Award No. 4678
Docket No. 4405
2-NPTCofO-CM-'65

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Harvey Daly when award was rendered.

PARTIES TO DISPUTE:

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

THE NORTHERN PACIFIC TERMINAL COMPANY OF OREGON

DISPUTE: CLAIM OF EMPLOYES:

(1) That the cleaning, repairing and testing of air brake valves and cylinders (pistons), removed for this purpose from railway cars, is Carmens' work under the current agreement.

(2) That on February 12, 16, 17, 23, 24, and 26, 1962 the Carrier was supplied 35 sets of A B brake valves and 9 sets of brake piston cylinders by the Union Pacific Railroad Company and, after receiving same, returned the same amount of valves and cylinders to the Union Pacific Railroad to be cleaned, repaired and tested in their shops, thereby violating the current agreement and damaging its Carmen employes.

(3) That accordingly the Carrier be ordered to compensate, as a penalty for the aforementioned violation, the 11 Carmen listed below with the date of violation and in the amount shown opposite each name:

R. G. Botel Sr.	February 12, 1962	8 hours pay
Walter Kinzel	February 16, 1962	8 hours pay
Herbert Luper	February 16, 1962	4 hours pay
Lyle Losinger	February 17, 1962	8 hours pay
Osa Rose	February 17, 1962	8 hours pay
J. Marcus	February 23, 1962	8 hours pay
C Templeton	February 23, 1962	8 hours pay
H. Coffman	February 24, 1962	8 hours pay
V. Dodson	February 24, 1962	8 hours pay
E. Hansen	February 24, 1962	8 hours pay
O. Chambers	February 26, 1962	8 hours pay
Herbert Luper	February 16, 1962	4 hours pay
Lyle Losinger	February 17, 1962	8 hours pay

Osa Rose	February 17, 1962	8 hours pay
J. Marcus	February 23, 1962	8 hours pay
C. Templeton	February 23, 1962	8 hours pay
H. Coffman	February 24, 1962	8 hours pay
V. Dodson	February 24, 1962	8 hours pay
E. Hansen	February 24, 1962	8 hours pay
O. Chambers	February 26, 1962	8 hours pay

EMPLOYES' STATEMENT OF FACTS: The eleven (11) carmen shown above, hereinafter referred to as the claimants, are regularly employed as carmen by the Northern Pacific Terminal Company of Oregon, hereinafter referred to as the carrier, at Portland, Oregon and hold seniority as carmen on this terminal.

On the dates shown with the names in this claim the claimants were available to have been called to perform the work of cleaning, repairing and testing the valves and cylinders involved herein. All are qualified to perform this work.

At Portland, Oregon, on their own property, the carrier maintains a shop fully equipped to make any and all repairs and tests which are needed on valves and cylinders removed from railway cars for this purpose and, until the dates for which this claim is made, did all such work in their own shop with their own carmen performing the work.

The valves and cylinders which were gotten from the Union Pacific Railroad Company were put in stock in the store department and intermingled with other such materials and used on cars from many railroads which were being repaired on the carrier's property.

This dispute has been handled with all officers of the carrier designated to handle such disputes, including the highest designated officer, all of whom have declined to make 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 carrier violated the current agreement and that the work involved herein is specifically carmens under Rule 134 thereof, which reads in part as follows:

> "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 Carmens."

It is further submitted that the repairs to such equipment is subject to be performed only by Carmen regularly employed in accordance with Rule 32 (Assignment of Work) which reads, in part, as follows:

> "None but mechanics or apprentices, **regularly employed as such,** shall do mechanics' work as per special rules of each craft, * * *." (Emphasis ours.)

and who hold seniority as carmen with this carrier in accordance with seniority provisions of Rule 31 (Seniority) which reads, in part, as follows:

random. However, a search of carrier's records shows that on the dates in question each claimant was on his assigned rest day, except Claimant H. Super, who was assigned to and did work on February 16, 1962. Additionally, Claimant E. Hansen reported sick on January 25, 1962, and was released for duty by the company doctor effective February 26, 1962, at which time he reported for work. Claim is made for February 24, 1962.

Entirely apart from carrier's position that it has the right to decide what is and is not scrap, there is nothing in the record to indicate that had we elected to attempt to repair the valves in question, the force would have been augmented on the dates of claim in order to do this. All of claimants, except as indicated, were regularly employed and suffered no loss. Carrier would in all probability, have either postponed the work or absorbed it during the working hours of the regular force. Also whenever, in exceptional circumstances, carmen are called in on their rest days they are not guaranteed eight hours, but are paid under Rule 7 (d). If all this is highly speculative, so is the assumption that claimants would have been called at all. Indeed, as stated in Item 22 of our "Statement of Facts" we have no evidence that the alleged work was actually performed by the Union Pacific Railroad on the dates in question. Neither has it been shown, or even alleged, that the Union Pacific increased its force on those dates.

Carrier believes it has shown that:

1. Petitioners have failed to assume the required burden of proof that the disputed work is reserved exclusively to NPT Carmen.

2. This carrier cannot direct other carriers where work will be done on their equipment.

3. To all intents and purposes the disputed valves were considered scrap when we sent them to the Union Pacific. Again, this is a judgment that carrier is entitled to make.

4. There is no conclusive evidence that the identical valves were repaired or returned to this property. See Item 6, Carrier's Statement of Facts.

5. Even if they had been, such exchange has been held to be entirely proper.

6. None of the claimants suffered any loss and two of them were not available. No firm basis has been shown for selecting either the dates in question or the amount of time claimed as damages. No such evidence may now be submitted.

