Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11024
SECOND DIVISION Docket No. 10590
2-C&NW-CM-'86

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

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

Dispute: Claim of Employes:

1. Carmen J. R. Matteo and D. D. Bunn were deprived of work and wages to which they are entitled when the Chicago & North Western Transportation Company improperly assigned Union Pacific Carmen to inspect and repair freight cars in the C&NWTC train yard at Fremont Nebraska, on October 1, 2, 3, 5 and 7, 1982.

2. That the Chicago & North Western Transportation Company be ordered to compensate Carmen J. R. Matteo and D. D. Bunn for five days pay at eight hours per day at the time and one-half 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 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 waived right of appearance at hearing thereon.

By notice dated September 23, 1982, the Carrier laid off its Carmen forces consisting of ten employees including the two Claimants at Fremont, Nebraska effective September 30, 1982. On October 1, 2, 3 and 7, 1982, two Union Pacific Carmen performed one or a combination of inspection, air testing, closing of car doors, locked containers or roll-by inspection. There is no dispute under the Controlling Agreement that this work is within the Organization's jurisdiction.

The Carrier initially argues that no jurisdiction exists for the Board to hear this matter since under the requirements of the Controlling Agreement, no action was taken by Organization indicating an intent to proceed before this Board within nine months from the March 30, 1983, denial of the Claim. We reject that argument. On the basis of this record, a review of the correspondence set forth above shows that a conference was set for October 28, 1983. After the conference an agreement was made to extend the deadline date for filing with the Board to February 28, 1984 - a procedure specifically permitted by the Controlling Agreement ("It is understood, however, that the parties may by agreement in any particular case extend the 9 months' period herein referred to.") The instant proceeding was submitted by letter dated February 14, 1984. Nothing in the record demonstrates, under the circumstances of this case, that the matter was not timely filed.

With respect to the merits of the Claim, the Organization asserts that the Union Pacific Carmen were not contractually entitled to perform work at the Carrier's Fremont, Nebraska yard and therefore, the Claimants are entitled to compensation at the punitive rate. In the handling of the Claim on the property, the Carrier first argued that the Power Brake Law, effective October 1, 1982, effectively changed the operation at Fremont so that the Fremont operation is now classified as an intermediate point. According to the Carrier, if the Union Pacific Carmen did inspect the trains, they did so under their own volition and not under any instructions given by an Officer of the Carrier. Second, the Carrier argued that its policy was to use the mechanics-in-charge at Fremont to close doors on the train in question. Third, on the property and in its Submission herein, the Carrier argued that there was insufficient evidence to show that the work was in fact performed by Union Pacific Carmen; and that, with respect to October 5, 1982, there was no suggestion as to what type of work was performed on that date.

We find that under the circumstances of this case, the Carrier's argument concerning the Power Brake Law's alleged changing of the status of the Fremont Yard must be rejected. This record does not reveal to a satisfactory degree that such an argument or assertion of fact, without more, can override the clear language of the Controlling Agreement that the work in question should have been performed by the Carrier's Carmen and not by Union Pacific Carmen.

The Carrier's argument that the Union Pacific Carmen did the work voluntarily is similarly not persuasive in this case. Aside from the base Claim, there is no record evidence to support such an argument. We fully recognize that the Board has held that a purely voluntary act by an employee should not be the basis for a Claim that a Carrier violated its Agreement. See Second Division Award No. 7154; Third Division Award No. 22807; Fourth Division Award No. 3837. However, a reading of those Awards shows cases decidedly different than the instant dispute. In Award No. 7154 a Machinist, on his own, and without direction from the Carrier, installed a battery in a crane, which work was claimed by the Electricians. The Board held that:

> "We are of the view that as long as there is no showing of a subterfuge, direction, instruction, or tacit approval, etc., a purely voluntary act by an employee should not be the basis for a claim that the Carrier violated the Agreement."

