Award No. 4193
Docket No. 3836
2-PRSL-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 109, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Carmen)

PENNSYLVANIA-READING SEASHORE LINES

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current regulations Carmen W. M. Coxson, S. C. Bruce, J. E. Scott and J. E. Farrar were improperly denied their rights to perform work at Manumuskin, New Jersey on August 20, 1959.

2. That accordingly the Carrier be ordered to make these employes, W. M. Coxson, S. C. Bruce, J. E. Scott and J. E. Farrar whole by compensating them each eight (8) hours at the punitive rate of pay.

EMPLOYES' STATEMENT OF FACTS: W. M. Coxson, S. C. Bruce, J. E. Scott and J. E. Farrar, hereinafter referred to as the claimants, are regularly employed as Carmen mechanics, by the Pennsylvania-Reading Seashore Lines, hereinafter referred to as the carrier.

On Thursday, August 20, 1959, due to the derailment of box car C.B.&Q. 61067 at Manumuskin, New Jersey: the carrier assigned four (4) car repairmen from the Pennsylvania Railroad's Engine House at Camden, New Jersey to perform the work of rerailing this car. Manumuskin, New Jersey is between forty (40) and fifty (50) miles from Camden, New Jersey.

The claimants have an established seniority on the carmen craft seniority roster, and by virtue of same being system wide; the claimants have the right to perform work assigned to carmen on the property of the carrier, of which, Manumuskin, New Jersey is a part.

The Pennsylvania Railroad employes assigned to perform the work in question, have no seniority rights, nor contractual rights to perform any work on the property of the carrier.

III. Under The Railway Labor Act, The National Railroad Adjustment Board, Second Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Second Division, is required by the Railway Labor Act to give effect to the said agreement, which constitutes the applicable agreement between this carrier and the Brotherhood of Railway Carmen of America, affiliated with the AFL-CIO, 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. To grant the claim of the organization in this case would require the Board to disregard the agreement between the parties, hereinbefore referred to, and impose upon the carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to the applicable Agreement. The Board has no jurisdiction or authority to take any such action.

CONCLUSION

The carrier has conclusively shown that there has been no violation of the applicable Agreement in the instant case and that the employes' claim is without merit.

Therefore, the carrier respectfully submits that your Honorable Board should deny the claim of the organization in this matter.

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.

On August 20, 1959, the Carrier's Train No. 350 was engaged in shoving five cars into a siding at Manumuskin, New Jersey, which is within the Carrier's territory. In the course of that operation, a car was derailed. The Carrier called upon the wreck truck crew of the Pennsylvania Railroad Company (hereinafter referred to as the "Pennsylvania") to rerail the car. This crew is headquartered at Camden, New Jersey, a distance of about 40 to 50 miles from Manumuskin. It was composed of the wreck master and four carmen. The latter are represented by the Transport Workers Union of America (AFL-CIO) and covered by a labor agreement between said Union and the Pennsylvania. The crew arrived at the scene of the wreck at about 7:00 P. M. and completed its task at approximately 11:00 P. M.

The four Claimants, S. C. Bruce, W. M. Coxson, J. E. Farrar, and J. E. Scott, are regularly employed carmen of the Carrier and have system-wide seniority. They are represented by the Carmen's Organization and covered by a labor agreement between said Organization and the Carrier. They filed the instant grievance in which they contended that they were contractually entitled to perform the wrecking work in question. They requested compensation of eight hours at the rate of time and one-half for each of them. The Carrier denied the grievance.

1. At the outset, the following jurisdictional question requires adjudication:

The Carrier has objected to our jurisdiction on the ground that the Pennsylvania carmen, who performed the wrecking work under consideration, or the Transport Workers Union of America have not been given notice of the instant proceedings pursuant to Section 3, First (j) of the Railway Labor Act. This Section provides, as far as pertinent, that "the several divisions of the Adjustment Board shall give due notice of all hearings to the employe or employes and the carrier or carriers involved in any disputes submitted to them". Because the term "involved" is not defined in the statute and because it may conceivably be construed in several ways, its interpretation and application have been the subject of numerous court proceedings. (Emphasis ours.)

