Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6742
Docket No. 6481
2-WP-CM-'74

The Second Division consisted of the regular members and in addition Referee Irving T. Bergman when award was rendered.

Parties to Dispute: System Federation No. 117, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)

The Western Pacific Railroad Company

Dispute: Claim of Employes:

That on November 2, 1971, Southern Pacific Railroad Company Carmen were used to change wheels on Milwaukee freight car No. 17865 on the Western Pacific repair track at Winnemucca, Nevada.

That Western Pacific Carmen L. I. Pitcher, John M. Coggins, and D. E. Petersen be compensated eight (8) hours each at straight time rate of pay.

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 Southern Pacific Transportation Company and the Western Pacific Railroad Company referred to herein as Southern and Western, both used a portion of Western's track. On November 2, 1971, a Southern train moving eastward over the jointly used portion of the track made a stop to set out a bad ordered car that had developed an overheated journal. The car was placed for repair upon a siding which was not part of the jointly used trackage. Southern carmen were called to change the wheels; Western carmen, claimants herein, were available and claim the work under their Agreement with Western. Third party notice was sent to Southern and the Carmen union having contract with Southern; the Southern replied, contending that the work was properly done by its carmen.

The joint track agreement between Southern and Western contains a provision that: "In emergencies, Southern Pacific may, or at the direction of Western Pacific shall, operate on tracks connecting with the joint line which are not a part thereof. Southern Pacific may set out bad order engines or cars upon such convenient tracks whether or not a part of the joint line, as may be satisfactory to, or directed by, Western Pacific. Such bad order engines or cars shall be repaired without unnecessary delay by either Southern Pacific or Western Pacific as may be mutually agreed upon from time to time, and the expense be borne by Southern Pacific. Such tracks while being so used by Southern Pacific shall be considered a part of the joint line." With regard to this, the Organization contended that there was no emergency and in any event, the Organization was not a party to the joint track agreement and is not bound thereby; in addition, that whenever Southern puts a car on Western repair tracks it becomes work of Western's carmen. Also, the Organization referred to three prior similar occasions which were resolved by payment to Western's carmen; The Carrier's answer to the last contention is that a supervisor, not authorized to make binding agreements, settled the claims with the expressed condition that these settlements were not to be considered as precedent.

The Organization has referred to Third Division Award No. 7585 as precedent for the proposition that work cannot be contracted out by Carrier agreement with a third party if the Organization is not a party to such agreement. This conclusion, however, was influenced by other considerations in the case such as a long standing past practice which is not evident from the facts in this record, and the meaning of "other work incident thereto." Third Division Award 6284 referred to by the Organization is not in point. It has reference to the general proposition that work of a class covered by the agreement may not be assigned to those not covered by the agreement. This is also noted in the other Awards brought to our attention by the Organization which have been carefully perused. Those Awards do not reach the facts involved here. There is no doubt that work of Western would have to be performed by claimants. The issue is whether or not, under the facts of this case, the work performed was within Western's control to assign exclusively to its employes and, whether or not Western could make the agreement quoted above with Southern without this Organization's participation in the agreement.

The Carrier has referred us to Second Division Award 4807, a case in which the Carmen's Agreement was with a Terminal that, in turn, had a contract to clean cars of the Railway Express Agency. The Terminal's carmen cleaned the cars until the Agency ended the contract and thereafter did the work with its own employes. The Terminal's carmen had no right to insist that it was still their work. The Carrier also relies on Second Division Award 2998 which held that: "the mere fact that the tracks on which the car was set out are owned by this carrier does not entitle it or its employes to perform the repair service involved.

Second Division Award 4129, to which there was no dissent, denied the claim on facts similar to the present case. In that case, the Carrier provided switching service in its terminal and also provided a "bridge" line for other carrier's train movements. A Santa Fe train operating on the Terminal Carrier's tracks required repair to a car and Santa Fe sent its own carmen to do the work. Carmen in the Terminal Carrier's employ claimed the work. Claimants in that case relied on a Rule similar to Rule 112 relied upon by the claimants in this case. The scope preamble of the Agreement in that case was considered to be unclear, ambiguous and subject to interpretation because of, "a doubt as to whether the scope of the agreement covers all carmen's work performed within the geographical territory of the Carrier as asserted by the Claimants or whether the agreement only covers the work which the Carrier has the power to assign as claimed by it." Award No. 4129 went on to state: "The only connection between the freight train under consideration and the Carrier's facilities was that the train was proceeding on the Carrier's tracks when the accident occurred. The work in dispute was assigned by the Santa Fe and not by the Carrier. The latter had no voice in or control over the assignment and performance of the work. What actually occurred here was that work fundamentally the responsibility of the Santa Fe was assigned by it to its own carmen who are covered by a different labor agreement---. In the absence of any indication to the contrary in the Preamble, we do not think it was the intent of the parties to the labor agreement to extend the scope thereof to such work. Any other construction would widen the scope of the agreement far beyond any reasonable application. See: Award 2998 of the Second Division." In that Award, claimants also relied on a rule dealing with carmen who are sent on the road to do the work, just as the claimants in this case rely on Rule 122 entitled "Carmen's Work Away From Shops". It was held that such a rule would apply only if and when another carrier requested the services of the Terminal Carrier's employes. Lastly, in that Award claimants asserted but failed to prove a long standing practice of performing the work in dispute.

In the present case, the Scope of Agreement provides: "This Agreement shall apply to those who perform the classes of work specified by the different classifications of the Agreement in all departments." The section of the Agreement headed, "Carmen Special Rules", makes no reference to the geographical area where such work would be performed. There is no reference to work to be performed on trains of other carriers who use any part of Western's tracks by joint agreement. There is no restriction in the Agreement against the making of an agreement for the joint use of the tracks and the work to be performed on the cars of such joint user of Western's tracks. The three prior occasions referred to by the Organization do not present convincing proof of a past practice.

In Second Division Awards 4169, 4170, it was held that the responsibility for the work (rerailment) on the cars of another carrier properly using tracks jointly, belonged to the crew operating the train and, "under the contract between the two carrier's with reference to the operations of the tenant line on the tracks in question;" Awards cited, including Second Division No. 2998.

From the reasoning quoted above and the Awards referred to, it appears that unless restricted by the Scope provision, a Carrier may contract not only for the use of its tracks by another carrier but also for the work to be performed on cars in trains operated by another carrier under an agreement for the joint use of the tracks. If we were to place a restriction on such joint track use agreement, we would be adding a provision to this Agreement. We have no authority to do so. The Awards relied upon to reach this conclusion are closely related to the facts of this case.

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
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 30th day of July, 1974.