Award No. 2032
Docket No. 1983

NATIONAL RAILROAD ADJUSTMENT BOARD

FOURTH DIVISION

The Fourth Division consisted of the regular members and in addition Referee David Dolnick when award was rendered.

PARTIES TO DISPUTE:

RAILROAD YARDMASTERS OF AMERICA

THE ATCHISON, TOPEKA AND SANTA FE RAIROAD COMPANY — COAST LINES —

STATEMENT OF CLAIM: Claim and request of the Railroad Yardmasters of America that—

Yardmaster work at Oakland, California, is being performed by those outside the scope of the Yardmaster class and in violation of the Agreement; and

In consequence thereof, one day at the appropriate Yardmaster rate be allowed for January 1, 1963, and all subsequent days on which there is no Yardmaster on duty at that point.

Claim made on behalf of unassigned Yardmasters C. Everett Smith, Roy H. Long, T. F. Brooks, R. R. Ferguson, A. H. Billingsley, H. R. Brown, V. M. Quarve, and all other yardmasters in the Bay Area as they might be adversely affected, in that seniority order, as their seniority would permit them to work.

EMPLOYES' STATEMENT OF FACTS: At Oakland, California, during the hours 7 A. M., to 3 P. M., during which period there is no Yardmaster on duty, the work of that class or craft continues to be performed by others outside the scope, contrary to and in violation of the Agreement.

On account of the continuing day to day violations of Article I, as indicated by the evidence submitted in the handling of this matter, claim was filed on behalf of those shown above.

POSITION OF EMPLOYES: The record of the handling of this dispute and the position of the employes is evidenced by the exchange of correspondence on the property, reproduced as follows:

Letterhead of

RAILROAD YARDMASTERS OF AMERICA
(AFL-CIO)
"Santa Fe System Local Lodge No. 50

611 Glenwood Avenue
Independence, Missouri
February 26, 1963

Finally, the Carrier would like to refer to Page 10 and remind the Board once more that Section 1-f of Article III requires payment of only wages lost, less amount earned in any other employment in cases of unjust dismissal, and Section 3 of Article IV requires payment of only the rate of his own position, where a regularly assigned yardmaster is required to fulfill a lower rated position. Applying this principle here, the maximum penalty would be loss of wages between the yardmaster's position at Oakand and any earnings as yardman and extra yardmaster. (See Awards 1897 and 1898.)

The instant dispute is without agreement support and should be denied in its entirety.

The several divisions of the Board have said on occasions almost innumerable that they are without authority to extend or modify agreement rules. See, for example, Fourth Division Awards Nos. 270, 271, 568, 596 and 962.

The Board has already interpreted the very rules involved in this case and at this same point—Oakland—in its Award 829. It should not overrule itself. See for example Awards 188, 506, 793, 965, 967, 1041 and 1053.

All evidence and argument included in the Carrier's position have been available to the Railroad Yardmasters of America. The Carrier, not having had access to the Organization's ex parte submission and being without knowledge of the contentions or material which the employes may set forth therein, must reserve the right to supplement its presentation with such additional facts, evidence or argument as in its judgment may be appropriate.

Oral hearing is desired.

(Exhibits not reproduced).

OPINION OF BOARD: It is first necessary to dispose of alleged procedural defects raised by the Carrier.

Carrier contends that the "claim is based on the abolishment of the first trick yardmaster's assignment, Job 397, at Oakland at close of shift August 8, 1958." That is not the case. This claim is based upon the allegation that employes not covered in the Yardmasters' Agreement are performing work reserved in the Scope Rule of that Agreement to the Yardmaster class. Such a violation is a continuing one. A claim may be filed under Section (d) of Article V of the National Agreement at any time before the violation is corrected. The previous withdrawal on May 15, 1961 of the claim of Yardmaster Billingsley, based upon the abolishment of Job 397, is not a bar to the consideration of the current claim.

Carrier also contends that the claim should be dismissed because it is made in behalf of named employes "and all other yardmasters in the Bay Area as they might be adversely effected in that seniority order, as their seniority would permit them to work." These claimants, Carrier argues, are not identified as required in the time limit rule.

