Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 9918
Docket No. 9048
2-C&NW-CM-'84

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
(
(Chicago and North Western Transportation Company

Dispute: Claim of Employes:

1. That under the current agreement, Carrier improperly assigned other than Carmen (Contractor J. C. Allen) to scrap and dismantle thirty-three (33) ore cars at Larch Siding, Rock, Michigan, wheels, brasses, draft gears, couplers, truck sides, bolsters and all air brake equipment from the following ore cars:

CNW: 112248, 118777, 118691, 112481, 112426, 122731, 122150, 112003, 112494, 112267, 118749, 122950, 112366, 112450, 118647, 112056, 112137, 112375, 122832, 118801, 118881, 118901, and 2447.

LSI: 7347, 7355, 7584, 7890, 7714, 7295, 7835, 7876, 7289, and 7131.

3. That accordingly, the Chicago and North Western Transportation Company be ordered to compensate the following named Carmen;

L. McRae: Twelve (12) days @ ten (10) hours per day at time and one-half rate for April 30; May 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 1979.

J. Lundre: Twelve (12) days @ ten (10) hours per day at time one-half rate for April 30; May 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 1979.

E. Derovin: Twelve (12) days @ ten (10) hours per day at time and one-half rate for April 30; May 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 1979.

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 employes 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 June 29, 1979, the Organization initially filed the claim which is now before the Board. In that claim, the local chairman asserted that the Agreement (Rules 47, 46 and 53) was violated based on the following factual assertions. He asserted that the Carrier hired an outside contractor (J. C. Allen) who, along with three of his employes cut up 33 condemned ore cars for "scrap and reclaimed salvaged parts, such as wheels, brasses, draft gears, couplers, truck sides, bolsters and all parts of air brake equipment." He also contended that the scrap salvage parts were loaded in separate cars and sent to the store department at Escanaba, Michigan and Clinton, Iowa for processing or disposal.

The Division Manager replied to the claim on August 24, 1979. It is noted that there was no exception taken by the Division Manager to the basic facts outlined in the claim. The only substantive response was contained in one sentence, to wit: "The cars in question were located at a point where suitable equipment and carmen were not available." The claim was appealed to the next highest level on September 18, 1979. The same material facts were asserted as had been laid out in the initial claim. A violation of rules 124 and 30 was also claimed at this point. The Carrier responded on November 9, 1979 with a simple two sentence denial which indicated the claim was not supported by the Agreement.

The Organization responded to the Carrier's November 9, 1979, letter on June 6, 1980, again making the same basic factual assertions and a variety of well developed arguments. This letter also contained statements by the carmen involved that they had used cutting torches and cranes in the past ("for many years") in scrapping cars at derailments in and outside yards. Some of the statements claimed that the necessary equipment to perform such an operation was still presently available.

The record, after the June 6, 1980 letter reflected a letter from the General Chairman requsting a conference and a letter dated July 31, 1980, from the General Chairman to the Carrier confirming the conference and requesting a time limit extension. The record reflects no other responses on the property to the claim except the two letters mentioned above. During the hearing before the Board, the Organization made a number of vigorous objections to what they considered to be new arguments and assertions of fact contained in the Carrier's submission. A review of their objections shows that these objections are quite proper and fully substantiated. The only arguments or evidence which will be considered are those that were presented on the property. The Board's rules of evidence are so well established that they do not require citation. Both parties are under an affirmative obligation to make a record of their position and the evidence on which they rely before the claim is appealed to the Board. However, it is noted that some of the Carrier's remarks in their submission confirm the assertions of the Union. The Carrier noted that they retained some of the parts and indicated that J. C. Allen never obtained title to the cars.

In view of the manner in which the case developed on the property, the Board is left to consider, as fact, the assertions made by the Organization concerning the circumstances surrounding this dispute. We are also left to measure the parties' relative positions based on the case that was made on the property.

The Organization claims that Rules 30, 47, 53 and 124 were violated. They read as follows:

Rule 30 reads as follows:

"In compliance with the special rules included in this agreement, none but mechanics and their apprentices in their respective crafts shall operate oxyacetylene, thermit, or electrical welders; where oxyacetylene or other welding processes are used, each craft shall perform work which was generally recognized as work belonging to that craft prior to the introduction of such processes, except the use of the cutting torch when engaged in wrecking service.

It will be understood that at points where there is not sufficient work to keep autogenous welders of a particular craft so employed, fifty percent of one shift, mechanics of respective crafts so affected will be assigned and when so assigned shall do such welding and cutting as may be required and will receive the differential rate while performing such work. If required to perform such work more than once on a shift, they shall receive the differential rate for the entire shift.

Should it become necessary to send any oxy-acetylene or electric welder out of the shop in cold weather, he will be given time to dry off before going out."

