Award No. 2189
Docket No. 2160

NATIONAL RAILROAD ADJUSTMENT BOARD

FOURTH DIVISION

Referee Jacob Seidenberg

ARTIES TO DISPUTE:

RAILROAD YARDMASTERS OF AMERICA

SOO LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim and request of the Railroad Yardmasters f America that—Yardmaster Joseph P. See be allowed one day's pay at the ppropriate Yardmaster rate for February 16, 1965 and each day thereafter ntil the condition complained of is corrected on account of Yardmaster work eing performed by others outside the scope of the yardmaster Agreement.

EMPLOYES' STATEMENT OF FACTS: The position of the Employes in ıe handling of this dispute on the property is reproduced herein and attached s Exhibits A, 2/5/65; B, 2/8/65; C, 4/8/65; D, 4/21/65; E, 5/11/65; F, 5/17/65; , 6/1/65; H, 6/9/65; I, 6/9/65; J, 6/25/65; K, 7/21/65; L, 11/26/65; M, /20/65; N, 12/15/65; O, 1/24/66.

The record herein discloses that when the Carrier abolished the Yardmaster osition at Chippewa Falls on February 15, 1965, it removed the last Yardıaster employe as such at this location. The remaining Yardmaster work must, f necessity, be performed by others outside the scope of the Yardmasters' ıgreement. That Carrier had some realization of this is evidenced in the tenor f the notices issued at the time of the job abolishment, reproduced in our ixhibits "A" and "B".

In Exhibit "A", Superintendent Hart stated to Yardmaster Tutle that Carier's action was dictated by a change in train makeup "resulting in more hrough trains, requiring less makeup and breakup at C. F. Yard." In Exhibit B", Superintendent's Bulletin directs that effective with the abolishment of the 'ardmaster position "all correspondence in connection with Chippewa Falls nd C. F. Yard should be addressed to Agent H. Rassmussen at Chippewa 'alls." We see here an admission that Yardmaster work remains to be perormed and we also see that matters dealing with C. F. Yard are to be referred o the Agent at Chippewa Falls. When the first assignment was abolished the 'ardmaster duties of that position were allegedly relegated to the remaining 'ardmaster position then in existence. With the abolishment of this last assignıent the remaining Yardmaster work, no longer capable of being assigned to mployes of the Yardmaster craft, is being performed by the agent, clerks and ıthers, outside the scope of the Yardmasters' Agreement as specifically shown n the ten day check made at C. F. Yard and reproduced herein as our Exhibit 'M". This check conclusively reveals a pattern of the Agent and Clerk issuing ırders and instructing the road and yard crews, aided and assisted at times ›y the operator on duty. The check shows that the performance of these duties s not minimal or sporadic but that it is of a day to day and continuing nature. t is patently clear from the evidence presented in this Exhibit that considerable switching is still being performed and it is also definitely shown that the work

program is being planned, assigned and supervised by employees outside the scope, and in violation of the Yardmasters' Agreement.

A situation analgous to the one herein involved was the subject of Fourth Division Award 1343. Carrier had abolished a Yardmaster position in 1954 and assigned the remaining duties of the position to the General Yardmaster, permissible under the controlling Agreement. However, when the remaining position was abolished in 1957 the Employes filed claim charging that Yardmaster duties remaining were subsequently performed by other employes outside the scope and purview of the Yardmasters' Agreement. As in the instant dispute, Carrier alleged that a decrease in the size of the operation, made the retention of the Yardmaster position unnecessary. In addition, it admitted that Yardmaster work was performed by various officers and clerks and other classes of employes. Although the Carrier does not admit that other employes are performing duties formerly performed by the Yardmaster at C.F. Yard, neither does it deny the Employes' charge that this is being done since the abolishment of the last Yardmaster assignment at Chippewa Falls. See the Organization's letters reproduced as Exhibits "C", "E", "F", "H", "I", "L" and "M'.

Carrier asserts that the Yardmaster position is no longer necessary as the need for same has ceased to exist. We assert that this is so only because employes outside the scope are now performing the duties formerly performed by the incumbent of the abolished Yardmaster position. It is clear that the Carrier retains the right to establish, maintain and abolish Yardmaster positions. The question to be resolved is whether the Carrier has the right to have Yardmaster duties performed by other employes. We say not. We quote the following from the Opinion of the Board in Award 1343.

