Award No. 5494
Docket No. 5192
2-SOU-CM-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James E. Knox when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 21, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

SOUTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Southern Railway Company violated the controlling Agreement, when on February 25, 1965, other than carmen were instructed and/or authorized to couple air hose and make brake test on Belt Delivery, Track No. 9, Departure Yard, Inman Yard, Atlanta, Georgia, where there are Carmen employed and on duty.

2. That accordingly, the Southern Railway Company be ordered to compensate Carman H. C. Smith, eight (8) hours at the rate of time and one-half for February 25, 1965.

EMPLOYES' STATEMENT OF FACTS: Carman H. C. Smith, hereinafter referred to as the claimant, is employed by the Southern Railway Company, hereinafter referred to as the carrier, in carrier's Department Yard, Inman Yard, Atlanta, Georgia.

Claimant was available and qualified to perform the work involved herein, i.e., the coupling of air hose and making brake test on Belt Delivery in Inman Yard, Atlanta, Georgia, on February 25, 1965.

On February 25, 1965, switchmen on Engine No. 8201 were instructed and/or authorized to couple air hose and make brake test on Belt Delivery, Track No. 9, Inman Yard, Atlanta, Georgia. Track No. 9, on which these cars and/or train were made up, is located in the Departure Yard at Inman Yard, Atlanta, Georgia, where carmen are employed and on duty. The Belt Delivery is made up in the Departure Yard, Inman Yard, Atlanta, Georgia, seven (7) days per week. It is required by the carrier that the air hose be coupled and brake test be made before said cars and/or train proceeds to the Main Line, in order to deliver and pick-up cars.

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.

In event this dispute is deadlocked and a referee is selected or appointed to render an award, Carrier desires to appear before the Board with the referee present.

(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.

On February 25, 1965, members of a yard or switching crew coupled air hoses on a cut of forty-five cars being assembled in the carrier's Inman Yard for delivery over main line tracks to industries and other yards within the switching limits of the carrier's Atlanta terminal. After they had completed the coupling, these employes observed whether the brakes applied and released.

The employes claim that Article V of the January 27, 1965, agreement assigns the work of coupling and observation to carmen. They argue that Article V reversed the previous awards of this Board upholding the assignment of such work to yard or train crews, e.g., Award 2–4963 (Johnson).

The negotiations leading to Article V were initiated by the employes' proposal that the following rule be adopted: "The coupling and uncoupling of air, steam and signal hose, testing air brakes and appurtenances on trains or cuts of cars in yards and terminals, shall be carmen's work."

Emergency Board No. 160 recommended adoption of the following rule in lieu of the employes' proposal:

> "In yards or terminals where carmen are employed and are on duty at or in the immediate vicinity of the departure tracks where road trains are made up, the inspecting and testing of air brakes and appurtenances of road trains, and the related coupling of air, signal and steam hoses incidental to such inspections, shall be performed by 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."

Article V as adopted by the parties generally follows the form of the Emergency Board's recommendation, rather than the employes' proposal, except the final version eliminates the qualification "road" from the references to train.

The carrier argues that the elimination of the qualification "road" did not change the rule because all "trains" are road trains. This definition of train

cannot be supported. A dictionary definition which refers to the display of markers as the test for a train is not sufficient to overcome the judicial decisions under the Power Brake Act that certain intra-terminal movements constitute "trains." These decisions were summarized by the Interstate Commerce Commission in a memorandum, dated August 9, 1958, as follows:

> "In determining whether the air brake provisions of the law apply to a particular movement, it must first be determined whether the movement involved is that of a train. It is not always easy to draw a definite line between a train movement and a switching operation. The courts generally have held that where there is a movement of a considerable number of cars for a mile or more, even in yard limits and by yard engines and crews, and no cars are set out or picked up en route, it is a train movement requiring the use of air brakes, particularly if public highways or other railroad tracks are crossed at grade. In some instances which involved unusual circumstances, the courts have held movements for less than a mile to be trains. The use of main-line tracks is not necessary to make the movement that of a train. If the movement is a switching operation, such as making up or breaking up a train, setting out, picking up or switching cars at frequent intervals and involving movements of one or a few cars at a time for only short distances between operations of this kind, the use of air brakes is not required by law."

