Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 6718
SECOND DIVISION Docket No. 6553
2-BN-CM-'74

The Second Division consisted of the regular members and in addition Referee David Dolnick when award was rendered.

Parties to Dispute: (System Federation No. 7, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Burlington Northern, Inc.

Dispute: Claim of Employes:

1. That the Carrier violated the rules of the current agreement when other than Carmen (i.e.Maintenance of Way Employes—Water Service) were improperly assigned to install a hot shower and hot water heater in Outfit Car NP 207371 at Lyle, Washington, March 21 and 22, 1972.

2. That accordingly the Carrier be ordered to compensate Carmen R. E. Stewart and J. D. Zwicki for twelve (12) hours each at the straight time rate.

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 waived right of appearance at hearing thereon.

The basic facts are not in dispute. Carrier operates a car repair shop at Vancouver, Washington. On March 21 and 22, 1972, Carrier's water service department employes installed a shower stall, a gas water heater and propane tanks in outfit car NP207371 used as away from home living quarters by such water service employes, who are represented by the Brotherhood of Maintenance of Way Employes. Carrier contends that this work was properly performed by water service employes under Rule 55,E in the Agreement between this Carrier and the Brotherhood of Maintenance of Way Employes which reads as follows:

"E. Water Service Mechanic-Pump Repair

An employe skilled in and assigned to repair pumps, pipe lines, or any other work in connection with the maintenance of water or fuel supplies or steam heating plants, including

"the bending, fitting, cutting or threading of pipe in connection with pipe work, coming under the jurisdiction of the Bridge and Building Department, shall be classified as a water service mechanic, pipefitter, steamfitter or plumber."

The Brotherhood of Maintenance of Way Employes is obviously a necessary third party to these proceedings. Pursuant to Section 3 First (j) of the Railway Labor Act, as amended, the Administrative Assistant of the Second Division of the National Railroad Adjustment Board give written notice on August 13, 1973 to the President of the Brotherhood of Maintenance of Way Employes advising him of the pendency of this dispute and in every other way complied with the provisions of the Act and with the decisions of the courts and with the Awards of the several Divisions of the National Railroad Adjustment Board.

The Brotherhood of Maintenance of Way Employes did not reply to the notice of August 13, 1973. Nonetheless, in considering the issues raised by the parties, the applicable provisions in the agreement between this Carrier and the Brotherhood of Maintenance of Way Employes have also been received and noted.

Carrier has waived the procedural issue of proper claim dates since Employes have accepted the dates of March 21 and 22, 1972, those relating to the claim. That issue is no longer before us.

Employes rely on Rule 83 of their Agreement with the Carrier as the basis for the validity of the claim. That rule enumerates work which shall be performed by Carmen. Among these is "work in building and repairing motor cars, lever cars, hand cars, and station trucks ... building, maintaining, dismantling (for repairs), painting, upholstering and inspecting all passenger and freight cars both wood and steel." Outfit Car No. NP207371 is such a car within the definition of Rule 83 say the Employes, and the work performed belonged to Carmen even though the work was done at Lyle, Washington, 75 rail miles from the Vancouver Shops where the Claimants were employed.

It is the position of the Carrier that Car NP207371 is a camp car or outfit car. It is neither a freight nor a passenger car within the definition of Rule 83. The outfit car was the living quarters of Maintenance of Way Employes. On December 27, 1972 the Carrier wrote the Employes listing 37 instances from July 1, 1968 to October 18, 1972 wherein water service employes represented by the Brotherhood of Maintenance of Way Employes installed and repaired, heaters, stoves, showers and water heaters in outfit cars in the field. If those outfit cars had been in the Shop it is agreed that the work would have belonged to Carmen. That work performed by water service employes on Car NP207371 was never categorically denied by the Employes.