> "The Carrier admits that yardmaster work was performed by 'various officers and clerks and other classes of employes' (ltr. Sept. 4, 1957. Supt. to Gen'l Chrmn.). And in its Submission to this Board, Carrier says, 'The record shows that duties of this nature have been performed by others for many years'. Apparently these statements purport to show that yardmasters do not enjoy an exclusive right to yardmaster work because the custom and practice on this property was to permit others to perform that work.
>
> We do not agree with this theory. Here there is a contract between Carrier and the representative of the yardmasters. It contains a Scope Rule which does not define the duties to be performed by yardmasters but must be construed to cover work belonging to that craft. To hold otherwise would render the whole agreement nugatory. As was said in Award No. 757 of the Third Division:
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> > 'It is well settled by many decisions of this and the First Division of this Board and predecessor Boards that as an abstract principle a carrier may not let out to others the performance of work of a type embraced within one of its collective agreements with its employes. See awards of this Division, 180, 323, 521 and 615; of the First Division, 351 and 1237. This conclusion is reached not because of anything stated in the schedule but as a basic legal principle that the contract with the employes covers all the work of the kind involved, except such as may be specifically excepted; ordinarily such exception appears in the Scope Rule, but the decisions likewise recognize that there may be other exceptions, very definite proof of which, however, is necessary to establish their status as a limitation upon the agreement.

Mere practice alone is not sufficient, for as often held, repeated violations of a contract do not modify it.'

(See also Fourth Division Award 445).

'Here the Agreement specifically permits the assignment of yardmaster duties to the General Yardmaster under Rule 1(c). That and section 1(d) are the only exceptions to the rule, and under elementary principles of contract construction no other or further exceptions may be implied. Consequently, Petitioner's cause of action did not arise until the position of General Yardmaster was abolished on July 1, 1957. Its allegation that since that time others are performing yardmaster duties is supported by Carrier's admissions of record. In the face of such admissions, no further proof need be adduced.'

'We find and hold that the Scope Rule of the Agreement in evidence has been violated by Carrier's action in assigning work covered by that Agreement to others not subject to the rule.' "

We also draw the attention of the Board to Rule 12 of May 1, 1945 Agreement between the parties which lists the locations and rates of pay of the Yardmaster assignments including C. F. Yard. Rule 17 provides that this Agreement shall continue in effect until changed in accordance with the procedure prescribed by the Railway Labor Act as amended. It has been often held that when positions are negotiated into an Agreement they may not be unilaterally eliminated by the Carrier if a substantial portion of the work remains. This principle was pioneered by Third Division Award 1296 in 1940 and has been upheld in many subsequent awards. hTe board found in Award 1296:

"When an agreement lists the positions together with the rates of pay attached to these positions, and then provides that these rates of pay shall continue until changed by certain procedure, we are of the opinion that it is as much of a violation of the agreement to abolish the position when the work remains and assign the work to someone else without following the specified procedure as it would be to change the rate of pay in an unauthorized manner."

Awards of more recent vintage upholding this principle are Third Division Awards 11368 and 13559. We quote in part from the Opinion in Award 13559, adopted in 1965:

"The Carrier apparently proceeded on the property on the theory that they had an absolute right to abolish these positions. Such is not the case. This right to abolish positions negotiated into the Agreement is clearly conditional upon the duties of the position being abolished. See Award 5944 (Messmore) cited by both the Carrier and Claimant."

Upon examining Award 6944 we find the following opinion which is relevant:

"The carrier may in the interests of efficiency and economy of its operations abolish positions and rearrange the work thereof unless it has limited its right to do so by the provisions of the collective agreement. However, when doing so the work of the positions abolished must be assigned to and performed by the class of employes entitled thereto under the agreement."

The employes have shown that the Carrier eliminated the last Yardmaster position at Chippewa Falls. The record reveals that employes other than yardmasters are performing the duties of the abolished Yardmaster position. The ten day check submitted by the Employes amply reveals this as fact. We have cited precedent awards supporting our position on the contractural facets of this dispute. We reiterate our position, that the terms of the controlling agreement are being continuously violated by the Carrier's violative action.

All data used in support of this claim has been presented to the management and made a part of the particular question in dispute.

Claim must be sustained.

CARRIER'S STATEMENT OF FACTS: Chippewa Falls, Wisconsin, is a relatively small city (1960 population approximately 13,000) located on Carrier's main line between Chicago and the Twin Cities of Minneapolis and St. Paul. It is also the junction point for a branch line running to Eau Claire, Wisconsin.

