following excerpt is found:

> "As praiseworthy as the parties' intention to resolve other questions on the property may be, the provision would seem to go

beyond the limits of appellate procedure provided for under the Railway Labor Act when used in the manner here attempted, namely, to compel the Carrier to supply gloves gratis or defray the expense thereof. Section 2 (i) of said Act appears to encompass only those subjects listed in the Preamble to the 1945 Agreement and in Item 5 preceding the emphasized words, above. Conceivably 'other questions' might, under some circumstances, include an appealable question but only because of relationship to someone or more of the purposes expressed in the Act, which we find is not the case here. **The Board's creation under the Act was not for the purpose of imposing contract provisions but to construe those negotiated by the parties."** (Emphasis supplied.)

IV. **THE CLAIM OF THE EMPLOYES HAS NOT BEEN PROCESSED IN ACCORDANCE WITH THE INTENT OF THE RAILWAY LABOR ACT.**

Such a claim has not been considered nor decided in special conference between the representatives designated and authorized so to confer, respectively, by the Carrier and by the employes interested in the dispute, nor has it been properly handled on the property in accordance with the spirit and intent of the Railway Labor Act.

Section 2 of the Railway Labor Act provides:

"First: It shall be the duty of all carriers, their officers, agents, and employes to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employes thereof.

"Second: All disputes between a carrier or carriers and its or their employes shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employes thereof interested in the dispute.

This Board's jurisdiction is derived from the following provision of Section 3, First, of the Railway Labor Act:

"(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, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

On this property, by Union election, there is no efficient manner of handling disputes. A grievance may be submitted from any number of sources. A group of employes may approach the Superintendent of the dock with a problem. The Union President or a member of the Union Committee,

acting independently, or the entire Committee, acting in concert, may approach the Superintendent or the Assistant Superintendent. The National Representative of the Union may call the Cleveland office of the Carrier. The Union, in full session, may introduce the matter in collective bargaining sessions or, as in the case of the 1957 labor negotiations, the problem may come up before a mediator or before a Presidential Fact-Finding Board. The various other sources from which a grievance may be introduced to the Carrier are many. The case in question has followed this pattern. There never has been a written grievance involving the Janitor classification filed with the Carrier. A conference set up specifically to discuss this case has never been held. As in all other cases of this nature, uniform procedure has been conveniently disregarded. The chaotic handling of this case, as well as all other grievances, precludes any possibility of conducting a smooth and efficient operation concerning the orderly disposition of such matters. The Carrier has earnestly attempted to rectify this situation by the incorporation into the contract of a workable grievance procedure. This has been a regular demand of the Carrier in the bargaining sessions with the Union. In the 1957 sessions, the Mediator recommended the adoption of this demand. The Emergency Fact-Finding Board, during this same round of negotiations, recommended its acceptance by the Union.

The Board must certainly be cognizant of the varied problems associated with the present method of handling grievances, particularly when reference is made to Article XVI of the contract, which provides:

> "Investigations and disagreements arising under this agreement will be handled between the Management and the Committee representing the employes."

The continued inclusion of this ambiguous and ineffectual provision, as well as the Union's refusal to cooperate in its modification, seemingly is in direct variance with the purpose and intent of Section 2 of the Railway Labor Act. Such section, it would seem, requires that a workable procedure be adopted and the remedies available therein be exhausted before a grievance is properly submitted to the Board.

In support of this proposition the Board's attention is directed to **Award 16694** which held:

> "This record reveals that petitioner at no time had a conference with the chief personnel officer of respondent carrier for the purpose of conferring upon the issue presented. Numerous awards of this Division, the most recent being Awards 16605 and 16606, have held that the parties must confer as is prescribed in the Railway Labor Act, and this Division has remanded such dockets to the parties for handling in accordance therewith. In keeping with previous holdings of the Division, this case is remanded to the parties for a proper conference and handling on the property."

Similarly, in **First Division Award 16354,** the Board said:

> "There is a showing in the record that this dispute was not properly handled on the property, the respondent not having rendered a final decision at the time this docket was prematurely submitted to the Division. Therefore, not having been handled to a conclusion on the property in accordance with Section 3, First (i), of the Railway Labor Act, it is remanded to the parties for such further handling as may be deemed necessary in the premises."

In **First Division Award 15617,** the Board said:

> "Only claims that have been processed to the highest officer of the carrier should come before this Board for determination."

In **First Division Award 16605,** the Board said:

> "It was clearly the Congressional intent that matters be submitted to this Board only when all reasonable means of settlement on the property had been pursued without avail."

The Fourth Division has followed the same course as is indicated by its Awards 474, 650, 688, 757, 826 and 999. In **Fourth Division Award 743,** the claim had not been appealed to the carrier's highest officers of appeal, and the Board said merely:

> "It is apparent from the record that this case has not been handled in the manner required by the Railway Labor Act and for that reason should be dismissed."

**V. UNDER THE RAILWAY LABOR ACT, THE NATIONAL RAILROAD ADJUSTMENT BOARD, FOURTH DIVISION, IS REQUIRED TO GIVE EFFECT TO THE SAID AGREEMENT AND TO DECIDE THE PRESENT DISPUTE IN ACCORDANCE THEREWITH.**

In summary, it is respectfully submitted that the National Railroad Adjustment Board, Fourth Division, is required by the Railway Labor Act to give effect to the said agreement, which constitutes the applicable agreement between this Carrier and District 50, United Mine Workers of America, Local No. 13612, and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, Subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the agreement between the parties to it. As stated previously, the granting of this claim would require the Board to disregard the agreement between the parties and impose upon the Carrier conditions of employment and obligations not agreed to by the parties involved.