We do not agree. It is a well established principle of all the Divisions of the Board that such a claim is valid when the identity of the Claimants is readily and easily ascertainable. The records of identity are in the possession of the Carrier. It is only a matter of detail to check the seniority records to ascertain the identity of the involved employes.

There is no merit to the procedural issues raised by the Carrier. The claim should be resolved on the merits.

We have consistently held that, in the absence of contract restrictions, Carrier may abolish a position for whatever reason. But we have also held that Carrier may not assign all or a substantial part of the work previously performed by employes of the abolished position to other employes not covered by the applicable Agreement.

The primary duties of a Yardmaster are to supervise the switching of cars in the freight yard and to issue orders to all yard employes. While the Scope Rule of the Agreement does not define or describe the work of Yardmaster employes, Carrier's Operating Department Rule 905 does. It says:

"Yardmasters

905. Yardmasters are under the direction of trainmaster and agent. They are responsible for the efficient and economical operation of yards and the prompt movement of cars and trains. They have supervision over all trains, engines and employes in yards."

The record shows that the clerk on duty during the first trick exercises supervision of the trains, engines and employes at the Oakland Yard. He gives the crew a list of cars to switch; he tells them how many and which ones to include in making up trains; he arranges train clearance; he directs which cars to spot and which are for storage; he advises the crew which cars are to be delivered and received at various industries. These are detailed examples in the record of such orders and such supervision by clerks for January, February, March and April, 1963, as well as for September, October and November 1963.

Carrier argues that the furnishing of switch lists to yard crews "do not constitute 'instructions' or 'supervision' over the road crews, and merely are informational in nature". The Carrier also argues that the clerk does not tell the conductor how the work should be done. Neither does a Yardmaster always tell a conductor how to switch the cars on the list. He may do so, but he seldom does.

Nowhere in the record does Carrier show who, if any one, supervises the yardmen. While it is true that Carrier is not obliged to maintain a Yardmaster and need have no supervisor on duty, it is apparent from all of the evidence in the record that a good deal of work is being performed by yardmen during the first trick. Is it not feasible to believe that they are supervised? The clerk exercises a substantial amount of direction and supervision to justify a finding in favor the Claimants. He may not perform all of the duties of a Yardmaster, but he performs a substantial part of them.

What constitutes a "substantial" part depends upon the facts in each particular case. It is conclusive that the clerk on the first trick at Oakland Yard does a considerable and large part of the work normally done by a Yardmaster. The work in dispute is neither isolated nor sporadic. Carrier may not permit the clerk to perform such work in violation of the Agreement. If the Carrier is permitted to do this, the Agreement would, for all intents and purposes, become a nullity.

There is some variance in the Awards of this Division on the subject of damages in the event of a sustaining Award. We have carefully examined all available Awards on the subject, including the Interpretation to Awards 1835

and 1836, and we have weighed the logic and considerations of each of them. It is our considered judgment that the sounder Awards are those which hold that punitive damages may not be assessed for a technical violation of the contract unless the Agreement contains a provision for liquidated damages. Awards 1897 and 1898, as well as other Awards of this and other Divisions of the Board, are predicated upon a sounder basis than the Interpretation to Awards 1835 and 1836. In a recent decision of the United States Circuit Court of Appeals (338 F. 2d 407), in the case of The Brotherhood of Railroad Trainmen vs. The Denver and Rio Grande Western Railroad Company, the Court, in part, said:

> " . . . that one injured by breach of an employment contract is limited to the amount he would have earned under the contract less such sums as he in fact earned."

Accordingly, it is the decision in this case that the claim should be sustained and that Claimants shall be compensated on the basis of the difference between what they would have earned as Yardmasters at Oakland, California Yard from January 1, 1963, until the violation is remedied less what such employes actually earned as employes of this Carrier.

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

The carrier and the 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.

The parties to said dispute waived right of appearance at hearing thereon.

The Carrier violated the Agreement.

AWARD

Claim sustained in accordance with this Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FOURTH DIVISION

ATTEST: Patrick V. Pope
Secretary

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