Similar conclusions were reached in a recent summary in American Law Reports of the cases defining "train." 17 A. L. R. 3d 283 (1968).

Thus the fact this movement was not a road train but was solely within the terminal limits did not disqualify it from being a train within the meaning of Article V. However, even if this movement were a train, Article V does not apply unless the work in question was "inspecting and testing." Coupling is included within Article V only to the extent it is "incidental to such inspection."

Of the two brake procedures prescribed by the regulations issued under the Power Brake Act, only the procedure prescribed for road train is characterized as inspecting and testing. In the case of road trains, section 132.12 of the regulations provides that such trains "must be given inspection and test as specified by paragraphs (a) to (h). . . ." Those paragraphs provide, **inter alia**, that an "inspection of the train brakes must be made to determine that angle cocks are properly positioned, that the brakes are applied on each car, that piston travel is correct, that brake rigging does not bind or foul, and that all parts of the brake equipment are properly secure." In the case of "transfer and yard train movements not exceeding 20 miles," section 132.13 (e) (1) merely provides that a reduction "must be made to determine that the brakes are applied on each car. . . ."

The rule recommended by the Emergency Board referred to the inspection and testing prescribed for road trains. In eliminating the qualification "road" there was no attempt to broaden the definition of the type of work to which the Article applied. The emphasis remained on inspection. Testing is referred to only in conjunction with inspection. Coupling of the hoses is included only to the extent it is "incidental to such inspection." The broad language proposed by the employes which encompassed all coupling and testing was not adopted.

It appears that the qualification "road" was deleted not to expand the type of work included within Article V, but merely to reflect the fact that the brake inspection prescribed for road trains is not limited to road trains. Section 132.13 (e) (2) provides that "transfer train and yard train movements exceeding 20 miles must have brake inspection" like that prescribed for road trains.

As so often happens in the case of new, hard questions of interpretation, we find ourselves confronted with conflicting precedent. In awards involving the same agreement and the same parties, we have held that Article V is limited to trains which leave the switching limits of the terminal, Awards 2–5368 (Ritter) and 2–5441 (Kane), and that visual observation for application and release is not "inspecting and testing" within the meaning of Article V, Award 2–5441 (Kane). These awards are contradicted and in part supported by awards construing the national agreement of September 25, 1964, which was the model for Article V. Under the national agreement we have held that the rule is limited to outbound trains, Award 2–5320 (Johnson), and we have held that the rule is not so limited, Award 2–5341 (Dolnick). We have held under the national agreement that observation for application is inspection, Awards 2–5341 (Dolnick) and 2–5367 (Ritter).

Those awards are too recent to have been relied upon. Whatever vested interest the carrier may have in the awards in its favor, it has no propriety interest in the reasoning by which those awards were reached. We believe that the awards limiting the rule to trains which leave the terminal limits reached an erroneous conclusion because of their failure to consider the manner in which the rule developed, the judicial decisions on the definition of a train, and the relationship of the rule to the regulations issued under the Power Brake Act. We further believe that the awards finding observation like that involved in this case to be inspecting and testing reached an erroneous conclusion because of their failure to consider the manner in which the rule developed and the relationship of the rule to the regulations issued under the Power Brake Act.

When the relevant factors are considered, it is clear that Article V is not limited to road trains but is limited to situations where there is an inspecting and testing of the kind prescribed by the regulations for road trains. To the extent the previous awards are inconsistent with this finding we find they are so palpably erroneous that it cannot reasonably be expected that our adherence to them would cause those who follow us to do the same.

We find that Article V was not applicable because there was no inspecting and testing.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1968.

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.