On the basis of the foregoing, the Carrier respectfully submits that the Board should either deny on its merits or jurisdictionally dismiss the claim of the employes in this matter.

The Carrier requests strict proof of competent evidence of all facts relied on by the claimants, with the right to test the same by cross examination, the right to produce competent evidence in its own behalf at a proper hearing of this matter, and it also reserves the right to request a record of the same.

An oral hearing is desired.

All data contained herein has been presented to the employes involved or their duly authorized representatives.

(Exhibits not reproduced.)

**OPINION OF BOARD:** This is a claim for restoration of the position of "Janitor" under the contract classification of "All Others" and to open the job to bid by the senior employes of the bargaining unit represented by the Union.

The Carrier and the Union are parties to a currently effective collective bargaining agreement dated June 21, 1956.

The job classification "All Others" is contained in Section 1 of Schedule "A" of the aforesaid agreement. Section 1 sets forth the basic rates of pay and job classifications of those employes engaged in the operation of Carrier's dock facilities during the naviagation season. Section 2 of Schedule "A" applies to those employes engaged in winter repair work or maintenance of the facilities during the winter season.

The issue here is whether the position of Janitor is one coming within the scope of the agreement, or more specifically, whether it is covered either by Section 3 of Article I or Schedule "A".

The aforesaid Section 3 reads as follows:

> **"Section 3.** It is the intent and purpose of the parties that the rules, rates of pay and conditions of employment set forth herein shall apply to employes engaged in the operation and maintenance of the coal and ore dock equipment at the Port of Lorain, Ohio."

It is clear from this language that only those employes who are engaged in the "operation and maintenance of * * * dock equipment" are intended to be covered by the contract. The duties of a janitor have been described as those of a person employed to take charge of rooms or buildings, to see that they are kept clean and in order, to lock and unlock them, and generally to take care of them. (Fagan v. New York, 84 N. Y. 352; Kramer v. Industrial Accident Comm. of State of Calif., 31 Cal. App. 673, 161 p. 278.) Manifestly, a janitor's customary duties cannot be said to include operation and maintenance of dock equipment. We hold, therefore, that the position of Janitor on this property is not covered by Section 3 of Article I of the agreement.

As to coverage of this position under Schedule "A", it is the Union's contention that the Carrier, having permitted the filling of the position by bid and assignment of covered employes for a period of years, may not, without violating the contract, refuse now to continue to offer the job to employes in the bargaining unit and is estopped from changing the method of assignment to the position. In brief, the Union asserts that by custom, usage, and practice the Carrier has included the job of Janitor within the "All Others" category.

We find that the classification "All Others" was included in agreements between the Union and the Carrier for many years prior to 1948, when the Carrier first created the job of Janitor on the property. We further find that the position was not put up for bid until 1954, so that between 1948 and 1954 —a period of six years—the job was filled without resort to the machinery of the contract. It is also a fact that in 1948 when the dock facilities were expanded and additional jobs added, all those jobs, with the exception of the janitor's, were the subject of negotiation between the Union and the Carrier leading to their inclusion in Schedule "A." It is, therefore, highly significant

in determining coverage of the position under Schedule "A", that neither the Union nor the Carrier attempted to negotiate the position into the schedule.

The evidence of record here clearly establishes that the janitor position was not created until 1948; that for six years—1948 until 1954—it was not open for bid; that the position was not the subject of collective bargaining between the parties as to classifications under Schedule "A"; and that a specific classification of "Janitor" is not to be found anywhere in the contract.

This leads to a consideration of the Union's position that past practice of the Carrier is determinative of the issue before us. We cannot agree with this conclusion. The fact that the position had been filled in accordance with certain provisions of the contract and that covered employes were assigned to the job from time to time has no effect upon the express terms and conditions of the contract. It is a recognized and established rule that either party to a valid contract may insist upon its rights thereunder at any time, notwithstanding a practice or custom. The rights and liabilities of the parties are fixed by the terms of the contract and absent vagueness and ambiguity, those terms may not be amended, modified, or rescinded by evidence of custom, usage, or past practice.

This Board is limited to the interpretation of agreements. We are without authority under the Railway Labor Act to write new rules into contracts or to supply what the parties may have neglected to include in the formulation of the agreement.

In carrying out our limited function under the law, we must necessarily be governed by the rules of contract construction. One such rule, universally observed, is that where a series of specific terms are used, followed by general terms, the latter are taken to mean terms similar or comparable to those specifically mentioned. Here the job classifications specifically listed in Section 1 of Schedule "A" are those pertaining to the loading and unloading of boats. Under the rule, the designation "All Others" must mean comparable occupations and to conclude that the occupation of janitor is comparable to any of those occupations specifically listed is manifestly erroneous.

Another established rule of contract construction, which is applicable here, is that where a contract may be susceptible to alternative constructions, one of which would lead to a reasonable or sensible result and the other to an absurd result, the contract should be construed in the light of the former. The facts here show that the labor costs for the janitor's job in one year under the agreement amounted to over $8,000. In view of the facts and evidence of record, it would be absurd to so interpret the agreement as to require the payment of over $8,000 a year for a janitor's services.

We conclude by holding that the position of "Janitor" on this property does not come within the scope of Section 3 of Article I, nor is it covered by the classification "All Others" under Schedule "A" of the agreement.

Claim must, therefore, be denied.

**FINDINGS:** The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier and the employe 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.

The parties to said dispute were given due notice of hearing thereon.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FOURTH DIVISION

ATTEST: Patrick V. Pope
Secretary

Dated at Chicago, Illinois, this 8th day of May, 1958.