Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 3763
Docket Number 3749

Referee Paul C. Carter

PARTIES TO DISPUTE: Railroad Yardmasters of America

Norfolk and Western Railway Company

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

Please allow me (Robert W. Kahler) one day at Second Trick Yardmaster rate account Road Foreman of Engines, D. E. Wilson performing yardmaster work at Conneaut Ohio yard, on Tuesday, February 13, 1979.

OPINION OF BOARD: The record shows that the regular 2:30 p.m. to 10:30 p.m. yardmaster assignment at Carrier's Conneaut, Ohio, yard was abolished on December 27, 1974. The first shift yardmaster assignment had previously been abolished on May 10, 1972.

There seems to be no dispute between the parties as to the work performed on February 13, 1979, the date of the alleged violation. In its submission to the Board the Carrier states:

> "There is no dispute as to the facts on which this claim is based. On the claim date, February 13, 1979, Road Foreman of Engines D. E. Wilson, a non-agreement supervisor, did instruct two Lake Erie 'B' District Road crews as to the switching and classification of cars, yarding of trains, disposition of locomotives, switching of various industries, and placement of cars on the repair track in and about the Conneaut, OH yard. He also provided supervisory oversight of clerical forces in their handling of waybills and switch lists, routing of cars, and calling of road train crews and of car department forces in their performance of duties with respect to outbound road trains."

The Carrier goes on to state that since the abolishment of the second shift yardmaster assignment on December 17, 1974, the Road Foreman of Engines and other non-agreement supervisors have routinely directed the activities of road trains in Conneaut yard by engaging in activities of the type complained of here, although when business required an extra yardmaster has been called out sporadically.

In the initial denial by the Trainmaster he stated: "This work has historically been done by the Division Road Foreman of Engines and/or Trainmaster." We do not find where the Trainmaster's statement was refuted by probative evidence in the on-property handling. In the appeal of the claim on the property the Carrier continued to maintain that the work complained of had traditionally been done by the Road Foreman of Engines and/or the Trainmaster. Also, in the on-property handling it was agreed that the crews instructed by the Road Foreman of Engines were road crews. No yard crews were assigned at the location involved.

The Organization relies upon the National Agreement dated September 21, 1978, effective October 15, 1978, which reads:

> "IT IS HEREBY AGREED:
> ARTICLE 1 - SCOPE AND EMPLOYEES AFFECTED
>
> Existing scope rules shall be amended by the addition of the following:
>
> The duties and responsibilities of a yardmaster include:
>
> "(a) Supervision over employees directly engaged in the switching, blocking, classifying and handling of cars and trains and duties directly incidental thereto that are required of the yardmaster in a territory as designated by the Carrier.
>
> "(b) Such other duties as assigned by the Carrier."

The Carrier maintains that the Scope Rule effective October 15, 1978, cannot be interpreted to reserve to yardmasters work which they had no exclusive right to perform before the effective date of that agreement.

The Board's attention has been called to letter agreement dated September 21, 1978, concerning the application of the National Agreement dated the same date and effective October 15, 1978. The letter agreement of September 21, 1978, reads in part:

> "1. The purpose of this Agreement is to enumerate the principal duties customarily and traditionally performed by the craft of yardmasters.

"2. In the application of this Agreement it is not intended to eliminate any existing rights of the respective parties under the applicable collective agreement."

The second paragraph of the letter of understanding clearly preserves the Carrier's right to handle the work in the same manner as theretofore without violating the Agreement.

In the opinion of the Board, the issue is whether the Organization previously had the right by custom, practice and tradition to perform the work they are now claiming to the exclusion of others throughout the Carrier's system prior to the adoption of the National Agreement effective October 15, 1978. Carrier has maintained throughout the handling of the instant dispute that road crews were not intended to be covered by the language of the National Scope Rule effective October 15, 1978, but it was only intended to cover those duties required of yard crews, who are "employees directly engaged in the switching, blocking, classifying and handling of cars and trains...that are required of the yardmaster in a territory as designated by the Carrier." We agree with the Carrier in this respect. See Award 2300 and Award 2 of Public Law Board 1148.

After a careful study of the entire record, and the thorough arguments presented in behalf of each party, the Board is of the considered opinion that the Organization has failed to prove (1) that the work complained of is of the type intended to be covered by the National Scope rule effective October 15, 1978, or (2) that employes covered by the Agreement had the exclusive right to perform work of the type complained of prior to the adoption of the new National Scope Rule, and that a substantial portion of such exclusive work has been reassigned to others. (Award 3482).

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.