In Award No. 22807, the Claimant therein was offered a Telegrapher position on a different shift than her assigned job as a Car Clerk. The Claimant voluntarily accepted the position and, because of the Hours of Service Law, she was precluded from working her regular shift as a Car Clerk on the disputed date. The Board rejected the Claimant's request for compensation for the hours she could not work (in addition to those hours that she worked as a Telegrapher) because of the legal restrictions placed upon her by the Hours of Service Law. The Board held that the acceptance of the Telegrapher assignment by the Claimant was voluntary and that the Agreement was not violated, especially since the Claimant had a net gain in compensation. The Board further noted:

> "The Organization cites several previous awards of the Board which granted similar claims. The majority dealt only with the problem of keeping the employe whole with respect to compensation. There is no such problem in the case at bar."

Finally, in Award No. 3837, a Conrail train entered the Carrier Delaware and Hudson Railway Company's yard on Memorial Day and the Conrail Conductor set off cars for interchange delivery which work was Yardmaster function, and did so without authority of the Carrier and in trespass of the Carrier's property.

None of the factors present in the aforementioned Awards are present in this case. The work performed by the Union Pacific Carmen was done over a period of one week on five separate occasions and not on a purely isolated basis as in Award Nos. 3837 and 7154. Further, in Award No. 22807, there was no violation of the Controlling Agreement and no loss of compensation. To the contrary, in this case, the Controlling Agreement clearly designated the work as belonging to the Carrier's Carmen and the Claimants herein did suffer loss of compensation. In this case, the Carrier cannot avoid its contractual obligations by merely claiming that the work was performed on a voluntary basis.

With respect to the Carrier's argument that its policy was to use mechanics-in-charge to close doors at the Fremont yard, there was no issue raised by the Organization concerning work performed by the mechanics-in-charge. The issue concerns inspection work performed by Union Pacific Carmen rather than the Claimants.

With respect to the sufficiency of the evidence that work was in fact performed by the Union Pacific Carmen, we are satisfied in this case that the Organization has carried its burden. A reading of the record as a whole shows that after the Claim was filed asserting that the work was performed by Union Pacific Carmen on the dates in question, the Carrier never really disputed that fact. The Carrier's responses to the Claims were couched in terms of language such as "if the Union Pacific Carmen did, in fact, inspect. . . . " Coupled with the fact that the Carrier has asserted that the work was voluntarily performed by the Union Pacific Carmen, we believe that there never was a serious dispute of fact concerning the performance of the work by the Union Pacific Carmen. An examination of the Claim shows that the Organization has made very specific factual allegations concerning the work performed by the two Union Pacific Carmen on October 1, 2, 3 and 7, 1983. We would expect, under circumstances such as these, that if the Carrier disputed the fact that the work was performed as asserted by the Organization, that the Carrier would have said so rather than relying solely on the arguments that it did. Further, under these circumstances, the fact that no specifics were given by the Organization concerning work performed on October 5, 1983 does not change the result. The date of October 5, 1983, is specifically set forth in the Claim and it appears to be part of the scenario concerning the dates in question. Again, if the Carrier really disputed the facts and had facts to the contrary, those should have been asserted. Because those contrary facts were not brought forward and the claims of the Organization were not denied, but were treated as they were in this case, we do not believe that the Carrier ever really disputed the factual assertions made that the work was performed by the Union Pacific Carmen on the dates in question.

Therefore, we find that in this case, the Organization has sufficiently demonstrated that the work was performed by the Union Pacific Carmen, which work should have been performed by the Carrier's Carmen. The only remaining question is the rate of compensation to be awarded the Claimants'. The Organization asserts that the Claimants' should be compensated at the time and one-half rate. The Carrier opposes that rate and asserts a pro-rata rate should be utilized. Without more, we find no justification for assessing the Carrier at the time and one-half rate. We find that under the circumstances of this case, the Claimants are entitled to be compensated at the rate they would have received had they been permitted to perform the work.

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 8th day of October 1986.