In general, the court cases centered around the seniority rights of two or more employes of a carrier under the same labor agreement or the job rights of two crafts or classes of employes of a carrier under one or two labor agreements to which the same carrier was a party. In such instances, the courts have usually held that all employes having or claiming to have any interest in the dispute were directly and materially affected by a decision of the Board and were thus "involved" in the dispute and entitled to notice under Section 3, First (j). See: Jack L. Kroner, **Minor Disputes Under the Railway Labor Act: A Critical Appraisal,** 37 New York University Law Review 41, 50-57 (January, 1962).

The facts underlying the case at hand are different. The Claimants are employes of the Carrier and not of the Pennsylvania. Their claim is based on a labor agreement between the Carrier and their duly authorized bargaining representative (Brotherhood of Railway Carmen of America). On the other hand, the carmen who performed the work in question are employes of the Pennsylvania and not of the Carrier. They are covered by a labor agreement between the Pennsylvania and the Transport Workers Union. The status of the Pennsylvania employes in this case is comparable to that of the employes of a sub-contractor who has contracted to perform certain work at the Carrier's property. Their interest in the instant dispute is at best indirect and remote. As stated by Circuit Judge Goodrich: "Anyone employed by another, even purely at will, has some 'interest' in his job. But the mere fact of that employment, without more, is not enough to make him a necessary party in an Adjustment Board hearing." See: Kirby v. Pennsylvania Railroad Co., 188 F. 2d 793, 800 (CA-3; 1951). Following such reasoning, we are of the opinion that the Pennsylvania carmen or their Union are not "involved" in this case within the purview of Section 3, First (j) of the Railway Labor Act and, consequently, not entitled to notice thereunder.

2. The law of railroad labor relations is well settled that work embraced within the scope of a labor agreement cannot be removed therefrom and

assigned to employes not subject to its terms. See: Awards 1040 and 1269 of the Second Division. The substantive question posed by the instant case is whether the work in dispute is covered by the labor agreement between the Carrier and the Carmen's Organization. The answer is in the affirmative.

Regulation 4-G-1 of the agreement contains detailed provisions regarding the compensation of employes engaged in wrecking service. Moreover the work classification of mechanics, helpers and apprentices appended to the agreement states under No. 17: "Men engaged in clearing wrecks, except derrick engineers."

Finally, Regulation 5-F-1 prescribes that "none but mechanics or apprentices regularly employed as such shall do work specified as that to be assigned to fully qualified mechanics." These provisions, read together, demonstrate **prima facie** that the work in question is included in the scope of the agreement and, therefore, belongs to the Carrier's carmen. This conclusion is corroborated by the Carrier's admission that its employes have been called upon in the past to perform minor wrecking jobs of rerailing cars or engines (Carrier's Submission Brief, p. 15). Accordingly, we hold that the Claimants and not the carmen of the Pennsylvania should have been assigned to perform the work under consideration.

3. In an effort to overcome the presumption that said work belongs to the Claimants, the Carrier relies on past practice to the contrary. The Claimants have strenuously denied the existence of the alleged practice. Our attention has not been called by the Carrier to a representative number of specific instances from which we could reasonably conclude the existence of a long-continued and consistent practice well-known to and generally accepted by all interested parties. To demonstrate authoritatively the existence of a binding rule to govern the rights of the parties, past practice must more adequately exhibit mutual understanding than the record here reveals. See: Awards 4016, 4097, and 4100 of the Second Division.

4. The available evidence discloses that work performed by the Pennsylvania employes consumed about four hours. Hence, the Claimants are entitled to four hours' pay at the pro rata rate. Their further claim is unjustified and hereby denied. See: Award 1937 of the Second Division.

AWARD

Claim partly sustained and partly denied in accordance with the above Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 27th day of May, 1963.