The present station forces consist of a Supervisory Agent, around-the-clock telegraphers, around-the-clock yard clerks and a general clerk.

Three eastbound through freights (Nos. 24, 26 and 30), two through freights westbound (Nos. 25 and 29), and one westbound way-freight (No. 23) pass through Chippewa Falls daily. A switch run over the Eau Claire branch is operated out of Chippewa Falls. Two yard switch engine assignments (6:30 a.m. and 8:00 p.m.) serve Chippewa Falls.

The day yardmaster's position was first established May 1, 1925, and the night position followed on March 16, 1926. Effective October 1, 1931, the night position was abolished and was not re-established until November 21, 1948. Declining local switching and changed train operations led to the abolishment of the night yardmaster's position (then held by Claimant Joseph P. See) on November 17, 1963. Trains that formerly required considerable switching were made "hot shots" by eliminating such switching. Trains 25 and 30 now merely made a straight setout and pickup of a block of cars and changed crews and cabooses. At that time Carrier considered also abolishing the last yardmaster's assignment as well but, in the knowledge that the incumbent of that position, Archie Tuttle, was 68 years old and contemplating retirement, retained the day yardmaster's position. Yardmaster Tuttle retired February 13, 1965, and the day yardmaster's position was abolished effective February 15, 1965. It was this action that precipitated the instant dispute.

There is in evidence the current rules and working conditions agreement between those employees represented by the Railroad Yardmasters of America and Carrier's predecessor, the Minneapolis, St. Paul & Sault Ste. Marie Railroad Company. The current scope rule adopted in the May 1, 1945, schedule revision reads as follows:

"SCOPE

Rule 1(a). The term 'yardmaster' shall apply to the positions of general yardmasters (except at Shoreham, Superior, and Schiller Park), assistant general yardmasters, yardmasters, assistant yardmasters and relief yardmasters, but not to agents-yardmasters or to footboard-yardmasters.

(b). This Agrement imposes no restrictions upon the Company as

to the duties which may be required of, or performed by the General Yardmasters excepted in rule (a) above.

(c). This Agreement shall not interfere in any manner with the right of the Company to establish or abolish yardmaster positions at its discretion, nor shall this Agreement be interpreted to require the Company to establish or abolish yardmaster positions when such action is not necessary in the judgment of the Company."

The previous rule had read as follows:

"ARTICLE 1—Scope

"The term 'yardmaster' as herein used shall be understood to include general yardmaster, assistant general yardmaster, yardmaster, assistant yardmaster, except general yardmasters referred to in Ex Parte 72, Interstate Commerce Commission.

One general yardmaster at each of the following points to be considered officials and without the provisions of this agreement—Shoreham, Superior, Schiller Park."

Events leading to this change are as follows:

In 1943 the Railroad Yardmasters of America had instituted a national movement seeking uniform wages, rules and working conditions. Under date of September 28, 1943, the General Chairman served his Section 6 notice on the Carrier (Exhibit 1) requesting, among other things, a new scope rule (Exhibit 2) reading as follows:

"Scope

The provisions of this agreement govern the rates of pay and working conditions of yardmasters.

The term 'Yardmaster' as herein used includes yardmasters of all grades, including relief and Extra Yardmasters.

It is mutually agreed and understood that the provision of this agreement cover and apply to all yardmaster work and that all yardmaster work will be performed by employees under the title of yardmaster and in accordance with the rates of pay and rules governing working conditions as set forth in this agreement." (Carrier's emphasis).

This was a period of war and government controls. After progression of these issues on a concerted national basis, the dispute was remanded to the parties for handling at the local level. Settlement on this property was had through a general wage increase effective December 27, 1943.

On May 10, 1944, the Organization renewed its demand for rules revisions. The present scope rule resulted from the bargaining that ensued.
(Exhibits not reproduced)

OPINION OF BOARD: The dispute arises from the fact that the Carrier discontinued the last Yardmaster's position at Chippewa Falls, effective February 15, 1965, and the work continued to be performed by the remaining work force consisting of a Supervisory Agent, around-the-clock-telegraphers, around-the-clock-clerks and a General Clerk. Chippewa Falls daily serviced the follow-

ing trains: three through east bound freights and two west bound freights; one west bound way freight as well as a local freight for the Eau Clair Branch which originated at Chippewa Falls. The Carrier maintains two switch engine assignments at this location—one originating at 6:30 A.M. and ther other at 8:00 P. M.