The basic issue is whether an outfit car used by employes as living quarters is a passenger or freight car within the meaning of Rule 83. If the language in that rule is clear and meaningful and includes outfit cars within that definition then the established practice may not controvene the explicit language in Rule 83. If the language in Rule 83 has an element of ambiguity with respect to the definition of a car, then the established and accepted past practice may be relevant to given accepted meaning and intent to Rule 83.

Second Division Award 6337 sustained a comparable claim because "Once work has been established as falling within the scope of a work classification rule in a labor agreement it may not be assigned or performed by employees not covered by the contract." But that award also found that: "Apparently this carrier official understands that camp cars were included in the 'passenger and freight car equipment' classification, but because scheduling difficulties existed in the shop he and others resorted to self help to perform the maintenance or repair work on camp cars... The evidence of the Organization and the Carrier establishes an understanding which includes camp cars in the Rule 144 equipment classification of 'passenger and freight cars.'" No such understanding exists in the instant claim before us.

Second Division Award 4687 is not applicable. It essentially held that: "The function or use of the equipment determines its purpose and proper nomenclature." The carbody in that case was used as a Yardmaster's Office. It was dismantled, loaded on a flat car and sent to the Shop for scrapping. No allegation of a past practice was made.

The question in Second Division Award No. 4604 was whether a Ramp Car was a car within a definition of work belonging to Carmen. In denying the claim the Award said that: "The fact that the Ramp Car or Structure carried a Rock Island 95000 series number -- the numerical designation used by the Carrier to indicate work equipment stock -- is not a determinative factor in this case. The function or use of the equipment determines its purpose and proper nomenclature."

"When the truck and coupler were removed from the same end of the Ramp Car, its function as a Car ceased. The fact that the truck and coupler were nearby is of no consequence."

There is no showing in this case that outfit Car NP207371 was coupled except, perhaps to another outfit car.

Third Division Award 19095 sustained a claim by Maintenance of Way Employes. Wheels and rolling stock were removed from a Pullman sleeper car. It was placed on a concrete foundation and used as a dormitory for train service employes. B&B forces built the concrete foundation, placed the car thereon and performed other incidental work. Subsequently, the Carrier had carmen remove all seats and berths and partitions between berths and turned the interior into a classroom. Maintenance of Way Employes claimed this as their work. By holding that the work belonged to Maintenance of Way employes the award says:

"A question for us to resolve is whether the sleeping car lost its identity as such when the drawbar, trucks, brake staff, etc. were removed from it and the body of the car was placed on a concrete foundation constructed by B&B forces. We think the 'car' may no longer be regarded as rolling stock and has taken on the identity of a structure or building."

It is apparent from all of the evidence in the record that what constitutes a passenger or freight car in Rule 83 is not altogether clear and meaningful. We know that what constitutes a car within that definition depends on the function, the use of the car, its purpose and proper nomenclature. We also know that an outfit car is used as living quarters for Carrier's employes. It is not a freight car loaded with merchandise for distant location; or unloaded awaiting direction to another location. It is not a passenger car occupied by revenue personnel to be carried to various points enroute. An outfit car is stationary, at least for a time. It is uncoupled to engines or other moving vehicles. Its function and use does not fall within the common and ordinary meaning of a passenger or freight car.

That being so the long existing past practice becomes relevant. It has been the practice for years on the property of former Spokane, Portland and Seattle Railway, now merged with others into Burlington Northern, Inc., and that practice has continued since the merger, that water service employes represented by the Brotherhood of Maintenance of Way Employes to install and repair heaters, stoves, showers, and shower heaters in outfit cars that were in the field away from the Vancouver Shops. This accepted and established practice has determined that outfit cars are not passenger or freight cars as defined in Rule 83 and that, therefore, work on such cars away from the Shop does not belong exclusively to Carmen. Maintenance of Way Employes under their Rule 55-E also have the right to that work.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By _____
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 28th day of June, 1974.

