NATIONAL RAILROAD ADJUSTMENT BOARD

Form 1 SECOND DIVISION Award No. 12674
Docket No. 12402
94-2-91-2-233

The Second Division consisted of the regular members and in addition Referee Joseph S. Cannavo, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen Division/TCU
(
(Port Terminal Railroad Association

STATEMENT OF CLAIM:

"1. That the Port Terminal Railroad Association violated the controlling agreement, particularly Rule 10, when Maintenance of Way welders were used to perform carmen's work on a flat car on the date of October 31, 1989.

2. That accordingly, the Port Terminal Railroad Association be ordered to pay Carman R. D. Stringer four (4) hours pay the pro rata 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.

As Third Party in Interest, the Brotherhood of Maintenance of Way Employes was advised of the pendency of this dispute and did file a Submission with the Board.

This claim arises out of an incident that occurred on October 31, 1989. On that date, the Claimant was first out on the overtime board of Carmen employed by the Carrier and one (1) Maintenance of Way welder and two (2) helpers were used to make repairs and perform welding on a flat car located behind the Maintenance of Way storage building. In support of its claim for four (4) hours pay

for the Claimant, the Organization relies on Rule 10 - Classification of Work which states in pertinent part:

"Rule 10 - Classification of Work

> Carmen's work shall consist of building, maintaining, dismantling...painting, upholstering and inspecting all passenger and freight cars... and all other work generally recognized as Carmen's work." (Emphasis added.)

The issue is whether the Port Terminal Railroad Association violated the controlling agreement, particularly Rule 10, when Maintenance of Way welders were used to perform Carmen's work on a flat car on the date of October 31, 1989.

It is the position of the Organization that the Carrier has willfully and deliberately violated Rule 10 of the current controlling agreement. Organization refers to Webster's New Collegiate Dictionary:

> "a flat car is a railroad freight car without permanent raised sides, ends or covering."

According to the Organization, this flat car was used as a means to transport both old and new ties. The new ties are considered new merchandise purchased and transported as freight. The old ties are removed and transported to be scraped or sold. This would also be considered the movement of freight on a freight car. Although this car was in the service of the Maintenance of Way Department, the car was not exclusively Maintenance of Way property. It is owned by the Port Terminal Railroad Association and the maintenance of the car belongs to the Carmen's craft as defined in Rule 10.

The Organization states that nowhere has the Carrier established any proof of any previous work being performed on this car and that this car is seven or eight years old, there should have been no maintenance necessary on this freight car until the time of the claim.

The Carrier states that the Carmen do not hold the exclusive rights to repair or maintain ,on track equipment that is used exclusively by the Maintenance of Way Department; that the Carmen's agreement does not include within the Scope Rule the equipment utilized by the Maintenance of Way Department and the long standing and the undisputed practice on the property has been for the Maintenance of Way Department to make modifications and repairs to the surface of the car in question. The Carrier has stated that this practice has existed for years. Therefore, it contends that the Carmen do not hold the exclusive right to repair the

Maintenance of Way car by agreement or practice and the claim should be denied for the lack of merit or contractual basis.

The Carrier also states that: the Organization's position is based solely on the content of Rule 10, which reserves the maintenance of freight cars to the craft of carmen; the Organization presented the definition of a flat car, not freight car to support their position; the Organization's claim is not for a flat car, but for a motor car flat car which has a different use and definition than a normal flat car. The Carrier's supports its position by their definition of freight as follows:

> "1) The compensated paid for the transportation of goods; 2) something that is loaded or transported; 3) the ordinary transportation of goods afforded by a common carrier and distinguished from express."

The Carrier states that the term freight car has historically been defined as equipment utilized by a common carrier to transport a customer's goods in which compensation has been paid for such transportation services; and that the Maintenance of Way "motor car flat car" is not a freight car as described and intended in Rule 10, and that the repair or maintenance of the car is not reserved to the class of Carmen.

In addition to the provisions of Rule 10 not supporting the Organization's claims, the Carrier claims that the practice on the property develops that the Maintenance of Way employees have historically made the repairs on the car and the Carmen have not made any repairs since it has been added to the Maintenance of Way equipment seven to eight years ago. Also, Carrier states that the Organization has not supported its claim with any proof that they have performed the work in question on an exclusive basis noting that Organization cannot furnish such evidence as the record clearly indicates that the Maintenance of Way has performed all maintenance on the car since it became part of their own track equipment.

The Maintenance of Way Organization states that the flat car involved here could not be construed as a "freight car" as contended by the Carmen; that the fact is that the flat car involved here is used exclusively by the Maintenance of Way and was not used for the purpose of hauling freight; and that welding and work incidental thereto has customarily and historically been assigned to and performed by members of Maintenance of Way. They state that the Carmen have failed to prove that the work in question was reserved to them by past practice or clear rule.

The Board notes that the Organization's position is based on the content of Rule 10 which reserves the maintenance of freight cars to the craft of Carmen. Railroad history establishes that freight cars are equipment utilized to transport customer goods for which revenue is paid to the railroad. The Board agrees with the Carrier that the Maintenance of Way "motor car flat car" is not a freight car as intended in Rule 10 and that the repair and maintenance of that car is not reserved to the class of Carmen. The Carmen failed to establish that although the car was in the exclusive control of the Maintenance of Way craft, it or any similar car, had maintenance and repair work performed exclusively by the Carmen craft. To the contrary, the record established that the Carmen have made no repairs on the car since it was built seven or eight years ago. Claims by the Carrier that Maintenance of Way employees have performed repairs stand unrebutted. The Organization is unable to claim intermittent repair and maintenance work on this car. The evidence compels the Board to reject the Organization's claim that no prior repair or maintenance work has been performed on this car in seven or eight years. The record establishes that everything about this car is exclusively Maintenance of Way. The Board finds that the Organization did not meet its burden of proof and thereby did not establish a violation of Rule 10.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Catherine Loughrin/lw
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 6th day of April 1994.