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

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:

Executive Secretary
National Railroad Adjustment Board

By: Nancy J. Dever
Assistant Executive Secretary

Dated at Chicago, Illinois, this 15th day of July 1980

DISSENT OF LABOR MEMBERS TO AWARD NO. 3763

DOCKET NO. 3749 - RYA v N&W

FOURTH DIVISION

It has been said many time, "Dissents do not change awards" and it is true, they do not. The Labor Member representing the Yardmasters Organization does not make a practice of writing dissents and generally take the good with the bad. We have not filed a dissent at this Division since the adoption of Award 2887 (Weston) in May of 1973. At that time we wrote a Dissent because the Award was so obviously erroneous as to be a disgrace to the profession of the Author. We dissent now, to Award No. 3763 for the obvious same reasons.

The issue that was presented in this case involved an interpretation of the National Mediation Agreement dated September 21, 1978, effective October 15, 1978 and reading as follows:

> "IT IS HEREBY AGREED:
> ARTICLE 1 - SCOPE AND EMPLOYEES AFFECTED
> Existing scope rules shall be amended by the addition of the following:
>
> The duties and responsibilities of a yardmaster include:
>
> "(a) Supervision over employees directly engaged in the switching, blocking, classifying and handling of cars and trains and duties directly incidental thereto that are required of the yardmaster in a territory as designated by the Carrier.
>
> "(b) Such other duties as assigned by the Carrier."

The Carrier in this dispute readily admitted that they had indeed violated the terms of this Agreement and in their Submission to the Board Carrier states:

> "There is no dispute as to the facts on which this claim is based. On the claim date, February 13, 1979, Road Foreman of Engines, D. E. Wilson, a non-agreement supervisor, did instruct two Lake Erie 'B' District Road crews as to the switching and classification of cars, yarding of trains, disposition of locomotives, switching of various industries and placement of cars on the repair track in and about the

"Conneaut, OH yard. He also provided supervisory oversight of clerical forces in their handling of waybills and switch lists, routing of cars, and calling of road train crews and of car department forces in their performance of duties with respect to outbound road trains."

The Award states:

"In the initial denial by the Trainmaster he stated: 'This work has historically been done by the Division Road Foreman of Engines and/or Trainmaster'. We do not find where the Trainmaster's statement was refuted by probative evidence in the on-property handling. . ."

In the first place, a matter of record, the position involved in the claim was not abolished 'til 1974 and prior to that time it was performed by a yardmaster so there is no historically performance as is intended by the Trainmaster's statement. Secondly, the claim that was brought before the Division was based on a violation of the 1978 Agreement and was progressed on the property within four months of the signing of the 1978 Agreement so "historically" has no meaning whatever beyond that agreement time.

The Award continues:

". . .In the appeal of the claim on the property the Carrier continued to maintain that the work complained of had traditionally been done by the Road Foreman of Engines and/or the Trainmaster. Also, in the on-property handling it was agreed that the crews instructed by the Road Foreman of Engines were road crews. No yard crews were assigned at the location involved."

In his letter to Mr. Neikirk dated June 18, 1979 which is also the "on property handling" the General Chairman states:

"The Carrier each day calls a "'Dean Turn' which is a road crew that is allegedly going to perform road service on the 'B' District, East of Conneaut but works 12 hours in Conneaut Yard under the direction of either the Road Foreman of Engines and/or the Trainmaster as Mr. Watters states. . ."

In his letter of October 23, 1979, also an "on-property handling" the General Chairman also wrote to Mr. Neikirk stating:

"I reminded you in the handling on the property that the Carrier has found a loop-hole in the UTU Agreement where a Road Crew can be used for switching cars within yard limits but under the Scope Rule effective October 15, 1978 that work is delegated to the Yardmaster."

And while these arguments were presented to the Carrier in the "on-property handling" Carrier chose not to make replies, leaving these statements uncontested as they are today. Therefore, the only thing that was agreed by the parties is that Carrier was using a Road Switcher to enter the yard at Conneaut and perform yard switching for 12 hours each day while this crew was involved in the switching, blocking, classifying and handling of cars and trains.

The Referee then quotes from the letter agreement dated the same day as was the Scope Rule Agreement and particular reference to Item #2 and we quote:

"2. . .In the application of this Agreement it is not intended to eliminate any existing rights of the respective parties under the applicable collective agreement."

The interpretation of that Item #2, according to the Referee, and again quoting from the Award, is this:

"The second paragraph of the letter of understanding clearly preserves the Carrier's right to handle the work in the same manner as theretofore without violating the Agreement."

As that sentence and interpretation sounded very familiar we went back to the Carrier Members Brief and found on page 5 the words:

"The second paragraph of that understanding preserves the Carriers right to handle the work in the same manner as theretofore, without violating the National Rule."

