Award No. 5189
Docket No. 5089
2-C&O-CM-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Harold M. Weston when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Carmen)

THE CHESAPEAKE AND OHIO RAILWAY COMPANY (Southern Region)

DISPUTE: CLAIM OF EMPLOYES:

1. Carman J. H. Justice, service rights and rules of the controlling agreement were violated when other than carmen were assigned or allowed to perform carmen's work on January 27, 1965, when Yardmaster Morris removed and replaced knuckle in car on number 19 Track, in the westbound Classification Yard.

2. Accordingly, the Chesapeake and Ohio Railway Company should be ordered to additionally compensate Carman Justice two (2) hours and forty (40) minutes at the carman applicable time and one-half (1½) rate for said violation.

EMPLOYES' STATEMENT OF FACTS: Carman J. H. Justice, hereinafter referred to as the Claimant, is regularly employed as such by the Chesapeake and Ohio Railway Company, hereinafter referred to as the Carrier, in its yards at Rusell, Kentucky where a large number of carmen and carmen helpers are employed and holds seniority under the provisions of Rule 31 of the Shop Crafts Agreement.

The Carrier's Russell Yards consist of a large facility where trains arrive, depart, trains are made up, switched and cars are repaired. Carmen are employed twenty-four hours per day, seven days each week servicing, inspecting trains and repairing cars. The Claimant holds regular assignment Tuesday through Saturday, rest days Sunday and Monday on the second shift.

On January 27, 1965 a cut of cars was in number 19 track, in the westbound Classification Yard and when the engine crew coupled into said track a knuckle was broken. The crew reported the broken knuckle to the Carrier's Yardmaster Morris at approximately 4:45 A. M. in order the Yardmaster could assign proper employes to make the necessary repairs, which work has always been performed by the Carmen Craft at this point while the cars are in the yards.

tion is not to be subjected to a penalty unless the words of a statute plainly impose it. Tiffany v. National Bank of Missouri, 85 U.S. 409; Keppel v. Tiffin Savings Bank, 197 U.S. 356. The rule is equally applicable to the construction of contracts; for the parties can readily agree upon penalty provisions if they so intend, and the absence of such provisions negatives that intent. The Supreme Court of the United States said in L. P. Steuart & Bro. v. Bowles, 322 U.S. 398, that to construe a statute as imposing a penalty where none is expressed would be to amend the Act and create a penalty by judicial action; that it would further necessitate judicial legislation to prescribe the nature and size of the penalty to be imposed. Similarly, for this Board to construe an agreement as imposing a penalty where none is expressed, would be to amend the contract, first, by authorizing a penalty, and second, by deciding how severe it shall be. Not only are the parties in better position than the Board to decide those matters; they are the only ones entitled to decide them. Consequently, there have been many awards refusing to impose penalties not provided in the agreements. Among them are: Awards 1638, 2722 and 3672 of this Division; Awards 6758, 8251 and 15865 of the First Division; and 7212 and 8527 of the Third Division."

The Carrier has shown that:

(1) Replacing of broken knuckles on cars has never been considered as "maintaining car" or "other work general recognized as carmen's work."

(2) Carmen on this carrier have never had the exclusive right to replace knuckles, such work having been done for many decades by other classifications of employes.

(3) The work of replacing the knuckle in the instant case was incidental to the yardmaster's duty of seeing that the train was promptly made up and dispatched.

(4) To assign carmen the exclusive right to replace knuckles would be impractical and would cause intolerable delays to railroad operations.

(5) The issue in this case has already been settled in Second Division Award 2697 involving the same litigants as are involved here.

(6) The claim attempts to extract a penalty where none is provided in the agreement.

The claim is without merit and it should be denied.

All data herein submitted in support of Carrier's submission has been presented to the Employes or duly authorized representatives thereof and made a part of the question in dispute.

(Exhibits not reproduced.)

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.

Petitioner maintains that Carrier violated the applicable Agreement when a yardmaster removed a broken knuckle from a car in the reclassification yard at Russell, Kentucky, and replaced it with a new knuckle he had obtained from the storage area. The engine crew had reported the broken knuckle to the yardmaster and the latter, the Petitioner maintains, should have notified and called upon Carmen to make the necessary repairs.

It may well be, as Award 2697 suggests, that road crew members handling a train are entitled to replace a broken knuckle in the course of their duties. The same principle may be applied to a switch crew working on a car with a broken knuckle (Award 3581) or to yardmen when a well defined practice exists on the property (See First Division Award 18006). This does not justify, however, the replacement of a knuckle by a supervisory employe such as a yardmaster at a terminal where carmen are available.

While it is tempting, from the standpoint of practical convenience, to permit a yardmaster to make on the spot repairs, it is quite evident that that practice could reasonably tend to whittle away working rights that generally belong to carmen. The disputed work is not the type of service that yardmasters should perform in preference to carmen and there is no evidence of any extreme emergency or established practice that warrants a different conclusion in this case.

We are satisfied that a violation has occurred and that the claim should be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 20th day of June 1967.

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