Award No. 5320
Docket No. 5053
2-SLSF-CM-'67

# 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.**

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## PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 22, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)**

**ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY**

DISPUTE: CLAIM OF EMPLOYES:

1. That Carmen C. G. Shell, P. G. Barbee, and T. E. Hamm, were improperly compensated under the terms of Article V of the September 25, 1964 Agreement.

2. That accordingly, the carrier be ordered to additionally compensate the said Carmen, in the amount of 40 minutes each at their respective pro rata rates.

EMPLOYES' STATEMENT OF FACTS: The St. Louis-San Francisco Railway Co. is hereafter referred to as the carrier, and Carmen C. D. Shell, P. G. Barbee, and T. E. Hamm are hereafter referred to as the claimants.

On January 22, 1965 in the departure yard of the Tennessee Trainyard at Memphis, Tennessee, on Track No. 8, an outbound train with two engines, Nos. 203 and 204, including 60 cars and a caboose, was worked by trainmen, under the carrier's orders, who performed the duty of coupling air hoses and inspecting the train for mechanical defects before departure.

Two car inspectors were on duty, in a position at the south end of Track No. 8, two were near the center of the track and one car inspector was at the rear of the train which departed. This has not been denied by the carrier. The related coupling of the air hoses was incidental to the inspection performed for mechanical defects before the departure of the train and in no way incidental to switch movements.

This dispute has been handled with the carrier's officials, up to and including the highest officer so designated by the company. A conference was held with the result the carrier has declined to adjust it.

The agreement effective January 1, 1945 as subsequently amended is controlling.

the movement to a "train." The usual meaning of the word is not susceptible to such a construction.

The yard crew did nothing more than to couple the air hose and make the usual air brake test on the cut of 51 cars to be handled from Tennessee Yard to Georgia Street Yard. Such functions were performed by the yard crew as incidental to their regular duties. The allegation that the yard crew made an inspection of the cut of cars for mechanical defects is specifically denied. The Organization has failed in its burden of proof to establish otherwise.

In the final paragraph of the General Chairman's letter of May 5, 1965 (Carrier's Exhibit F), the Federal Power Brake Law of 1958 is injected into this dispute. It is needless to say that this Division in its deliberation of the question before it will concern itself with interpreting the Agreement concerning rates of pay, rules or working conditions in its application to the factual situation involved rather than whether there has been compliance with the Federal Power Brake Law of 1958.

With respect to the reparations portion of the claim, the Organization contends that it required forty minutes for the three members of the yard crew to perform the work under claim and, therefore, the Organization claims that the three claimants should each be additionally compensated for 40 minutes at their respective pro rata rates of pay. The claimants were not subject to call because it has already been shown that they were on duty and under pay at the time of the occurrence. Neither has the Organization explained why the three particular claimants were selected. Among the car inspectors employed in Tennessee Yard Claimants Shell and Barbee respectively rank second and third in seniority order, but Claimant Hamm ranks sixth in seniority order. Had it been necessary to call any regular employes from the overtime board to perform the work under claim, the claimants would not have stood to be called for the reason that they were already on duty and under pay.

There is no provision in Article V of the September 25, 1964 Agreement or in any other Agreement rule requiring the Carrier to compensate an employe at double-time rate under circumstances such as are involved in this dispute. Also, in the absence of an affirmative showing that any one of the claimants suffered a financial loss or was in any way damaged and since the Agreement contains no provisions for liquidated damages or imposition of penalties, the Carrier respectfully submits that under any and all circumstances the claimants are not entitled to recover the amounts sought. See Third Division Awards 13236, 13237, 13326, 13334 and 13390.

On the basis of the record and all of the evidence, the Board is respectfully requested to find that the Carrier did not violate the Agreement.

All data used in support of Carrier's position have been made available to the claimants or duly authorized representative thereof and made a part of the particular question in dispute.

Oral hearing is waived unless requested by the Employes.

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.

Although the claim is that the Claimants "were improperly compensated under the terms of Article V of the September 25, 1964 Agreement," the question actually presented is whether the Carrier violated this provision of Article V:

"ARTICLE V.

