



Award No. 5632
Docket No. 5521
2-GM&O-CM-'69

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee A. Langley Coffey when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 29, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

GULF, MOBILE & OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the current agreement was violated when Mechanical Foreman N. S. Davis traveled from Bogalusa, La., and inspected GM&O Woodrack No. 4856 at West Columbia, Miss., February 28, 1966.

2. That accordingly, the Carmen be made whole by additionally compensating Carman Mason Fornea, who was off duty and available at the time relevant, in the amount of four (4) hours at the straight time rate of pay.

EMPLOYEES' STATEMENT OF FACTS: *The Gulf, Mobile and Ohio Railroad, hereinafter referred to as the Carrier, maintains a Mechanical Department at Bogalusa, La., consisting of approximately 20 Carmen, 4 Machinists, 4 Laborers and 1 Mechanical Foreman. Mr. N. S. Davis is the Mechanical Foreman.*

Mason Fornea, hereinafter referred to as the Claimant, is one of the regularly assigned Carmen and at the time in question was filling the vacation vacancy of Hubert Talley which works Saturday and Sunday on the third shift, Monday on the Second shift, Tuesday and Wednesday on Third shift, rest days Thursday and Friday. The Claimant is on the overtime board and was off duty and available for service during the first shift when Mr. Davis performed the work in question.

West Columbia, Miss., 32 miles distant from Bogalusa, has considerable pulp wood industry which ships over Carrier. When the shipper noted that GM&O Woodrack 4856 had a tendency to topple over when a load was placed on it, the Carrier's Dispatcher was notified. The Dispatcher in turn notified the Mechanical Department at Bogalusa to have the car inspected to see what was wrong with it.

"Award No. 3920, between the same parties, likewise found that no specific agreement existed which granted to carmen the exclusive right to inspect trains." (ES)

Similar claims have also been denied by this Board involving other Carriers. Second Division Award No. 4086 involves a claim on the Missouri Pacific Railroad that a supervisor performed the duties of an electrician when making an examination of equipment. In denying the claim, the Board stated:

"Under Rule 26 (GM&O Rule 33) foremen are not prohibited from performing work in the exercise of their duties. Consequently, in order to establish their improper performance of the work of a craft it must be shown not to have been done in the exercise of their duties."

In Second Division Award No. 4233, involving a claim on the Frisco Railroad because a supervisor inspected an inoperative diesel, this Board held that it was clearly within his supervisory duties to inspect the diesel. The Board, with Referee Howard A. Johnson, denied the claim, stating in part:

"The claim is that the carrier assigned the diesel foreman to go out and perform work contracted to the electrical workers. But the carrier alleges that until after the arrival of the diesel supervisor it was not known whether the trouble was electrical or otherwise, and the record indicates nothing to the contrary. In fact, the Employes placed in the record the initial denial of the claim, which stated that upon the call to the yardmaster at Sherman no indication was given as to the nature of the trouble or what craft might be needed to make repairs. The carrier had a clear right to send the diesel supervisor to find what was wrong, and to do so without sending out a mechanic of each craft whose work might later prove to be involved.

At any rate, the carrier did not 'assign the diesel supervisor to perform work contracted to the Electrical Workers;' it assigned him to learn what had to be done, which was no violation of the Agreement. His inspection of the inoperative diesel was clearly within his supervisory duties."

CONCLUSION

The Carrier has not contracted away its right to have a mechanical foreman look at a car to determine whether or not it is safe for movement. The observation of the mechanical foreman of Car 4856 at West Columbia, Mississippi, on February 25, 1966, in no way violated the carmen's agreement. The observation of the car in question is in accord with the past practice and prior decisions of this Board.

The claim is not supported by the agreement, past practice or practical railroad operation, therefore, it 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 were given due notice of hearing thereon.

On a given day, Carrier says February 25, 1966, (claim is for February 28) Mechanical Foreman Davis at Bogalusa, Louisiana, went to West Columbia, Mississippi, to investigate a shipper's complaint that a car GM&O Woodrack No. 4856, was "leaning to one side and in danger of turning over" or, as the Employes say, was reported by the shipper to have "a tendency to topple over when a load was placed on it."

When the foreman arrived at West Columbia, he found that a side bearing on the loaded car was missing. On his instructions and at his directions, the shipper had the load shifted so the loaded car could be used to transport the lading to the consignee at Bogalusa, which was successfully done. Afterwards the car was delivered to the repair track at Bogalusa for the repairs to be made.

Carrier alleges that Foreman Davis went to West Columbia at the shipper's request "to look at this car to determine whether or not it was safe to move in a train"; that the foreman did not "inspect" the car; that the defective side bearing was only observed by him while viewing the manner in which the car had been loaded by the shipper and how it was leaning as a consequence under the load.

The Employes allege that Foreman Davis did "inspect" the car and "placed a bad order card on it and had it sent to the Bogalusa repair track."

Carrier denies that the foreman placed a "bad order" tag on the car; and, affirmatively alleges that the car was not "inspected" until it had been put on the repair track at Bogalusa after the delivery to the consignee had been successfully accomplished.

Claim was progressed by the Employes for an "off duty and available" carman account Carrier's failure to resort to Rule 4 as the means for having an inspection made of a car that had been set out on line of road for loading by shipper.

The claim was initially handled on the property, March 1, 1966 by Foreman Davis. He denied the claim for "My duties as Foreman includes inspecting freight cars."

The dispute was submitted by the Employes under covering letter dated July 17, 1967. Carrier's submission is dated October 9, 1967. Attached to that submission is a "To Whom It May Concern" statement dated August 25, 1967, by Foreman Davis whose statement raises some question for the first time in the record about the date on which the incident occurred. His statement also makes it appear that Foreman Davis may not be of the same opinion which was expressed by him when he initially declined the claim on March 1, 1966.

The Board has been favored with helpful arguments on oral hearing by worthy advocates for the parties who stressed, in their arguments, what is within the Board's general understanding, i.e. that the dispute does not concern the payment of a time claim as such, but is here because the parties cannot agree in principle.

Since the parties cannot agree upon principle or fact, the Board must draw its own inferences, deductions, and conclusions from the facts of record.

The Board is of the opinion that the time claim should have been allowed on March 1, 1966 when first considered on the property.

AWARD

Claim (1) Sustained.

Claim (2) Sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January, 1969.

CARRIER MEMBERS' DISSSENT TO AWARD NO. 5632

It is the prerogative and duty of Mechanical Foreman Davis to decide what work shall be done, who shall do it, how and when it shall be done, as well as to advise shippers concerning the loading, blocking and securing of loads before cars moved over Carrier's tracks.

The performance of Mechanical Foreman Davis did not deprive carmen of any work. The car was checked to determine if it could be moved safely to the consignee. Later the car was moved to the repair track for mechanical inspection and repairs.

Nothing in the Agreement prevents any foreman from performing work when incidental to their duties. Rule 33 of the agreement provides that foremen are not prohibited from performing work in the exercise of their duties.

The award therefore is in error and we dissent.

P. R. Humphreys
H. K. Hagerman
H. F. M. Braidwood
F. P. Butler
W. R. Harris