

**Award No. 4170
Docket No. 3956
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 February 27, 1960 at Ogden, Utah the Carrier violated the controlling agreement, particularly Rule 138 thereof, in rerailling Milw Car 26280 on the repair track with other than Carmen.
2. That, accordingly, the Carrier be ordered to pay Carmen G. Michelson, J. Pugmire and J. Riddle for a call of four hours each at straight time rate for the aforesaid violation.

EMPLOYES' STATEMENT OF FACTS: Carmen G. Michelson, J. Pugmire and J. Riddle, hereinafter referred to as the claimants, are regularly employed as carmen by the Union Pacific Railroad Company, hereinafter referred to as the carrier, on its Ogden repair track at Ogden, Utah.

On February 27, 1960, the Ogden Union Railway & Depot Company switch crew derailed Milwaukee Car 26280 on the south end of Track No. 1 of the carrier's Ogden repair tracks. The O.U.R. & D. Co. switch crew which derailed the car was unable to reraill it without assistance, and a section foreman and two sectionmen were called, and assisted in rerailling the car. The section foreman and sectionmen set blocks, frogs, handled cables, and made hitches with the cables on the derailed car and the locomotive, which fact is evidenced by statements of three carmen employed on 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 a satisfactory adjustment. The agreement effective September 1, 1949, as subsequently amended, is controlling.

POSITION OF EMPLOYES: The foregoing indisputable facts reflect beyond question that the derailment of Milw Car 26280 occurred within the carrier's Ogden yard limits, specifically on the south end of Track No. 1 of the carrier's Ogden shop tracks, and that the O.U.R. & D. Co. switch crew,

The work in dispute in this docket took place at a time when the claimants were off duty. They demand compensation at the overtime rate. Therefore, even if it were conceded *arguendo* that the organization's theory of the case was supported and Union Pacific carmen should have been used, these claimants 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 would 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 employees 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 rerailling of the car involved herein was incidental to the delivery of cars by the O.U.R.&D. and was accomplished entirely by O.U.R.&D. employees 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 employee or employees involved in this dispute are respectively carrier and employee 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.

This claim is identical with Award 4169 and requires the same disposition.

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 requires 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