COUPLING, INSPECTION AND TESTING

In yards or terminals where carmen in the service of the carrier operating or servicing the train are employed and are on duty in the departure yard, coach yard or passenger terminal from which trains depart, such inspecting and testing of air brakes and appurtenances on trains as is required by the carrier in the departure yard, coach yard, or passenger terminal, and the related coupling or air, signal and steam hose incidental to such inspection, shall be performed by the carmen.

This rule shall not apply to coupling of air hose between locomotive and the first car of an outbound train; between the caboose and the last car of an outbound train or between the last car in a 'double-over' and the first car standing in the track upon which the outbound train is made up."

It will be noted that the second paragraph of Article V refers specifically to "an outbound train," whereas the first paragraph does not. However it is clear that it also relate to outbound trains; for the reference is to yards or terminals "from which trains depart," and to "such inspecting and testing of airbrakes and appurtenances on trains as is required by the carrier in the departure yard, coach yard or passenger terminal, and the related coupling of air, signal and steamhose incidental to such inspection, * * *."

The Employes' statement of the case is that "an outbound train * * * including 60 cars and a caboose was worked by trainmen * * * who performed the duty of coupling air hoses and inspecting the train for mechanical defects before departure." This seems to mean an outbound train coupled and inspected by its trainmen.

The Carrier's statement is that "the yard ground crew coupled the air hose and made the usual air test on a cut of 51 cars to be handled in a yard movement between Tennessee Yard and Georgia Street Yard (less than twenty miles)," and adds: "The cut of 51 cars included 31 cars for interchange delivery to the Illinois Central, 5 cars for interchange delivery to the Rock Island and 15 cars for city industries at and in the vicinity of Georgia Street Yard. The yard crew left Tennessee Yard with the cut of 51 cars at or about 7:00 A. M., January 22, 1965." The Carrier states that there was no inspection for mechanical defects.

These statements by the Carrier are not specifically denied by the Employes but are denied by this general statement: "All allegations or implications of the Carrier designed to support their position not heretofore specifically answered are emphatically denied." However the Employes admit in their rebuttal that the hose coupling and the inspection were performed by the switch foreman and two assistant switchmen, and not by a road crew of a train. They also repeat the Carrier's statement "that this train was on an outbound track in the Tennessee Departure Yard, and that the train did travel approximately twenty miles more or less over the main line." These admissions or statements indicate that a switch crew and switch movement were actually involved, rather than an outbound train and its crew. But assuming, nevertheless, that the Employes' general denial of the Carrier's specific allegations concerning this movement is sufficient to controvert them, this Board is confronted with an unresolved dispute of fact. Therefore the claim has not been established that the movement involved was an outbound train or that it came within the provisions of Article V of the September 25, 1964 National Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 26th day of October, 1967.

## DISSENT OF LABOR MEMBERS TO AWARD NO. 5320

The first paragraph of Article V (Coupling, Inspection and Testing) of the September 25, 1964 Agreement, which is the basis of this dispute, reads as follows:

> "In yards or terminal where carmen in the service of the carrier operating or servicing the train are employed and are on duty in the departure yard, coach yard or passenger terminal from which trains depart, such inspecting and testing of air brakes and appurtenances on trains as is required by the carrier in the departure yard, coach yard, or passenger terminal, and the related coupling of air, signal and steam hose incidental to such inspection, shall be performed by carmen."

The last three paragraphs of the referee's findings read as follows:

> "The Employes' statement of the case is that 'an outbound train * * * including sixty cars and a caboose was worked by trainmen * * * who performed the duty of coupling air hoses and inspecting the train for mechanical defects before departure.' This seems to mean an outbound train coupled and inspected by its trainmen.
>
> The Carrier's statement is that **'the yard ground crew coupled the air hose and made the usual air test on a cut of 51 cars** to be handled in a yard movement between Tennessee Yard and Georgia Street Yard (less than twenty miles),' and adds: 'The cut of 51 cars included

31 cars for interchange delivery to the Illinois Central, 5 cars for interchange delivery to the Rock Island and 15 cars for city industries at and in the vicinity of Georgia Street Yard. The yard crew left Tennessee Yard with the cut of 51 cars at or about 7:00 A. M., January 22, 1965.' **The Carrier states that there was no inspection for mechanical defects.** (Emphasis ours.)

