Award No. 4169
Docket No. 3955
2-UP-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Ben Harwood when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 105, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Carmen)

UNION PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That on December 19, 1959 at Ogden, Utah the Carrier violated the controlling Agreement, particularly Rule 138 thereof, in rerailing Cars S.P. 116268, S.P. 109027 and PRR 82613 on the repair track with other than Carmen.

2. That accordingly, the Carrier be ordered to pay Carmen J. Riddle, L. Pope and E. Spiers for four hours at the straight time rate.

EMPLOYES' STATEMENT OF FACTS: Carmen J. Riddle, L. Pope and E. Spiers, hereinafter referred to as claimants, are regularly employed as carmen by the Union Pacific Railroad Co., hereinafter referred to as the carrier, on its Ogden repair tracks at Ogden, Utah.

On December 19, 1959 an Ogden Union Railway and Depot Company switch crew derailed cars SP 116268, SP 109027 and PRR 82613 on track No. 4 of the carrier's Ogden repair tracks.

The O.U.R.&D. Co., switch crew, which derailed the cars was unable to rerail the cars without assistance and a section foreman and sectionman were called and assisted in rerailing the cars. The section foreman and sectionman set blocks, frogs, handled cables, and made hitches with the cables on the derailed cars and the locomotive, which fact is evidenced by statement of 3 carmen employed on the repair track at Ogden.

This dispute has been handled with all officers of the carrier designated to handle such disputes, including the highest designated officer of the carrier, all of whom have declined to make satisfactory adjustment.

The agreement effective September 1, 1949 as subsequently amended is controlling.

still would not be entitled to any compensation. Other carmen were on duty when the work was performed and if it had been necessary and proper they wouud have been used. These claimants would not have been called and paid punitive time under any circumstance. Thus, in any event, the carrier would not be required to have work performed at penalty rates when it was possible, within the framework of the agreement, to have work performed by employes on duty at straight time. In this regard, see **Third Division Awards No. 5331, No. 7191, No. 7227; Special Board of Adjustment Award No. 173, Award No. 32, Special Board of Adjustment Award No. 10; First Division Awards No. 9990, No. 10086, No. 12169, No. 12297, No. 12669 and No. 15527.**

The rerailing of the cars involved herein was incidental to the delivery of those cars by the O.U.R.&D. and was accomplished entirely by O.U.R.&D. employes on tracks on which they had every right to be for that purpose. The work performed was entirely the responsibility of the O.U.R.&D., and the Union Pacific was neither informed nor consulted, and was in no way whatsoever involved. The work was not work which Union Pacific carmen in general had any right to claim under their agreement with the Union Pacific and, since there were Union Pacific carmen on duty who could have done the work if it had been necessary or proper, it was not, in any event, work to which these off-duty claimants had any right or reasonable expectation. For these and the previously set forth reasons it is submitted that the claims should be denied.

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.

The essential facts of this case are not in dispute. It is clear from the record that the derailment and subsequent rerailment which brought about the controversy here considered occurred on Union Pacific trackage rightfully in use under a long standing agreement between said carrier and the Ogden Union Railway and Depot Company, hereinafter referred to as OUR&D. Pursuant to said agreement, the cars derailed were being delivered by an OUR&D switch crew to the repair track of the Union Pacific. After the derailment they were later rerailed by the OUR&D Switch Crew with the assistance of two OUR&D sectionmen and under the supervision of an OUR&D yardmaster. The Union Pacific was not involved in any of this activity.

It is the contention of the three claimants, who are Union Pacific employes regularly engaged as carmen on the Ogden repair tracks of said company, that above mentioned rerailment by OUR&D employes was a violation by the Union Pacific of the agreement between the parties, with particular reference to Rules 138 and 32, and that these claimants, accordingly, are each entitled to compensation for four hours at the straight time rate. The carrier denies any violation of the agreement of the parties.

The respective positions of claimants and carrier have been presented and argued with great care, both in written submissions and orally, and these we have fully considered as well as the various authorities cited. In Award 13697 of the First Division, our attention is called to the denial of a claim wherein OUR&D employes contended it was their right to do certain switching operations which had been performed by employes of the D&RGW, a tenant line having rights to operate on the tracks involved. It was there held that the work performed was the responsibility of the D&RGW under the contract between the two carriers with reference to the operations of the tenant line on the tracks in question. (Note also First Division Award 14127).

With these and other authorities in mind, it is our view that the determining factor in such cases is the question of upon whom lies the responsibility for conducting the operations involved. Here, in the instant case, the authorized operations of the OUR&D crew resulted in a derailment; therefore, the rerailment became the responsibility of the OUR&D. It was so held in Award No. 441, Special Board of Adjustment No. 108 (Referee Douglas). See also First Division Awards 18612, 15404 and 5777 which, in varying fact situations, support the principle that the operator responsible for the work is the one to carry it through to completion. Award 2998. In the case before us we hold likewise and have concluded that this claim may not be sustained.

In the view we take of the controversy presented by this record, it is unnecessary to consider the contention that notice of the pending claim, under Section 3, First (j) of the Railway Labor Act, need be given both OUR&D and its employes.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 20th day of March, 1963.

DISSENT OF LABOR MEMBERS TO AWARDS 4169 and 4170

We agree that it was unnecessary to give notice of the pending of this claim, under Section 3 First (j) of the Railway Labor Act, to the Ogden Union Railway and Depot Company and its employes but not for the reasons given by the majority. It is apparent that the carrier's absurd pleading of the 3 J notice issue confused the majority as to the precise issue presented to the Division in this dispute. Since neither the OUR&D nor its employes are parties to the existing agreement between the Union Pacific Railroad and its employes it is obvious that the OUR&D and its employes are strangers to the agreement governing the disposition of this dispute. (See Kirby vs. Pennsylvania Railroad, U. S. Court of Appeals, Third Circuit (Philadelphia) taken from Volume 27, page 2617 through page 2622 of Labor Relations Reference Manual) or 188 F.2d 793.

The majority concedes that the instant derailment and subsequent rerailment occurred on Union Pacific trackage and that the ensuing rerailment was performed by other than carmen subject to the agreement between the Union Pacific and its employes, which agreement requres that ". . . For wrecks or derailments within yard limits, sufficient carmen will be called to perform the work," but mistakenly bases its findings and award on an agreement between the Union Pacific and the Ogden Union Railway and Depot Company. The jurisdiction of the National Railroad Adjustment Board Second Division is limited to the handling of disputes between an employing carrier and its employes as defined in Section 3 First (h) of the Railway Labor Act.

C. E. Bagwell

T. E. Losey

E. J. McDermott

R. E. Stenzinger

James B. Zink