Award No. 5505
Docket No. 5244
2-D&RGW-CM-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee George S. Ives when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 10, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

(1) That the Denver & Rio Grande Western Railroad Company violated Article V of the Agreement of September 25, 1964 when other than Carmen inspected, coupled hose and made brake test on train leaving the departure yard about 5:33 P. M., November 1, 1964.

(2) That accordingly, the Denver & Rio Grande Western Railroad Company be ordered to compensate Carmen G. T. Burke, Frank Elliot and E. E. Billings each in the amount of a four (4) hour call for November 1, 1964.

EMPLOYES' STATEMENT OF FACTS: G. T. Burke, Frank Elliot and E. E. Billings, hereinafter referred to as the claimants were employed as carmen by the Denver & Rio Grande Western Railroad Company hereinafter referred to as the Carrier and were available to have been called to perform the work subject to dispute.

At about 4:30 P. M., November 1, 1964, a switch crew of three men headed by Foreman Driggers began putting a train together for movement from west yard, Grand Junction, Colorado to east yard, Grand Junction, Colorado, approximately three (3) miles. Driggers called the yard master and asked for carmen to couple the air hose and make the air tests. Even though carmen were on duty and working in the yard they were not notified. Driggers called the dispatcher and received a telephoned order permitting him to use the east bound main line from west yard to east yard between the hours of 5:40 P. M. and 6:40 P. M. Fifty-three (53) cars, more or less, had been put into the train. These cars consisted of those made empty and those loaded at west yard serviced industries and previously switched to holding tracks No. 3 and No. 6 west yard as well as both loads and empties that had been set out of trains arriving in west yard. All the cars were bound for the east

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."

While in no way admitting that the rule may otherwise be interpreted in this case, in a situation where it was held that the Carrier had misinterpreted or misunderstood the rule rather than an intentional disregard, your Board held in Award 4289:

"In the instant case, we are satisfied that Burkinshaw's action was caused by a misinterpretation or misunderstanding of Rule 36(e), rather than by an intentional disregard thereof. Under these circumstances, we disallow the claim for compensation without prejudice to other or future claims of the same nature."

The Employes have materially changed, enlarged and expanded the claim presented to the Second Division which is a claim of first impression which was not handled on the property under the provisions of Section 3 (i) of the Railway Labor Act as amended, and the Carrier respectfully points out that the Second Division may not assume jurisdiction in this case which must be dismissed.

On the merits, the Employes have not affirmatively carried the burden of proof of their claim either as to application of the rule to the situation nor as to the claimants named nor the damages demanded, furnishing no evidence or argument whatever in the handling of the claim on the property; and the plain reading of the rule calls for a denial of this claim.

All data in support of Carrier's position have been submitted to the Employes and made a part of the particular 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 waived right of appearance at hearing thereon.

Petitioner contends that Carrier improperly assigned a switch crew consisting of three men to inspect, couple hose and make brake test on Carrier's train of fifty-three (53) cars before it left the departure yard at Grand Junction, Colorado on November 1, 1964. It is alleged that the disputed work belongs exclusively to Carmen under the provisions of Article V of the September 25, 1964 Agreement, which in part reads as follows:

> "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 of air, signal and steam hose incidental to such inspection, shall be performed by carmen." (Emphasis ours.)

In the first instance, Carrier avers that the claim submitted to this Division is not the same claim presented and progressed on the property by the Petitioner, and that said claim must be dismissed as it was not handled in accordance with Section 3(i) of the Railway Labor Act, as amended. Claim No. 1 presented on the property reads as follows:

"CLAIM NO. 1

> That the controlling rules of the agreements, particularly the agreement dated September 25, 1964, were violated when switchmen were used to couple air hose and test air on a train departing west yard Grand Junction, Colorado, November 1, 1964."

The instant claim alleges that "other than Carmen **inspected,** coupled hose and made brake test on train leaving the departure yard about 5:33 P. M., November 1, 1964."

It is apparent that the original claim has been materially changed and expanded to include additional violations which were not alleged or considered while the dispute was being progressed on the property. Such additional allegations must be dismissed, but the original claim on the property will be considered as the expanded charges can be excised readily therefrom.

The original claim on the property charged Carrier with violation of the applicable Agreement when switchmen were used to couple air hose and test air on a train departing west yard on November 1, 1964. No reference to "inspection" is included in the original claim nor is any evidence found in the record to support a finding that switchmen did more than couple air hose and test air to determine that the brakes applied and released properly on a switch cut of fifty-three (53) freight cars in Carrier's west yard before transfer to Carrier's east yard for classification. The particular tests of air involved herein have been considered to be operational tests rather than the type of inspection exclusively performed by Carmen within the purview of Article V of the September 25, 1964 Agreement. Award 3593 and Award No. 27 of Special Board of Adjustment No. 686.

Analysis of Article V of the September 25, 1964 Agreement discloses that coupling of air hose is specifically reserved to Carmen only when related and incidental to the inspection and testing of air brakes and appurtenances of trains. Petitioner has failed to establish that all conditions requisite to a finding that the work in dispute belongs exclusively to Carmen existed at the time said work was performed. See Award 5192. Accordingly, the claim must be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 16th day of July, 1968.

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