These statements by the Carrier are not specifically denied by the Employes but are denied by this general statement: 'All allegations or implications of the Carrier designed to support their position not hereinbefore specifically answered are emphatically denied.' **However the Employes admit in their rebuttal that the hose coupling and the inspection were performed by the switch foreman and two assistant switchmen, and not by a road crew of a train.** They also repeat the Carrier's statement 'that this train was on an outbound track in the Tennessee Departure Yard, and that the train did travel **approximately twenty miles more or less over the main line.' These admissions or statements indicate that a switch crew and switch movement were actually involved, rather than an outbound train and its crew.** But assuming, nevertheless, that the Employes' general denial of the Carrier's specific allegations concerning this movement is sufficient to controvert them, this Board is confronted with an unresolved dispute of fact. **Therefore, the claim has not been established that the movement involved was an outbound train or that it came within the provisions of Article V of the September 25, 1964 National Agreement."** (Emphasis ours.)

The sentences emphasized from the last two paragraphs quoted from the referee's findings indicate that there is a distinction made between the switch crew and a road crew performing the work involved in this dispute, that is the referee did not consider it a violation of the rule involved to have the switch crew perform the work. There is no reference whatsoever in the rule to trainmen, switch crew, road trains or yard trains. The rule says and means all train movements that meet the criteria set forth in the rule. There is only one criteria in the rule governing who will perform this work and that is **if inspecting and testing of air brakes and appurtenances on a train is required by the carrier in a departure yard et cetera where carmen are employed then the related coupling of air hose, signal and steam hose incidental to such inspection (the rule then states) shall be performed by carmen.**

The referee in his denial award gives weight to the fact that the train involved in the dispute left from an outbound track in the Tennessee departure yard and traveled twenty miles, more or less, over the main line to reach its destination, which was the Georgia Street Yard. There is absolutely nothing in the rule that requires such trains as involved in this dispute to travel any given distance — the distance could be two miles or five hundred miles from the departure yard, that is immaterial. It seems incredible that the referee would be so careless when evaluating facts to ascertain if the rules were violated, especially so since the Labor Members furnished him with undisputable facts and evidence showing what constituted a train, including excerpts from numerous court decisions. Three of the excerpts from the Supreme Court of the United States read as follows:

**"United States vs. Chicago, Burlington & Quincy Railroad Company** (May 10, 1915, 237 U. S. 410, 413; 59 L.ed. 1022, 1027. 'That they

carried no caboose or markers is not material. If it were, all freight trains could easily be put beyond the reach of the statute and its remedial purpose defeated. Neither is it material that the men in charge were designated as yard or switching crews, for the controlling test of the statute's application lies IN THE ESSENTIAL NATURE OF THE WORK DONE RATHER THAN IN THE NAMES APPLIED TO THOSE ENGAGED IN IT.' "

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"**United States vs. Northern Pacific Railroad Company** (Dec. 6, 1920) 254 U. S. 251, 254; 65 L ed. 249, 253; 41 Sup. Ct. 101: In the language of Mr. Justice Brandeis, 'A moving locomotive with cars attached is without the provision of the act only when it is not a train; as where the operation is that of switching, classifying, and assembling cars within railroad yards for the purpose of making up trains.' "

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"**Bridge Co. v. United States,** 249 U. S. 534, 39 S. Ct. 355, 356, 63 L. Ed., 757, applying the Act to the transfer of cars from the terminal of one company to that of another three-quarters of a mile distant, Mr. Justice Clark, also speaking for a unanimous court, said in elaboration of the factual differences between a train and a switching movement:

'An engine and 26 cars assembled and coupled together, not only satisfies the dictionary definition of a "train of cars," but would certainly be so designated by men in general, and in any fair acceptation of the term must be regarded as constituting a train within the meaning of the statute.

* * * * *

'The work done with the cars, as described, was not a sorting, or selecting, or classifying of them involving coupling and uncoupling and the movement of one or a few at a time for short distances, but was a transfer of the 26 cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single car, and it cannot, therefore with propriety be called a switching movement.' "

The probative facts in this dispute establish beyond any question that the movement involved is a train and came within the provisions of Article V of the September 25, 1964 National Agreement and the denial award of the majority in this case is palpably wrong.

**O. L. Wertz**
**D. S. Anderson**
**C. E. Bagwell**
**E. J. McDermott**
**R. E. Stenzinger**

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