If, as the Award directs, a carrier may at all times handle the work in the same manner as theretofore, the words of the 1978 Agreement "Existing scope rules shall be amended by the addition of the following." has no meaning whatever. Secondly, that part of the amended scope rule granting that yardmasters shall have supervision over employees directly engaged in the switching, blocking,

classifying and handling of cars and trains also has no meaning simply because a carrier may say that they have performed this work through other supervision prior to the signing of the 1978 Agreement. Thirdly, if this Award were to be found to be sound and followed by other neutrals, any carrier in the future may simply say that any contested work whether performed by a clerk, operator, dispatcher, trainmaster or others cannot now be protested if the carrier states that such work was performed by any others prior to the 1978 Agreement which granted the performance of the work to yardmasters.

And, if it ended there, it would be catastrophic enough. But to say that a carrier may continue "to handle the work in the same manner as therefore" means any work, including the supervision over employees engaged in the make up and break up of trains and general yard switching which has been held by practically every referee when the issue was before them as work belonging to yardmasters. Thus, the sentence as taken from the Carrier Members Brief, in addition to wiping out the 1978 Agreement, holding that the scope rule is not to be amended as agreed, further intends to wipe out all of the awards dealing with the make up and break up of trains since Award No. 86 and all of the following awards holding to the same position. That is not merely catastrophic, it is plain unintelligent and attempts to overrule the precedent in Awards 86 (Messmore), 87 (Messmore), 88 (Messmore), 89 (Messmore), 100 (Messmore), 102 (Messmore), 184 (Wolfe), 186 (Wolfe), 189 (Wolfe), 190 (Wolfe), 272 (Gallagher), 420(Jackson), 445 (Chappel), 559 (Munroe), 568 (Munroe), 716 (Begley), 797 (Boyd), 967 (Simmons) 1088 (Johnson), 1151 (Cluster), 1897 (Weston), 2032 (Dolnick) 2660 (Weston), 2685 (Weston), 2769 (Weston), 3009 (O'Brien), 3041 (O'Brien), 3204 (Eischen), 3206 (Eischen), 3257 (Zumas), 3297 (Dolnick), 3309 (Eischen), 3335 (Dolnick), 3339 (Dolnick), 3451 (Dolnick), and many others. In addition, the Carrier Members writing a dissent to Awards 1495 and 1496 (Weston) stated:

". . .Certainly, the majority have effectively downgraded yardmasters by requiring them to perform an obviously non-supervisory task which prevents them from performing their primary function, the supervision of the making up and breaking up of trains and other yard operations."

This Referee then, with a first interpretation of the 1978 Agreement not only attempts to wipe out the 1978 Agreement, all of the precedent in the make up and break up of trains held to belong to yardmasters since June of 1941, and even overrules the Carrier Members statement in their dissent that this work belongs to yardmasters.

The Award continues and the Referee next writes:

"In the opinion of the Board, the issue is whether the Organization previously had the right by custom, practice and tradition to perform the work they are now claiming to the exclusion of others throughout the Carriers system prior to the adoption of the National Agreement effective October 15, 1978 . . ."

From the Carrier Member's Brief, page 5 we read:

"The issue then, simply drawn, is whether the Organization previously had the right by custom, practice and tradition, to perform the work they are presently claiming to the exclusion of others throughout Carriers system. . ."

In the first place that was <u>not</u> the issue before the Board nor was it any part of the issue that the Organization brought to the Board to be decided. The issue that was brought before the Board was that the Claimant be paid for one day on February 13, 1979 account of the Road Foreman of Engines violating the 1978 Agreement at Conneaut, Ohio. It was handled in that manner because the 1978 Agreement itself states that the work belongs to a yardmaster "in a territory as assigned by the Carrier" and Conneaut, Ohio is such a territory. Instead of deciding that issue, which was the only issue before the Board, the Referee, using the Carrier Members words verbatim and decided that the issue was something else based on custom, practice and tradition throughout <u>the Carrier's system</u>. The very agreement that was before the Board for interpretation states very clearly where the work is intended to be covered and has nothing whatever to do with what happeneds "throughout the Carrier's system".

The Referee continues then with:

"Carrier has maintained throughout the handling of the instant dispute that road crews were not intended to be covered by the language of the National Scope Rule effective October 1, 1978, but it was only intended to cover those duties required of yard crews, who are 'employes directly engaged in the switching, blocking, classifying and handling of cars and trains....that are required of the yardmaster in a territory as designated by the Carrier. "We agree with the Carrier in this respect." (Our emphasis)

Reading from page 6 and continuing on page 7 of the Carrier Members Brief we find:

"In reference to the first portion of the National Rule, Carrier has maintained throughout the handling of this dispute, that Road Crews were not intended to be covered by the language of this rule but rather, it was only intended to cover those duties required of yard crews, who are the employes 'directly engaged in the switching, blocking, classifying and handling of cars and trains...that are required of the yardmaster on a territory as designated by the Carrier."

