

Award No. 4707

Docket No. 4541

2-UP-CM-'65

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Bernard J. Seff when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 105, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L.-C. I. O. (Carmen)**

UNION PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: (1) That under the current agreement the Carrier violated the rules and deprived Carman F. R. Allen of his service rights when other than Carmen were required to make repairs to Car M. P. 85288 on September 14, 1961 within the Spokane terminal yard.

(2) That accordingly the Union Pacific Railroad Company be ordered to additionally compensate Carman F. R. Allen four (4) hours at the applicable rate for this violation.

EMPLOYES' STATEMENT OF FACTS: Carman F. R. Allen, hereinafter referred to as the claimant, is regularly employed as carman by the Union Pacific Railroad Company, hereinafter referred to as the carrier, at Spokane, Washington and holds seniority at this point.

The carrier maintains a car repair track and car inspectors are employed on three shifts each day at Spokane. Car inspectors or repair men are available at all times to perform carmen's work on this terminal when needed.

On September 14, 1961 Switch Engine Crew Foreman J. Foulks, while handling M. P. 85288 along with other cars of a cut they were switching in the yards, found this car with a bursted air hose. Foreman Foulks thereupon proceeded to secure the necessary tools and make repairs by taking air hose from another car which was not being switched and removing the hose and applying it to the aforesaid car. No carmen that were on duty were called to make this repair.

Carman F. R. Allen, the claimant, was available to perform the work if called.

This dispute has been handled with all officers of the carrier designated to handle such disputes, including the highest designated officer of the carrier, all of whom have declined to make a satisfactory adjustment.

Eureka, Utah. The court decided, however, that the Board had erroneously awarded the petitioners one day's penalty pay, reasoning as follows in its fourth and fifth Conclusions of Law:

"4. Since the collective bargaining agreement contains no provisions for punitive damages for contractual violations such as that found in this case, damages, if any, must be assessed on the basis of ordinary contract law. Petitioners here have not been damaged monetarily by the contractual violation, and they are, consequently, under well-settled principles of contract law, entitled to no more than nominal damages. The award of the Railroad Adjustment Board, insofar as it awards damages of one day's pay for each date for which a claim was filed is erroneous, and the award of damages predicated upon that basis must be set aside.

5. Individual petitioners and other employes of respondent carrier who filed claims based on the contract violation involved are entitled to nominal damages in the amount of one dollar (\$1.00) per day for each claim filed."

The shop craft agreement on this carrier contains no provisions for penalties or punitive damages for contractual violations.

For the above reasons it is submitted that this claim should 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.

On September 14, 1961 Switch Engine Crew Foreman J. Foulke, while handling M. P. 85288 along with other cars of a cut they were switching in the yards, found this car with a bursted air hose. The Foreman thereupon secured the tools and made the necessary repairs by taking air hose from another car which was not being switched and applying same to the car in question. Petitioner states that none of the Carmen who were on duty were called to make this repair and that the Claimant was available to perform the task if he had been called .

The Carrier states that at the time the air hose burst it was in a car being moved across the Washington Street Crossing which resulted in blocking an important automobile crossing during a time when the crossing was busy; that the said Washington Street crossing is located in what is known as the "Old Spokane Yard"; carmen are not employed at this point but are employed at the repair track which is 4½ miles from this crossing; there is an Ordinance No. A 99 which prohibits a railroad from blocking any street in the City of Spokane for more than five minutes. All of the above facts resulted in creating an emergency situation and the Carrier argues that in an emergency it was not required to await the arrival of carmen who might not be immediately available and at best could not arrive on the scene for some time. The Carrier

then recites the principle that a carrier has the right to use employes readily available to meet an emergency situation and cites many awards in support of this position. Even without the existence of an emergency the Carrier points out that it is well settled that the coupling of hose incidental to the movement of trains is not within the exclusive jurisdiction of car inspectors (carmen). In conclusion the Carrier calls attention to Award 3614, which did not involve an emergency where it was held, inter alia, that

“ * * * The right to replace fractured air hose is not specifically spelled out in the carmen's agreement. It is in the nature of repair work but not strictly such. Although it is regarded as generally belonging to carmen yet when necessity therefore develops en route where carmen are not located, replacement may be made by trainmen as incidental to the movement of their train. This should apply to yard crews as well as road crews.”

The Organization takes the position that the car in question was being handled in a Terminal Yard by a switch crew and not a train crew; it cites Awards 1791 and 3701 both of which state that the replacing of air hose is repair work within the meaning of similar language to the current agreement; the Organization also denies there was any emergency; further it is alleged that there were other carmen available to do the work in question.

The Carrier's argument in support of its contention that there was in fact an emergency is persuasive. Even without this element the evidence in the instant record does not support the Petitioner's argument that under the existing agreement Carmen have the exclusive right to replace fractured hose.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April, 1965.

DISSENT OF LABOR MEMBERS TO AWARD NO. 4707

We think the conclusion of the majority that the instant work was performed in an emergency, and therefore the use of other than carmen was justified, is without foundation for the reason that the crossing could have been opened in a matter of seconds by simply cutting out the air from the line on the car ahead of the bursted air hose and bleeding off the air from the bad order car. Even if there had been an emergency using other than available carmen to perform the work violated Rule 134, which, among other things, provides that carmen's work shall consist of maintaining passenger and freight cars. Thus the claim should have been sustained.

E. J. McDermott

C. E. Bagwell

T. E. Losey

R. E. Stenzinger

James B. Zink