NOH WBJ Dolnick

LABOR MEMBERS' DISSENT TO AWARD NO. 6718,
DOCKET NO. 6553

It was stated in the Findings in Award No. 6718, Docket No. 6553:

> "The basic issue is whether an outfit car used by employes as living quarters is a passenger or freight car within the meaning of Rule 83. * * *"

A summary of the application of Second Division Award Nos. 6337, 4687, 4604 and Third Division Award No. 19095 were given as to their relationship to the facts in the instant case.

In the summation of Award No. 6337, the majority stated:

> "* * * The evidence of the Organization and the Carrier establishes an understanding which includes camp cars in the Rule 144 equipment classification of 'passenger and freight cars.' No such understanding exists in the instant claim before us."

However, the majority overlooked the fact they had previously made the statement:

> "* * * If those outfit cars had been in the Shop it is agreed that the work would have belonged to Carmen. * * *."

The Labor Members are at a loss to understand how it can be determined that the work involved on the outfit car and/or camp car is Carmen's work in the shop but not on the road. There is no question but when Carrier recognized that the work on outfit cars and/or camp cars was Carmen's work in the shop that the work fell within the scope of Rule 83, which reads in part:

"Carmen's work shall consist of building, maintaining, dismantling (for repairs) painting, upholstering and inspecting all passenger and freight cars both wood and steel; * * * and all other work generally recognized as carmen's work."

As pointed out above, Carrier agreed and the majority took no exception that the work involved would have belonged to carmen if the outfit car and/or camp car was in the shop. The fact that the outfit car and/or camp car was away from the shop does not change Rule 83.

Rule 90 captioned "Road Work" reads in part:

"When necessary to repair cars on the road or away from the shops, carmen, and helper when necessary, will be sent out to perform such work * * *."

Rule 27(a) reads in part:

"(a) None but mechanics or apprentices regularly employed as such shall do mechanics' work as per the special rules of each craft * * *."

The above rules were the same rules relied on in Award No. 6337. As to the facts in Award No. 6337 and in the instant award they are the same.

The outfit cars and/or camp cars in Award No. 6337 were seventy-five (75) miles from the shop. Carrier submitted a statement from the Signal Engineer that the cars had been in the shop numerous times for repairs but were unsuccessful in getting work done at the shop.

However, the Carrier in Award No. 6337 took the position that these cars were not passenger or freight cars and submitted signed statements that for some twenty-five years Signal employes living in camp cars had installed oil heaters, gas cook stoves, repaired windows, repaired roof and painted the interior.

As will be noted, the Carrier in Award No. 6337 took the same position as the Carrier in this award, i.e. the work belonged to the Carmen's craft in the shop but not on the road. The majority in Award No. 6337 stated:

> "When a provision of a Labor Agreement is capable of two or more interpretations the generally accepted analytical procedure in railroad labor relations is to examine past practices to resolve any ambiguities. A past practice is established when a consistent procedure has been followed for a duration of time sufficient to show that the parties have mutually accepted one interpretation of the Labor Agreement. The carrier in this case introduced evidence tending to show that employees occupying camp cars have performed maintenance work including painting. In Signal Engineer Sampson's letter he stated in reference to work on camp cars:
>
> > 'I have tried numerous times, but without success, to get work done at the shops. I had the cars over to shops for painting for two weeks and only ten feet was done on exterior painting. (Carrier's Exhibit D).'
>
> Apparently this carrier official understood that camp cars were included in the 'passenger and freight car' equipment classification, but because scheduling difficulties existed in the shop he and others resorted to self help to perform the maintenance or repair work on camp cars. * * *."

Therefore, from the facts of record in Award No. 6337 and the instant award, it is clear to the Labor Members that the majority did not read the entire case in Award No. 6337.

To further substantiate the Employes' position, Second Division Award Nos. 1269, 1656, 2214, 2357, 4217 and 5618 were furnished the Referee. Second Division Award No. 3406 was referred to in the Findings of Award No. 6337, which was available to the Referee.

