Award No. 3283
Docket No. 2898
2-PFE-CM-'59

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James P. Carey, Jr., when award was rendered.

PARTIES TO DISPUTE:

BROTHERHOOD RAILWAY CARMEN OF AMERICA, OPERATING THROUGH RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.—C. I. O.

PACIFIC FRUIT EXPRESS COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the permissible switching of cars and parts thereof, within shop yards and buildings with derricks, cranes or machine tools in connection with the building, repairing and the maintenance, etc., of all cars is Carmen's work under the scope of the current agreement.

2. That accordingly the Carrier be ordered to assign the performance of the aforesaid work with Carmen subject to the current agreement.

EMPLOYES' STATEMENT OF FACTS: The carrier, at Los Angeles, California maintains facilities in the car department for the building, maintaining and repairing of both passenger train refrigeration and freight train cars, and including a force for the purpose of performing such service of about 900 carmen, apprentices, helpers and laborers.

The carrier also maintains at this shop location one diesel-electric crane and other equipment self-propelled which is used from time to time to switch or move from place to place cars and parts thereof in connection with carmen's work. However, the carrier has made the election to assign the operation of these self-propelled equipment, with the exception of the diesel-electric crane, to the store department employes in connection with the performance of this aforementioned carmen's work.

This dispute has been handled up to and with the highest official of the carrier designated to handle such matters, with the result that on more than one occasion he has declined to adjust it.

Since the Decision of the United States Supreme Court in **Whitehouse v. Illinois Cent. Ry.**, 349 U. S. 366 (1955), the Circuit Court of Appeals for the Eighth Circuit rendered the decision in the case of **The Order of Railroad Telegraphers v. New Orleans, T. & M. Ry.**, 229 F. 2d 59 (8th Cir. 1956) in which the Court declared Award 4734 of the Third Division, National Railroad Adjustment Board, void because the Board had failed and refused to give involved clerical employes and the clerical organization notice of the dispute and an opportunity to appear and be heard at the hearing in the case, in violation of the fifth amendment of the Constitution of the United States, and section 3(j) of the Railway Labor Act.

In addition, Awards Nos. 1523, 1525 and 2698 of the Second Division recognize the necessity of such notice; and the court decisions on which those awards are based still represent the established law.

The attention of the Board is also directed to Third Division's Awards Nos. 5432, 5433, 5600, 5702, 5785, 6051, 6052, 6072, 6224, 6402, 6482, 6484, 6485 6680, 6682, 6696, 6799, 6812, 6813, 7975, 8022, 8023, 8050 and 8053; particularly to the following which appears in the opinion of Board in Award No. 5432 of the Third Division:

> ". . . we bow to the inevitable and, notwithstanding what may be found to the contrary in any of our previous awards, from the records that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, representing employes having rights that might be affected by our decision, were not served with notice of the filing of the claim and given an opportunity to be present and heard throughout all stages of the proceedings. In such a situation the proper procedure in our opinion is to dismiss the claim without prejudice, thereby affording the claimant an opportunity to take whatever action it may deem advisable in the future."

The carrier, therefore, respectfully submits that this Division is in duty bound to give due notice of this proceeding and of any hearing or hearings therein to the other employes involved in this dispute, whose working rights (if any) are placed in jeopardy by this claim; to permit these employes to appear before this Division, in person or by representive, and make such showing by way of evidence and argument as they consider appropriate; and pending such notice, to suspend all further proceedings in this docket. Alternatively, the carrier suggests, it is the duty of the Division to dismiss the claim and terminate all proceedings in this docket, for obviously the Division cannot make any valid award or order here in the absence of due notice to these essential parties in interest.

CONCLUSION

The carrier asserts that this Division is without power to proceed to hear and determine this dispute for the reasons above noted, but without in any manner whatsoever waiving or impairing the above motion to dismiss the claim in its entirety, the carrier asserts that it has conclusively established that the claim in this docket is entirely lacking in either merit or agreement support and requests that said claim, if not dismissed, be denied.

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 were given due notice of hearing thereon.

Under the provisions of the tri-partite agreement of December 5, 1939, between the carrier, Brotherhood Railway Carmen and Brotherhood of Railway and Steamship Clerks, jurisdiction of tractor, portable crane and lift truck operators was relinquished by the carmen and vested in the clerks.

The work of derrick or crane operator is carmen's work under Rule 42(a) of the carmens' agreement as revised November 1, 1951. Rule 42(b) declares the duties of a derrick or crane operator to consist of "operation of derrick or crane in loading and unloading materials; the loading and unloading of wrecked cars; raising and lowering cars and parts in connection with carmen's work; permissible switching of cars within shop yards and buildings."

The instant claim involves the question whether switching of cars and parts thereof within shop yards and buildings by use of a self-propelled tractor is work belonging to the carmen under their agreement. As we have seen, carmen are entitled to operate derricks or cranes and to perform permissible switching. Tractors do not properly fall within the category of derricks or cranes and we find no basis in the applicable rules of the carmens' agreement which can fairly be said to support the inference that carmen are granted exclusive rights to perform switching by use of tractors. The record indicates that switching by tractors on this property has in the past been performed by the clerks' organization. The term "permissible switching" as it is employed in Rule 42 (b) of the carmens' agreement refers to switching which is declared to be the work of carmen by the language of the agreement. Switching by use of tractor is not expressly or impliedly vested in the carmen under their agreement and consequently the carrier's use of Store Department employes in performing that work is not prohibited by the carmens' agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 24th day of June 1959