Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6634
Docket No. 6454
2-Wini-USWA-'74

The Second Division consisted of the regular members and in addition Referee Louis Yagoda when award was rendered.

Parties to Dispute: (United Steel Workers of America, District 23
(Winifrede Railroad Company

Dispute: Claim of Employes:

"Did the Company violate the contract when it sent ten cars to the C & O Railway Company for repair."

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.

The Collective Bargaining Agreement between the parties herein (National Bituminous Coal Wage Agreement of 1971 between Bituminous Coal Operators Association Inc. and United Mine Workers*) contains the following provision which the parties agree is controlling on this claim:

"Article II

Section (f) Work Jurisdiction

The following work shall be performed solely by members of the United Mine Workers of America and will be covered by this agreement:

(1) * * * * * *

(2) All repair and maintenance work in and around the mine to the extent that the Employer has the necessary equipment at such mine or at a central repair shop where such work is normally performed and regular employes with the necessary skills available to do the work.

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*The petitioning Union is a successor contracting party to the U.M.W.A. and the parties stipulate that all references in the Agreement to United Mine Workers of America are to be read as if United Steelworkers of America.

"Nothing in this section shall be construed or applied to diminish the exclusive work jurisdiction otherwise expressed or implied by this agreement."

Certain of the circumstances giving rise to this claim are not in dispute.

The Employer (hereinafter also referred to as Carrier) operates a shortline railroad engaged almost exclusively in transporting bituminous coal from mines. At the time of these events, the two Claimants were in the Car Repairman job classification and were the full compliment thereof.

It is undisputed that Claimants were fully employed at the time working their normal 7¼ hr. workday, five days per week doing maintenance and light repair work of the kind usually assigned to them and had been so fully employed for some time. Nor is Carrier testimony disputed that there was an accumulated backlog of approximately six weeks work waiting to be performed in the Car Repair Shop.

According to further unrefuted Carrier testimony, there were 10 cars in the shop which had become "outdated" at the beginning of May 1972 and 5 more which would become "outdated" in June 1972 under ICC regulations. This has reference to the requirement of the Association of American Railroads and the Interstate Commerce Commission that complete freight air brake equipment must be cleaned, oiled, tested and stencilled after expiration of 45 months but no later than 48 months.

It is also undisputed that Claimants were capable of doing this kind of work and have done it in the past, but Carrier decided that they were not available to do the work because they were fully occupied then and prospectively and the work was urgently needed. On that basis, the cars were sent out to have this so-called C.O.T.& S. or air overhaul work performed within a specified time limit in the shops of the C & O railroad.

The parties join issue on the question of whether when all regular employees in a given craft are working their full regular workweek, they are nevertheless "available" within the meaning and intent of Article II, Section (f) 2. to do the work and the Employer is consequently forbidden to send said work out to be done by others.

We regard certain factors in this situation to be determinative on the questions presented:

(1) We find Carrier decision concerning the urgency of the work in question to have been made in good faith. Employees argue that the contested work could have been given priority in the shop while less urgent work was laid aside. But we do not find evidence in the record to indicate the decisions which were made on this subject were other than within reasonable management needs rather than a subterfuge to avoid giving the contested work to the Claimants.

(2) In their submitted position on the issue, Employees disclaim any demand for overtime pay at premium rates for Claimants. They seek only the straight time pay equivalent to the hours put in on this work by the outside employees. It must follow that Employees are agreed that the "availability" of the subject employees must be regarded as encompassed within the boundaries of full regular and normal workdays and workweek. But it has not been shown that Claimants were denied work and pay in these respects. How can it be said that there was a deprivation when compensation is sought for that which has not been denied? Employees are apparently arguing for a concept of a continuance of work with the work contracted out regarded by them as a segment which, if added to the existing fund of work, would stretch the total into a longer period. But this is a speculative and conjectural concept, at best. How long would the continuous totals of normal workweeks be prolonged if this work was inserted at this point while other work was delayed? Would other deadlines have been, in turn, created, for the work put aside? And, with what other possible consequences of unfair injury to the employee (with, perhaps, resort to outside contractors eventually needed for the delayed work)? On the basis of that which the record discloses, as we have already indicated, there has been no showing that such rights were arbitrarily, eccentrically or malevolently exercised in this instance.

(3) Finally, even if the matter were looked at in terms of whether the management was required to work Claimants overtime hours rather than sublet the work, it has been previously and properly held by other arbitrators where the "availability" criterion was controlling and there was absent a clear contractual requirement extending that concept to overtime hours, those who work a full workweek are not to be regarded as "available" for work contemperaneously needed. See Anchor Motor Freight, 62-2ARB5313, Anaconda Aluminum Co. 68-1ARB8109 and Bethlehem Mines Corporation and Local Union No. 750, District 17, UMWA, Umpire's Decision 11-22-71 (Lugar).

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By: Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 6th day of February, 1974.