Award No. 4111
Docket No. 3865
2-CofG-CM-'63

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. 26, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Carmen)

CENTRAL OF GEORGIA RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier violated the controlling Agreement on April 6, 1959 when it used two Illinois Central Carmen, who were stationed at Birmingham, Alabama, to apply wheels to C. of Ga. hopper No. 21789 at Leeds, Alabama.

2. That accordingly the Carrier be ordered to additionally compensate Carmen O. D. Gilbert and W. S. Taylor in the amount of four (4) hours at the applicable overtime rate for the aforesaid violation.

EMPLOYES' STATEMENT OF FACTS: The Central of Georgia Railway Company, hereinafter referred to as the carrier, used two Illinois Central carmen, who evidently were regularly assigned to work at Birmingham, Alabama, to apply wheels to CofGa hopper No. 21789 at Leeds Alabama, a point on the Central of Georgia mainline at which a CofGa carman is regularly assigned, on April 6, 1959.

This car, CofGa 21789, had been set out of a Central of Georgia main line train at Leeds, Alabama.

Carmen O. D. Gilbert and W. S. Taylor, hereinafter referred to as the claimants, are regularly assigned at Columbus, Georgia, stood head out on the road trip overtime board, and were available for this service had they been called.

Claimants, and other carmen stationed at Columbus, Georgia are familiar with this type of work and have been used on line of road work for years.

Carrier has had a carman, B. H. Wilson, Jr., regularly assigned at Leeds, Alabama for a number of years.

2. The claim is in fact a request that the Board cancel the contract and practice thereunder between the Central of Georgia and the Illinois Central Railroad, and grant the petitioners a new all-encompassing rule. That under such facts in the past this Board has correctly held it is without authority to cancel such contracts or to grant new rules, and

3. Since the claim clearly is not supported by the current shop crafts agreement on this property, the Board should not do other than render a denial award.

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 were given due notice of hearing thereon.

Rule 117 provides that "Carmen will be sent to inspect and repair cars on line of road or away from shops". The Carrier had a carman regularly assigned at Winburn, four miles from Leeds, but he had other duties, lacked the necessary tools, and in any event could not have changed the wheels alone.

Instead of sending carmen out for this work the Carrier had it done by two carmen employed by the Illinois Central at Birmingham, 17 miles away, whom it calls "joint employes" of the two roads under an "historical agreement and practice" for the performance of work on Central of Georgia equipment. The Employes deny the existence of any such historical agreement or practice.

In support of its contention the Carrier cites an agreement of June 17, 1917, between the two railroads under which repairs upon its road engines and cars would be performed by the Illinois Central at its East Thomas Yard, and the Carrier would pay it "actual cost, plus 10% on labor and 15% on material and supplies."

Two points are obvious. In the first place, the 1917 agreement does not turn Illinois Central's East Thomas employes into joint employes of the two railroads; it merely makes the Illinois Central a cost-plus independent contractor for the performance of work by men who continue to be its own employes under its control and its union agreements. In the second place, it does not provide for such work on the line of Carrier's road, but only in the Illinois Central Shop at its East Thomas Yard.

The Carrier also cites a new agreement dated and effective on October 10, 1951, and subject to cancellation by either party on sixty days' notice, the preamble of which states as follows:

"From time to time Central of Georgia has requested that (a) repairs be made to cars in its account located at points in and about Birmingham away from the mechanical facilities of Illinois Central

at East Thomas, which, at times, necessitates use of truck for transporting men, tools, and material to the point or place where repairs are made; and (b) cars damaged on line of Central of Georgia and brought to East Thomas to be put in shape to move to place of repair or disposition, or be permanently repaired."

