Award No. 5191
Docket No. 5095
2-C&O-CM-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

The Second Division consisted of the regular members and in addition Referee Harold M. Weston when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Carmen)

THE CHESAPEAKE AND OHIO RAILWAY COMPANY (Southern Region)

DISPUTE: CLAIM OF EMPLOYES:

1. Carman Billy McBrayer, service rights and rules of the controlling agreement were violated on March 29, 1965 when Maintenance-of-way Employe was assigned to repair cars in violation of Rules 32 and 154 of the Shop Crafts Agreement.

2. Accordingly, the Chesapeake and Ohio Railway Company should be ordered to additionally compensate Carman McBrayer two (2) hours and forty (40) minutes at the carman applicable time and one half (1½) rate for said violation.

EMPLOYES' STATEMENT OF FACTS: Carman Billy McBrayer, hereinafter referred to as the Claimant, is regularly employed as such by the Chesapeake and Ohio Railway Company, hereinafter referred to as the Carrier, in its yards at Russell, Kentucky where a large number of carman and carmen helpers are employed and holds seniority under the provisions of Rule 31 of the Shop Crafts Agreement. The Carrier owns and operates a large facility in Russell, Kentucky known as the Russell Yards where trains are made up, switched, arrive, depart and cars are repaired.

On March 29, 1965 car C&O 116359, was shopped and placed on the shop track for repairs and Maintenance of way or (section) employe was assigned to use crane RC-18, to make repairs by pulling the sides of the car in, as the car was shopped for spread sides. The Carrier's Shop Track referred to is a track where cars are placed when in need of repairs. Carmen are assigned seven days per week to make necessary repairs to cars or to keep the equipment in operating condition.

In the handling of this claim on the property the Carrier alleged that a motor shaft was broken on the three ton electric crane, was the reason for permitting or assigning the Maintenance of way employe to perform carmen's work. At no time has the Carrier denied the work in question was work belonging to the Carmen Craft. This work has always been performed by carmen at this point. Prior to the assigning of the three ton electric crane, re-

"No pecuniary loss or damage to Claimants is shown, and the Agreement does not provide for any arbitrary or penalty for this violation. It is a well settled rule of statutory construction that a penalty is not be readily implied, and that a person or corporation is not to be subjected to a penalty unless the words of a statute plainly impose it. Tiffiny v. National Bank of Missouri, 85 U.S. 409; Keppel v. Tiffin Savings Bank, 197 U.S. 356. The rule is equally applicable to the construction of contracts; for the parties can readily agree upon penalty provisions if they so intend, and the absence of such provisions negatives that intent. The Supreme Court of the United States said in L. P. Steuart & Bro. v. Bowles, 322 U.S. 398, that to construe a statute as imposing a penalty where none is expressed would be to amend the Act and create a penalty by judicial action; that it would further necessitate judicial legislation to prescribe the nature and size of the penalty to be imposed. Similarly, for this Board to construe an agreement as imposing a penalty where none is expressed, would be to amend the contract, first, by authorizing a penalty, and second, by deciding how severe it shall be. Not only are the parties in better position than the Board to decide those matters; they are the only ones entitled to decide them. Consequently there have been many awards refusing to impose penalties not provided in the agreements. Among them are: Award 1638, 2722 and 3672 of this Division; Awards 6758, 8251 and 15865 of the First Division; and 7212 and 8527 of the Third Division."

On all counts the claim is without justification. It should be denied.

All data herein submitted in support of Carrier's position has been presented to the Employes or duly authorized representatives thereof and made a part of the question in dispute.

An oral hearing before the Board is not requested unless Employes should request such hearing in which event Carrier should have advance notice thereof. (Exhibits not reproduced).

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.

Petitioner contends that Carrier breached the applicable Agreement on March 29, 1965, when a Maintenance of Way employe was used to repair a coal car on the shop track at the Russell, Kentucky yards.

The crane and operator were borrowed from the Maintenance of Way Department because the Mechanical Department's electrical crane was temporarily out of service, having sustained a broken motor shaft on March 25, 1965. Carrier maintains that it was necessary to move fast and use the Maintenance

of Way equipment and operator because the consignee of the coal car's contents had informed Carrier that it would not accept the shipment if it had to wait until the load was transferred to another car.

The record is clear that the disputed work belongs to carmen under Rules 154 and 32 (a) and is performed by them on the property. Rule 165 stipulates that Carrier will furnish "power driven machinery and tools" to carmen and maintain them "in safe working condition." The mere fact that work may be expedited by using non-carmen to perform carmen's work does not warrant a violation of the plain terms of the Agreement. Not every such situation is an emergency and the evidence before us is not sufficient to establish such extreme circumstances as to justify calling upon a Maintenance of way employe for car repairs in this case.

We do not subscribe to Carrier's theory that a penalty is involved here. A clear violation has occurred and to enforce the Shop Crafts Agreement, the claim will be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 20th day of June 1967.

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