Award No. 3970
Docket No. 3707
2-T&P-CM-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 121, RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L.-C. I. O. (Carmen)

THE TEXAS AND PACIFIC RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That at Sherman, Texas on or about October 30, through November 1, 1958, the Carrier violated the current agreement particularly Rules 21 and 89 by having other than Texas and Pacific Railway Carmen remove and apply wheels to NYC 72294 Car loaded with steel.

2. That accordingly the Carrier be ordered to compensate Carman B. A. Nikirk, M. H. Brown and J. H. Goodwin of Fort Worth, Texas 8-hours additional pay under Rule 5(a) as follows:

> A. Carman B. A. Nikirk, who has a truck driver's license and is ordinarily used to drive the company truck on such road trips be additionally compensated in the amount of 8-hours at the time and one-half rate.
>
> B. That Carmen M. H. Brown and J. H. Goodwin each be additionally compensated in the amount of 4-hours at the time and one-half rate and 4-hours at the pro rata rate.

EMPLOYES' STATEMENT OF FACTS: On October 30, 1958, Texas and Pacific Extra Train No. 554 south picked up NYC Car No. 72294 loaded with steel at Denison, Texas for movement to Odessa, Texas. While in transit NYC Car No. 72294 developed a hot box and was set out on line of road at Mile Post A-154 by the crew of Train No. 554 near Sherman, Texas. Thereafter NYC Car No. 72294 was picked up by local and switched to the St. Louis-San Francisco Railroad at Sherman, Texas for repairs where a pair of wheels were removed and applied at position R&L-1 by carmen of the St. Louis-San Francisco Railroad in the Frisco Shops at Sherman, Texas. After being repaired NYC Car No. 72294 was switched back to the Texas and Pacific Railroad by the Frisco for movement to its destination of Odessa, Texas.

Carmen B. A. Nikirk, M. H. Brown and J. H. Goodwin, hereinafter re-

However, in this particular case we would not have put on more men, nor worked anyone overtime. We could and would have simply deferred some other work, and used available employes during their assigned hours at straight time. But the industry's cost problem is constantly increasing, and we cannot raise our rates at will, and competition with other forms of transportation is also increasing; and the long run effect of such a rule would be to harm the employes themselves, along with their employers. Therefore, no one was damaged by what was done in this case in any event, least of all the claimants, —and there would be no basis for any claim for money in this case, even though there had been a violation of some agreement.

Furthermore, there would be no basis for awarding pay at the punitive rate in any event, because no one was actually imposed upon by being required to lose his rest day or work excessive hours.

Our submission in Second Division Docket 3136 under our file T-30884 covers much of this, and all of it is too clear and too well-established to justify the use of any more space in this submission, especially in view of the clearly-established fact that there was no violation of the agreement anyhow.

For the reasons stated above, the carrier respectfully requests the Board to dismiss or deny this claim in all respects.

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 Labo 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.

On the morning of October 30, 1958, while in transit over carrier's line at Sherman, where carrier has no shop, a New York Central freight car was found to be in bad order. It was therefore set out there; two days later it was picked up by the connecting Frisco railroad, two wheels were changed in the latter's shop, and the car was returned to Sherman the same day, to resume transit on carrier's lines. The diversion to the Frisco line was solely for repairs.

Rule 81 provides that carmen's work includes maintaining freight cars. Rule 89 provides that "when necessary to repair cars on the road or away from the shops, carmen, and helper when necessary will be sent out to perform such work as putting in * * * wheels, and work of similar character." Rule 21 provides that "none but mechanics or apprentices regularly employed as such shall do mechanic's work as per special rules of each craft," with certain exceptions not material here.

The reference in the Rules to work "away from the shops" must mean the carrier's shops; and the reference to "mechanics regularly employed" must mean mechanics employed by the carrier. Taken together, these three rules mean that only the carrier's carmen shall do the work of their craft arising on its line of road away from its shops. No exception is indicated with reference to the outside ownership of cars being handled by carrier.

Carrier contends that the carmen have not exclusive rights to this work,

and that for many years it has been the established practice to set out such cars at Sherman to have wheels changed and other repairs made at the Frisco shops. The organization denies the existence of such practice and disclaims knowledge of like incidents. The carrier cites only seven such instances, all during 1958 and the two immediately preceding years, and says that it is difficult to locate old records of that nature. The showing is insufficient to establish a long established practice or acceptance by the Organization. It is not aided by reference to claimed interchanges of work between carrier and certain subsidiary railroads in past years, or to the Organization's contention in such instances, not that the subsidiaries' employes could not properly do the carrier's work, but that when doing so they should be regarded as carrier's employes and should be included in its seniority lists. That contention was settled by the decision of an emergency board that the subsidiaries were separate corporations and that their employes were not the carrier's employes. The past practice asserted by the carrier is not established by the record, assuming that the meaning of the rules is doubtful so as to permit consideration of accepted practices.

The time or the number of carmen actually required for the work is not shown, but as it was done in one day it apparently could have been performed on October 30, when the Claimants were available. Carrier states that it would have used either one or two carmen and either one or two helpers to do the work. Presumably three carmen would not have been needed, especially since under Rule 89 a helped will be used if necessary.

Claim 1 should be sustained and the case remanded to the property for determination of the number of carmen needed for the work, the time required, and the claimant or claimants entitled to compensation. Pay for time not worked should be at the straight time rate.

AWARD

Claim 1 sustained.

Claim 2 remanded for settlement in accordance with findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 18th day of April, 1962.