Rule 47 of the current agreement provides the following:

"When dismantling for reconstruction, or repairing engines, boilers, tanks, cars or machinery, the work shall be done by mechanics of their respective crafts. Necessary help will be furnished.

When destroying scrapped or condemned engines, boilers, tanks, cars or machinery, the work will be done by helpers, excepting the removal of useable parts from locomotives, or the operation of the cutting torch."

Rule 53 states:

"Mechanics work as defined in the special rules of each craft will be performed by mechanics, regular and helper apprentices to the respective crafts."

Rule 124 reads as follows:

"Carmen's work shall consist of pattern making, flask-making, cabinet work, passenger car work, surfacing, priming, varnishing, lettering, decorating passenger cars and locomotives; upholstering, building, repairing, removing and applying locomotive cabs, pilots, pilot beams, running boards, foot and headlight boards; wood tender frames; wood machine operating, buffing, millwright work and all other work of the same class generally recognized as carmen's work.

Other carmen's work shall consist of bench carpenter work, passenger car platform work, carpenter work in connection with building and repairing motor lever and hand cars, station truck and other similar equipment when at shops and all other carpenter work in shops and yards; building and repairing way car steps, repairing stationary car equipment and similar boxes; burning off or sand-blasting paint; spraying or painting underframes, roofs, floors, trucks, iron work, battery boxes, and other equipment on passenger cars; locomotive painting, freight and way car painting and stenciling tool houses, gateman towers and similar buildings, roadway signs, station trucks, motor cars and other similar equipment when at shops; paint removing with sandpaper or torch and all other work generally recognized as painters' work. Freight and passenger car inspecting, air hose coupling in train yards and terminals; mounting, dismounting, and repairing steam, air and water hose; operating punches and shears doing shaping and forming, hand forges and heating torches in connection with carmen's work; repairing freight cars and tender trucks, pipe work in connection with air brake equipment on freight cars; applying prepared metal roofing; insulating refrigerator car doors and hatch plugs; wrecking derrick engineers; oxy-acetylene, thermit and electric welding on work generally recognized as carmen's work and all other work of the same class generally recognized as carmen's work."

As mentioned above, this case involves the scrapping and dismantling of damaged freight cars. With respect to dismantling, this Board has many times considered disputes similar to this in fact and contract. Under rules similar to Rule 47, the Board has found that the work of dismantling cars is work reserved to Carmen craft. The Organization cites Award 6800 involving the same parties and Rule 138. The Carrier argues that this decision is distinguished because Rule 47, unlike Rule 138 limited the reservation of dismantling work to mechanics when the purpose is "reconstructing". Even assuming this is true for the sake of discussion, it is clear that many of the parts in this case were saved and it is easily presumed that these parts would be used to reconstruct or repair other freight cars. We see no practical distinction between repairing or reconstructing. Thus, Rule 47 clearly controls.

Applying the instant facts to Rule 47, the Carrier makes two defenses. They claim (1) no carmen were employed at the location involved and (2) the necessary equipment was not available. With respect to the first defense, there doesn't appear to be anything in the Rule which compromises or qualifies its application to the instant set of facts. With respect to the second portion of their defense, there are assertions made in the record by the claimants that they have done similar work. The Carrier, in their submission, qualified their defense by indicating that they did not have the equipment "available at the time." There is no indication in this record that this derailment or the necessity to remove the cars was an emergency or a matter of urgency which would justify the use of a contractor.

It is noted that there is no defense present that any of the scrapped materials were sold to a contractor. In other cases, the Board has upheld the Carrier's right to sell its property. For instance, in Award 6800 it was stated:

"No one is questioning Carrier's right to sell its equipment and have the purchaser remove it from Carrier's property. However, such was not the case at hand. Carrier concedes that the contract with Milkie required that certain specified material be returned to it. We are forced to conclude from the record before us that the primary purpose of the contract with Milkie was the dismantling of the freight cars in question with Carrier's intent to salvage useable parts and scrap metal."

Thus, nothing in this decision should be construed to alter the Carrier's right to sell its property. Also see Second Division Award 6529 wherein it was stated:

"Petitioner does not, in the instant matter, challenge the right of Carrier to sell its equipment and have the purchaser remove same from Carrier's property. If it did, it would have been faced with the holdings of this Board rejecting claims based thereon. Awards 2377, 2922, 3158, 3228, 3585, 3586, 3635, 3636, 3739, 4476, 5957, and 5958."

In view of the foregoing, it is found that a violation of Rule 47 occurred in respect to the dismantling of the cars for reconstructions and repairing as opposed to scrapping. It is noted that there is nothing in the record to distinguish how many hours were spent dismantling versus scrapping. This can best be determined by the parties. The Claimants shall be compensated at the straight time rate for the number of hours spent in dismantling cars.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of May 1984.

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A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of May 1984.