7. No rules of the current Agreement have been in any way violated. This being so, the claims are without merit and 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 waived right of appearance at hearing thereon.

In pleadings before the Referee the Carrier claimed that "third party" notice should be given to the Carmen Craft representatives of the Union Pacific Railroad Company, because two different Carriers and two different Carmen's seniority districts are involved in this dispute.

The Board cannot support such a pleading because only the Carmen's Craft is involved herein and both Carriers as well as the respective Carmen's Crafts are governed by the provisions of the same Labor Agreement. Therefore, the Board deems such notice unnecessary.

The Carrier's objections to the admissibility of the Organization's Rebuttal Statement Exhibits A, A-1 and A-2 are sustained, because those Exhibits were not timely introduced on the property.

The record establishes that the Carrier is jointly owned by the Union Pacific Railroad Company, the Southern Pacific Company and the Northern Pacific Railway Company. The Carrier owns and operates a number of switch engines and other vehicles, but it does not own or operate any freight or passenger cars. The Carrier performs certain services for the proprietary lines using its facilities.

On the dates set forth in the claim, 35 sets of reportedly unserviceable valves were removed from various freight cars by Carrier Carmen and sent to the Union Pacific Railroad Company's facility at Portland, Oregon, for disposition. Carrier Carmen replaced the reportedly unserviceable valves with valves that had been reconditioned by the Union Pacific Railroad Company and then sold to the Carrier's Store Department.

The Organization's principal contentions are that:

1. The Carrier sent the 35 valves to the Union Pacific Railroad Company to be cleaned, repaired and tested;

2. The Carrier maintains a shop fully equipped and has Carmen available and qualified to do the work in dispute;

3. Carmen have previously repaired, oiled and tested valves on Carrier's property;

4. The Carrier's action violated the controlling Labor Agreement.

The Carrier denies that the 35 valves were sent to the Union Pacific Railroad Company to be repaired, oiled, tested and reconditioned. Furthermore, the Carrier argues, the record provides no evidence whatsoever as to what the U. P. did with the 35 valves they received from the Carrier.

Although the Carrier does not dispute the second and third contentions of the Organization, supra., the Carrier does aver that if any work were done on the valves in question, it most assuredly was not done on the Carrier's property nor at the Carrier's direction, and it did not, therefore, represent work which the Carrier had farmed out or work over which the Carrier had control. Furthermore, the Carrier contends the work of removing and replacing the valves was not done on Carrier equipment but on cars in control of the proprietary lines.

No one could successfully deny that the Carrier has the right — except where that right may be restricted by law or agreement — to manage its business according to its best judgment. In this dispute, there were no contractual restrictions which prevented the Carrier from sending the 35 sets of unserviceable valves to the U. P. and from replacing them with valves reconditioned by the U. P.

The Board is convinced that the facts set forth above do not support the Organization's position that the 35 valves were sent by the Carrier to the Union Pacific Railroad Company to be repaired, oiled and tested. Therefore, a denial Award is required.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: William B. Jones
Chairman

E. J. McDermott
Vice-Chairman

Dated at Chicago, Illinois, this 26th day of February, 1965.

DISSENT OF LABOR MEMBERS TO AWARD NO. 4678

The findings and award of the majority are based upon fallacious reasoning. While it is true that under the terms of the letter agreement of June 22, 1949 between The Northern Pacific Terminal Company of Oregon and System Federation 105 the agreement negotiated between System Federation 105 and the Union Pacific Railroad Company is applicable to the classes of employes of The Northern Pacific Terminal Company of Oregon, the two railroads are not merged and the carmen's work involved is subject to be performed only by carmen regularly employed as such by The Northern Pacific Terminal Company of Oregon.

We agree that it is unnecessary to give Third party notice to the carmen craft representatives of the Union Pacific Railroad but not for the reasons given by the majority. The reason Third Party notice is unnecessary is because Section 3 First (j) of the Railway Labor Act provides, as far as pertinent, that "* * * the several divisions of the Adjustment Board shall give due notice of all hearings to the employe or employes and the carrier or carriers involved in any disputes submitted to them." Neither the Union Pacific Railroad or its employes are involved in the instant dispute; The Northern Pacific Terminal Company of Oregon and its employes are the only ones involved.

The majority states that "The carrier denies that the 35 valves were sent to the Union Pacific Railroad Company to be repaired, oiled, tested and reconditioned," but admits that "the Carrier argues the record provides no evidence whatsoever as to what the U.P. did with the 35 valves they received from the Carrier." Furthermore, since a valve has to be dismantled to determine whether or not it should be scrapped and since this was not done on the

property of The Northern Pacific Terminal Company of Oregon and since the 35 valves were replaced by reconditioned valves that had been reconditioned by the Union Pacific it is reasonable to assume that the 35 reportedly unserviceable valves were likewise reconditioned by the Union Pacific. Had the majority not erroneously sustained the carrier's objection to the admissibility of the Organization's Rebuttal Exhibits A, A-1 and A-2, which were in refutation of statements made in the Carrier's Submission, the majority would have had no recourse except to sustain the employes' claim that the 35 valves were sent to the Union Pacific for the purpose of being cleaned, repaired and tested in its shops, thereby violating the controlling agreement between The Northern Pacific Terminal Company of Oregon and the claimant carmen.

/s/ E. J. McDermott

/s/ C. E. Bagwell

/s/ T. E. Losey

/s/ Robert E. Stenzinger

/s/ James B. Zink