The Organization predicates its position on the theory that, while the Carrier may, at its discretion and judgment, discontinue a Yardmaster assignment, it may not, however, without running the peril of violating the scope article of the existing agreement, discontinue a yardmaster position and then distribute the yardmaster work to other employes who are not encompassed within the scope of the yardmaster agreement. The Organization contends that this is exactly what the Carrier has done in the instant case. It specifically points to a 10 day study made by the Claimant between the hours of 6:30 A.M.-2:30 P.M. which discloses a pattern of having the Agent and Clerk issuing orders to the road and yard crews assisted by the operator on duty. It states, for example, that the study showed that the yard clerk instructed crews to block empties, spot loads, make up trains, how to block and switch trains and on which tracks to do so. The study further showed that the operator ordered, called and made certain that train and engine crews were present for outbound trains. All this work was formerly done by the Yardmaster and the Carrier has nowhere denied this fact. The Organization stresses that the work now performed by the non-yardmaster employes was of a regular and continuing nature, and it was not minimal or sporadic. The check further shows that there was considerable switching work being performed, which work was planned, assigned and supervised by the employes outside the scope of the yardmasters' agreement. The work now being performed by these non-yardmaster employes was substantial in character, and it was work which had been performed for 40 years under the supervision by a Yardmaster. The Organization states that it is a reasonable assumption that when this much work is being done that somebody has to supervise its performance. The Organization points out that the very notice abolishing the yardmaster position in issue containde a notice to all parties in interest to direct their correspondence pertaining to Chippewa Falls Yard to the Supervisory Agent, which is direct proof that some of the Yardmaster's duties were being assumed and taken over by non-yardmaster employes.

The Organization contends that the principal part of the Carrier's argument is irrelevant because what is in issue, is not the Carrier's right to discontinue a yardmaster assignment at its discretion, but rather, its right to discontinue a yardmaster's job and then distribute his existing duties to employes outside the scope of the yardmasters' agreement. If the Carrier may properly do that, then it has reduced the Agreement to a nullity.

The Carrier, on the other hand, maintains that the claim is without merit because the current agreement, as distinguished from prior agreements, gives it the unchallenged right to establish, alter, or abolish yardmasters' positions at its decretion, dictated solely by its assessment of the advantages or benefits to be derived from having such supervision present in light of the volume of traffic being handled, the yard efficiency, and general economic conditions. It refers to the specific provisions of the scope article of the Yardmasters' Agreement which states in part:

> "1(c) This Agreement shall not interfere in any manner with the right of the Company to establish or abolish yardmaster positions at its discretion, nor shall this Agreement be interpreted to require the Company to establish or abolish Yardmaster positions when such action is no necessary in the judgment of the Company."

The Carrier states that local switching and changed train operations at Chippewa Falls led to the abolishment of the night yardmaster position in November 1963. At that time the Carrier also considered abolishing the last yardmaster assignment, but retained the position because the incumbent was 68 years old and contemplating retirement. When in fact the incumbent did retire on February 13, 1965, the Carrier two days later, February 15, 1965, abolished the post.

The Carrier points out that the Board has consistently recognized that the primary function of a Yardmaster is supervisory, and it is also the exclusive prerogative of Management to decide where, when, and whether the supervisory functions supplied by Yardmasters are required. Management is free to exercise reasonable discretion and authority in determining the needs of service.

The Carrier maintains that the 10 day study is a self serving assertion by the Claimant. Even so the document shows that the work described therein is not work exclusively belonging to yardmasters. There is no evidence therein that anyone is performing supervisory work at the Yard. Since there is only yard engine on duty at each shift, the engine foreman lines up his own work but exercises no supervision or coordination over the other crews or employes. All that the study reveals is that the engine foreman was getting information as to the work which had to be performed. It was the duty and responsibility of the engine foreman to line up the work and integrate any special work that had to be done in compliance with these special requests, while performing his routine work. If a yardmaster position was established there still would be the need to get messages from the dispatcher concerning the movement of trains or requests from an agent to furnish empties to certain industries. The Carrier notes that the 10 day study only covers the tour of the 6:30 A.M. switch engine. There is also a switch engine on the 8:00 P.M. tour. Similar work must be done by the 8:00 P.M. switch engine, and by a parity of reasoning, the Organization should be insisting that a Yardmaster position be established for this night shift.

The Carrier concludes by contending that the degree of supervision that it wishes to have at a given yard is a matter of which it has exclusive discretion and there is no showing that the several employes at the Yard were exercising any supervisory functions over the yard and road crews there employed.