In Award No. 2214, the bunk car was one hundred seventy-seven (177) miles from the point where Claimant was employed. Carrier, in Award No. 2214 stated two (2) reasons why the claim should be denied:

(1) "* * * While these appurtenances may under certain conditions correctly be the subject of carmen's work, we most assuredly do not believe that the living quarters of these gangs can be classified as either freight or passenger cars so as to bring all work thereon under Rule 110 of the applicable agreement which provides:"

Then Rule 110 - Carmen - Classification of Work Rule was quoted.

(2) "For this reason, it has been customary for outlying maintenance and bridge crews who take pride in the condition of their living quarters at outlying points to make arrangements for its ordinary upkeep."

The facts in Award No. 2214 are basically the same as in the instant case, i.e. Carrier contends that bunk cars are not classified as freight or passenger cars and that maintenance

and bridge crews have customarily performed such work at outlying points. However, the claim was sustained in Award No. 2214.

In Second Division Award Nos. 1269, 2214, 3406 and 4217, it was held that work on camp cars and/or outfit cars was carmen's work.

Second Division Award Nos. 4604 and 4687 were furnished the Referee by the Labor Members to show when this Division considered a "car" no longer being considered as rolling stock and had taken on the identity of a structure or building.

In Award No. 4604, a truck and coupler was removed from the car and the car was used as a ramp. In this case the Board found that under the facts of record the car lost its rolling stock function and took on another use and characteristic, i.e. a ramp.

In Award No. 4687, the car was remodeled for an office for Yardmasters in which porches, railings and stairs were connected to the car. Carrier contended this car body was an office building and the work belonged to M. of W. employes. The Referee upheld Carrier's position.

In comparing the facts in Award Nos. 4604 and 4687 with the facts in this case, the car in the instant case was not a building and was still rolling stock with all component parts attached. The same as in Award Nos. 1269, 2214, 3406 and 4217.

The Referee referred to and quoted part of Third Division Award No. 19095 in support of his Findings in this case. The facts in Award No. 19095 briefly were that a Pullman sleeper car was placed on a concrete foundation after the draw bar, trucks and brake staff were removed and the car used as a dormitory for train service employes. The Board found that the car could no longer, under these facts, be considered as rolling stock and had taken on the identity of a structure or building.

We point out that the facts leading to the decision in Third Division Award No. 19095 are different than the facts in this case. We reiterate that the car in the instant case was still rolling stock with all component parts attached and subject to be moved from place to place on Carrier's lines.

As stated by Referee Garrison in Memorandum to accompany Third Division Award No. 1680:

> "But in the case of this Board the composition of the referees is not stable; one goes and another comes. If referee A reverses referee B upon the same set of facts, the same rule, and the same presented data, he is simply substituting his own personal judgment for that of B. If he does so, the identical question, arising between other parties, will inevitably be presented to referee C, who will then have to choose between the opinions of B and A. His choice will not determine the matter, for the question will again come up before D, and thus the matter may never end."

Referee Anrod stated in his Findings in Award No. 3954, the pertinent part of which reads:

> "It is a well-established rule of law generally observed in the application and interpretation of a collective bargaining agreement that such an agreement, as a safeguard of industrial and social peace, should be given a fair and liberal interpretation consonant with its spirit and purpose -- disregarding, as far as feasible, strict technicalities or undue legalism which would tend to deprive the agreement of its vitality and effectiveness. See: Yazoo & M.V.R. Co. v. Webb, 65 F.2d. 902, 903 (Ca-5, 1933); Arbitration Award in re Cameron Iron Works, Inc., 25 LA 295, 299 (1955). * * *."

The majority failed to carry out this well established rule of law in their decision in Award No. 6718.

Therefore, Award No. 6718 is palpably erroneous.

W. O. Hearn, Labor Member

E. J. McDermott, Labor Member

E. J. Haesaert, Labor Member

G. R. DeHague, Labor Member

D. S. Anderson, Labor Member