Then, after continuing to copy his Award from the Carrier Members Brief the Referee then states: "We agree with the Carrier in this respect."

The Agreement itself states very clearly that the duties of a yardmaster include:

"Supervision over EMPLOYEES directly engaged in the switching, blocking, classifying and handling of cars and trains..."

Therefore, through his quoting from the Carrier Members Brief he has agreed with the Carrier Member that those men who were involved in doing the work as described in the Agreement are not actually "employees" or else he does not understand the meaning of the word employees. The only other explanation is that the Carrier Member who really authored the award does not like the wording of the Agreement has decided to change it through interpretation.

The Referee then concludes with the following:

"After a careful study of the entire record, and the thorough arguments presented in behalf of each party, the Board is of the considered opinion that the Organization has failed to prove

"(1) that the work complained of is of the type intended to be covered by the National Scope Rule effective October 15, 1978, or (2) that the employes covered by the Agreement had the exclusive right to perform work of the type complained of prior to the adoption of the New National Scope rule, and that a substantial portion of such exclusive work has been reassigned to others. (Award 3482)." (Our emphasis).

Reading from the Carrier Members Brief, page 6 we find:

"Thus, the Organization must first prove that the work is the type described in the National Scope rule and secondly, that they had the exclusive right to perform this work on a system-wide basis prior to the adoption of the new National Scope Rule."

And from page 7 of this same Brief:

",...The Carrier position is that when Yardmasters positions are established, it is only to supervise the work of yard crews, and then only where there is a substantial amount of work to perform."

The words "substantial portion of such exclusive work" was not a defense of the Carrier at any time in the handling of this case. The only place that these words appear are in the Carrier Members Brief and in the Award itself. In the process of copying his award from the Carrier Members Brief the Referee then raised a new defense which is his and the Carrier Members and thus, presenting new argument for the Carrier for the first time in the Award.

The Referee, stating the position of the Carrier Member, says first that the Organization has failed to prove that the work complained of is of the type complained of prior to the adoption of the new National Rule. The Organization did not attempt to prove anything prior to the adoption of this Rule. Anyone with even average intelligence would understand that the Organization was protesting the violation of the 1978 Agreement and the work that was granted in that Agreement. Why in heavens name would the Organization be attempting or required to prove that the work was theirs before it was gained in the very agreement here for interpretation. Secondly, there was never any question of the "type" of work because the Carrier openly admits that the work in question is the work granted by this Agreement.

As to the exclusivity issue this Referee, by allowing himself to be conned by the Carrier Member is still in the dark ages. The Agreement itself gives the work as exclusive as is possible. It states as clearly as is possible to put it on paper that this Agreement, including between the RYA and the N&W will now amend the scope rule and give this work to yardmasters. That work included the supervision over EMPLOYEES directly engaged in the switching, blocking, classifying and handling of cars and trains. Therefore, the only question for this Referee to decide was: On February 13, 1978 were there EMPLOYEES engaged in the switching, blocking, classifying and handling of cars and t ains in the yard at Conneaut, Ohio. And if so, were they being supervised by other than a yardmaster. The Carrier themselves agreed that this type of work was being performed. Secondly, that it was being supervised by their Road Foreman of Engines. However, as Carrier pointed out many times, they have been getting away with it for so long they should be permitted to continue. That was Carrier's defense and between the Carrier Member and the Referee they decided and wrote an entirely new and different defense. They decided between them that not only must you prove that the agreement grants you the work now, but also that it was yours even before it was written into agreement. Disgraceful.

We understand and agree that it is proper for a referee to consider the material in our Briefs and to even be persuaded that the stated position therein is sound. That is one of the reasons that the Members write Briefs. But it is an entirely different matter when a referee writes an entire award based only on the opinion of one Carrier Member and even takes this Member's language verbatim, from his Brief, and states this language as his own opinion. We already knew the opinion of the Carrier Member which was ridiculous and continues to argue baseless issues, having no meaning, such as "system wide, entire system, type of work, and preponderance of work". It is meaningless to continue to argue these issue:

because the agreement itself states the exact work intended, the locations intended, and who is to perform it. What was needed and requested was an unbiased opinion of a neutral, based on the facts of the claim itself. What we got was a biased and prejudiced opinion based on the opinion of the Carrier Member and a verbatim quotation of that biased and prejudiced opinion.

And while the dissent will not change the Award, it will serve to register our opinion in this instance when the Carrier Member had dictated the decision and the neutral permitted it.

R. F. O'Leary

R. F. O'Leary
Labor Member - Fourth Division