When the Board has reviewed and analyzed the multitudinous awards presented to it by the parties, it is singularly aware that the problem inherent in the instant claim is one of long standing and that the Board has gone both ways on the issue. What this Board has synthesized from its study of the record and relevant precedents is that the parties have generally agreed that the scope rules of the Yardmasters' Agreement has exclusively vested in members of the Yardmaster craft, and in no other craft, the right to perform the work that exclusively belongs to Yardmasters, even though there may not be a precise and detailed description in the Agreement as to what constitutes yardmaster work or duties. This principle is not vitiated even though the very same scope rule also contains a provision giving the Carrier the unequivocal right to abolish, discontinue or establish yardmaster positions.

Where the parties do disagree is upon the determination as to what sort of work or functions may be exclusively ascribed to the craft or class of yardmaster and may not be performed by another class or craft of employes. Disputes devolve upon the determination of whether such duties, either singly or collectively, as giving instructions or messages to engine foremen or footboard yardmasters, furnishing switching lists to road and yard crews, calling or marking up crews, handling complaints from shippers, are duties or functions which exclusively belong to the yardmaster craft or may also be

performed by other classes or crafts. On the other hand, there is general agreement that a Yardmaster's principal duties, and the duties which exclusively belong to the Yardmaster craft, are the supervision of road and yard employes, within the confines of yard limits, when these employes are engaged in the making up, breaking up and handling of trains and performing switching duties. Obviously, the resolution of the present case, as other cases in the past, hinges upon the application of the aforementioned principles to the specific facts of the instant case.

When the Board applies the established criteria to the case at hand, it is forced to conclude the evidence of record principally in the form of the 10 day study, (the facts therein being basically uncontradicted or refuted by the Carrier—only the interpretation drawn therefrom being challenged) supports the position advanced by the Organization. In the first place it is not contradicted in the record that the duties set forth in the study have been performed by yardmasters for the past 40 years at this Yard. Secondly, there is no showing in the record that there has been a sudden appreciable diminution in these duties. The Carrier states that it contemplated abolishing the yardmaster position at this Yard in 1963 but took no action until 1965 in order to provide employment for the then incumbent who was close to retirement. This fact not only indicates that the Carrier was compassionate but that there were also yardmaster duties to be performed because it is unlikely that the Carrier would have maintained a position in existence for two years if there was no work to be performed.

But the most telling evidence in favor of the Organization's position is that the 10 day study reveals that such non-yardmaster employes as clerks and operators performed the following duties: clerks directing that certain trains be placed on certain tracks; making up trains on certain tracks; instructing crews to spot cars for unloading on certain tracks; yarding trains; instructing crews how to switch certain trains and what cars; directing that empties be placed and removed from certain locations; ordering cabooses to rip track for washing and cleaning purposes; switching the rip track and spotting cars on the team track. Operators marked up the crew board and ordered and called crews to work.

The Board must hold that it is a reasonable assumption that when clerks and operators were instructing and directing road and yard crews to perform the above-mentioned duties they also are supervising these crews to insure that these functions are properly executed, absent the presence of a yardmaster. The nature of these duties demanded that the clerks and operators be more than a conduit for relaying or transmitting instructions. Railroad operations are not as cut and dried as the routine operation of a production line in a factory. In the course of railroad operations variable and unusual factors appear requiring a supervisor to make judgments and reach decisions to insure that the rendered instructions are carried out in the proper manner. The above mentioned work for many years had been supervised by a yardmaster, and the record now clearly indicates that the same supervisory work is now being divided up and parcelled out among several classes or crafts of employes not within the scope of the Yardmasters' Agreement. On the record before it, the Board had no recourse but to find that work existed which was within the purview of the Yardmasters' Agreement, and said work was being transferred to, and performed by, employes not encompassed by the Yardmasters' Agreement, to the detriment of the Claimant's contractual rights.

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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FOURTH DIVISION

ATTEST: Muriel L. Humfreville
Secretary

Dated at Chicago, Illinois this 16th day of May, 1967.

CARRIER MEMBERS' DISSENT TO THE FOLLOWING AWARDS:

Award No. 2189, Docket No. 2160—RYA v. Soo Line

Award No. 2196, Docket No. 2175—RPIU v. NP

"Carrier Members dissent."

CARRIER MEMBERS

C. A. Conway
A. H. Deane
B. G. Upton

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.