The new agreement then provides for the basis of payment,

"including rental of equipment used in transporting men, tools, and material to place where repairs are made away from East Thomas",

and proceeds:

"It is understood that, while the agreement of December 20, 1948, as amended by letter agreement of August 31, 1949, and memorandum agreement of September 29, 1949, provides for Central of Georgia cars being taken care of and repaired at the mechanical facilities of the Illinois Central in its East Thomas Yard at Birmingham, said Agreement, as heretofore and as herein amended, shall be construed to include and apply to repairs to Central of Georgia cars or cars in its account at **points or places in or about the joint Birmingham Terminal other than at said mechanical facilities of the Illinois Central.**" (Emphasis ours.)

In other words, the 1951 agreement still relates to "the joint Birmingham Terminal" and to "points or places in and about" it. We need not consider whether this work on Carrier's line of road 17 miles away is to be construed as having been done "in or about the joint Birmingham Terminal" within the intent of the 1951 agreement. For that agreement preceded this claim by only seven and one-half years and fails to indicate an "historical agreement and practice" in the light of which the Agreement of September 1, 1949, should be construed.

AWARD

Claim sustained at the applicable straight time rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 6th day of February 1963.

DISSENT OF CARRIER MEMBERS TO AWARD 4111

The Board's Opinion and the Award based thereon are erroneous. This Award has settled nothing and furnishes no precedent or help in future problems analogous to the instant dispute. This Award is not a just determination of this dispute, because the erroneous new interpretation given to Rule 117 by the Board is not supported by the unproven assertions of the Organization. To arrive at this conclusion, it was necessary for the Board to set aside the evidence presented by the Carrier and then to give full weight to the unsupported claims and contentions of the Organization.

The record in this docket showed that both the Carrier and the Organization had over the years understood that what was done here was not a violation of any agreement provision. As shown, the work in dispute since at least 1917 had been handled in precisely the same manner as here with no

question ever being raised as to the propriety of such handling. Notwithstanding this lack of objection or challenge, the Board had to ignore this past practice in order to reach its conclusion. This practice now in dispute also exists throughout the Railroad industry. In such a reciprocal arrangement between Carriers, the operation of the law of averages equalizes the gains and the losses to the employes.

The Carrier in support of its position offers in evidence statements from the following officials — Master Mechanic, Superintendent of Car Department, and Superintendent of Motive Power; also a statement from the Illinois Central Car Foreman at Birmingham Terminal, as well as an accounting record going back to the year of 1948, one year prior to the present agreement. It is wrong for this Board to reject evidence of its own volition and without any objection or challenge to such evidence having been raised. Apparently this was done.

Moreover, the Organization in arguing before the Referee recognized the Carrier's right to have a contract with the Illinois Central at Birmingham Terminal to allow for the repairs of Central of Georgia equipment by Illinois Central employes within the Terminal limits. The Organization also recognized the Carrier's right to call for help in time of an emergency, as have many awards of the N.R.A.B.

Rule 117 has no application in this dispute. The record shows that Central of Georgia hopper car No. 21789 was set out of a train on the Central of Georgia main line, 17 miles outside of Birmingham Terminal, because it was unsafe to continue in service or to be moved to the nearest repair facility, due to a bad wheel. The Organization admitted that if hopper car No. 21789 could have been returned safely to the Terminal, no claim would have arisen.

Since the car could not be moved and it failed in service in the vicinity of the Terminal, it was only reasonable and practical for the Carrier to arrange for the Illinois Central to make the car safe for movement in accordance with the agreement terms and custom. This Board has repeatedly held that the practical construction placed on the agreement as evidenced by the practice is controlling. (See Awards 758 and 3873 of this Division and others.)

The public has interest in prompt and uninterrupted transportation service, and when trouble occurs to the Carrier's equipment it is the obligation of the Carrier to restore service as speedily as possible. For this reason, Carriers must have certain reciprocal arrangements covering both car and locomotive emergency service and repairs.

Rule 117 does not contemplate that the employes are entitled to perform work such as involved in this dispute. The Organization waited ten years (date of agreement to date of claim) and then came before this Board and successfully claimed rule violation, while enjoying the benefits of the same practice elsewhere.

For these reasons, we dissent.

P. R. Humphreys

F. P. Butler

H. K. Hagerman

W. B. Jones

C. H. Manoogian