Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 12013
SECOND DIVISION Docket No. 11853
91-2-89-2-154

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/Division of TCU
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(Terminal Railway Alabama State Docks

STATEMENT OF CLAIM:

1. That the Terminal Railway Alabama State Docks (hereinafter referred to as the Carrier) violated the Agreement when they allowed employes of South Rail Railroad to inspect and repair freight cars on Terminal Railway property on September 6, 8, 9, 12, 15, 27, 29 and 30, 1988.

2. That the Carrier should be ordered to compensate Carmen W. H. Shields, D. N. Middleton, T. R. Stephens, R. P. Miller, M. L. Wiseman, K. R. Graff, W. H. Shields, and D. N. Middleton (hereinafter referred to as the Claimants) for two (2) hours and forty (40) minutes each at time and one-half on each respective dates listed above as a result of said violation.

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.

The Claim of the Organization is that Carrier violated Rules 48 and 22 of the Agreement, wherein employees foreign to the Agreement were permitted to do Carmen's work on the Carrier's property. Rule 48 is a Classification of Work Rule. Rule 22 states that "none but mechanics...shall do mechanic's work ...." The instant record substantiates that the disputed work was within the scope of Carmens' work. A major argument of the Organization on the property was that the Carrier "allowed the South Rail Railroad employees to come on their property and perform work..."

The Carrier, in denying the Claim provides two defenses. First, by letter of November 15, 1988, it states that the South Rail Railroad Carmen made the repairs on "a track leased to them." Second, that the practice has been existing without objection by the Organization for over three years.

As a preliminary point this Board finds the record to include material which may not be considered. Among such material are the AAR Rules which are not negotiated contractual provisions between the Organization and the Carrier. In addition, both Ex Parte Submissions include Rules, arguments and material evidence which is new to the dispute. By long established Board precedent we may not consider evidence and arguments which were not clearly raised on the property (Second Division Award 10962; Third Division Awards 27328, 24494, 22893, 20064).

This Board's review finds that the Carrier never refuted the Organization's contention that cars were "inspected, oiled and repaired by South Rail carmen on TRASD property." Nor did the Carrier refute that employees foreign to the Agreement were allowed "to come on their property and perform work which should have been performed by Terminal Railroad Carmen." Unrebutted assertions are taken by this Board as fact. However, Carrier statements that this was a three year practice and on leased track are similarly unrebutted and must stand as fact.

This Board has carefully, systematically and chronologically reviewed the on-property record. We hold that the Claim must be partially sustained for the following reasons. Chronologically, the Organization argued that Carmen from South Rail Railroad performed Carmen's work on the Carrier's property in violation of Rule 48. The Carrier did not deny the fact, but argued initially that the work was done "exclusively" on South Rail cars. The Organization thereafter stated that "the violation was admitted." The Board notes that the alleged violation was never rebutted. Nevertheless, the Carrier by letter dated November 15, 1988, stated that the work was done on "a track leased to them." Although not directly refuted by the Organization, the Carrier thereafter is alleged again to allow employees foreign to the Agreement "to come on their property" or "to perform work on the property of Terminal Railroad."

Finding contradictory and unrefuted statements, this Board has carefully reviewed the final sort of correspondence on the property. The Carrier does not further refute that South Rail Railroad employees are coming onto its property. The Carrier does not repeat, amplify or document the earlier statement of "lease." In fact, rather than restate that position, the Carrier instead changes its defense contending repairs were made "in our interchange yard into (sic) a track designated for their use for more than three years." On such a key point, the Carrier's failure to confirm or restate its defense is a serious defect. In fact, this Board finds the one early lease statement contradictory with its statement concerning use of a designated track. While "lease" could mean "designated," the language could also indicate a distinctly different meaning.

The Board holds that the Carrier failed to consistently and adequately defend itself against the alleged violation of the Agreement. If indeed, a lease had been entered into and the work thereafter performed by South Rail Railroad, then this Board has previously held that under most circumstances no violation of the Agreement would have occurred (Second Division Awards 11574, 11567, 11562; Third Division Award 26103). However, there is insufficient support in this record to convince this Board of the actual existence of a lease in the instant circumstances. The Carrier never directly refutes the existence of a violation on its property. Nowhere does the Carrier explicitly state or reconfirm earlier arguments that repairs never occurred on its property, but only and exclusively on leased property. We hold a violation of the Agreement occurred and sustain part one of the Claim.

With respect to the issue of compensation, this record includes the unrebutted statement by the Carrier that this practice had been continuing for over three years without objections from the Organization. Carrier states that since the beginning of operations, South Rail cars were returned to South Rail for its employees to inspect. Nowhere does the Organization deny said practice. The evidence of record is that the Organization acquiesced to employees foreign to the Agreement inspecting cars, oiling journal boxes and making running repairs on the Carrier's property.

Accordingly, part two of the Claim is denied. The Organization has the right to require compliance with the Agreement. However, we fail to find in this record evidence listing the cars, specific repairs and time involved on the dates claimed. Moreover, the Carrier had every right to come to expect its practice with regard to South Rail Railroad would continue without complaint. This Board finds it inconceivable to hold the Carrier liable for compensation for a practice it long regarded as legitimate given the acquiescence of the Organization. For those reasons, we deny the Claim for compensation.

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 20th day of February 1991.