Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8341
SECOND DIVISION Docket No. 8219
2-TP&W-CM-'80

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: (System Federation No. 6, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Toledo, Peoria & Western Railroad Company

Dispute: Claim of Employes:

1. That under the current Agreement, Carrier improperly assigned other than Carmen (Morrison Marine Construction Company) to dismantle twenty-three (23) railroad cars at Marietta, Illinois.

2. That the Carrier reclaimed usable parts consisting of truck sides, bolsters, A.B. brake valves, A.B.D. brake valves, air brake reservoirs, hand brakes, hand brake wheels, and car wheels, which totaled five gondola cars full of reclaimed parts.

3. That accordingly, Carrier be ordered to make the Carmen whole by additionally compensating Carmen Jim Whetstone, Roy Dippel, Terry Tracey, Bob Tracey, Jay Young, Bob Caughey, Ed Taylor, Jerry McCulloch, Jerry Kneer, and Bob Kinman equal number of man hours as spent by Morrison Marine Construction Company employees cutting up twenty-three (23) scrap cars and saving of reusable parts.

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.

This dispute arises from the results of a derailment of 34 cars on June 9, 1978. Of the 34 cars, the Carrier determined that 23 cars were to be scrapped, and the Carrier entered into an agreement with an outside firm, Morrison Marine and Construction, for this purpose. The agreement included provisions for representatives of the Carrier to mark on such cars, certain "parts and trucks", which were to be returned by the outside firm to the Carrier. There is no dispute that such "parts and trucks" filled five gondola cars, as claimed by the Organization.

The Organization claims that the work of dismantling (for purposes of reuse) and of scrapping the cars should have been assigned to Carmen and that the performance of such work by the outside contractor was in violation of rules under the applicable agreement.

Rule 29, Assignment of Work, provides in part:

> "None but mechanics or apprentices regularly employed as such shall do mechanic's work as per the special rules of each craft..."

Rule 111, Classification of Work, provides that "Carmen's work shall consist of ... dismantling ... freight cars ..."

The Carrier argues that its primary purpose herein was to divest itself of the damaged cars and, to do so, exercised its right to sell the cars to an outside firm, an action it claims to be not violative of any rule. Retention of certain equipment on the cars was incidental to the operation, according to the Carrier.

The Board has made numerous decisions in situations similar to this, and these awards warrant close study for a determination in this dispute. One basic consideration is the well established principle that a carrier may sell its property, with the purchaser doing as he wishes with it. In Award No. 6529 (Shapiro), the Board stated:

> "Petitioner does not, in the instant matter, challenge the right of Carrier to sell its equipment and have the purchaser remove same from Carrier's property. If it did, it would have been faced with the holdings of this Board rejecting claims based thereon. Awards 2377, 2922, 3158, 3228, 3585, 3586, 3635, 3636, 3739, 4476, 5957, and 5958."

The Board, however, has examined intent in other instances. Where the Board has found that property has been disposed of but the Carrier has simultaneously exercised the right to reclaim the dismantled property in its component pieces, a different finding appears. In such instances, the Board has found that employes (i.e., Carmen) have been improperly denied work which should be assigned to them. Award No. 6800 (O'Brien) states:

> "No one is questioning Carrier's right to sell its equipment and have the purchaser remove it from Carrier's property. However, such was not the case at hand. Carrier concedes that the contract with Milkie required that certain specified material be returned to it. We are forced to conclude from the record before us that the primary purpose of the contract with Milkie was the dismantling of the freight cars in question with Carrier's intent to salvage useable parts and scrap metal. Since such was the primary result sought we deem this to be Carmen's work and they should have been assigned thereto by Carrier. Rule 138 of the Agreement having been violated

"here we shall allow the compensation claimed but at the pro rata rate."

Likewise, Awards Nos. 7660 and 7661 (Williams):

"Numerous awards have held that a Carrier is free to sell its property and such a sale would not violate Classification of Work Rules. The basic issue in such cases is whether the primary purpose of the agreement is a sale or it is a contracting out of work covered by a Classification of Work Rule. In this case, the agreement includes a firm price which tends to show a sale. On the other hand, the term requiring the return of reusable parts tends to show the Carrier was contracting out the work. Given these terms in the agreement, the Carrier was receiving the same benefits from the outside firm that it would have received from the Claimants had they performed the work. The purpose of the agreement therefore appears to be primarily a contracting out of work rather than a sale of property. See Second Division Awards 6529 and 6800."

What, then, of the present dispute? The Board finds that the Carrier's overriding intention was to dispose of the cars and actually sold them not with a view to retaining them in their component parts (i.e., scrap and reusable parts). Nevertheless, the Carrier did specify in advance -- by contract and by identification with its own personnel -- that it wished to retain certain equipment on the cars. This portion of the work fell clearly within the "dismantling" function for salvage purposes. These salvaged items did not effectively leave the Carrier's possession, and the work was clearly within Carmen work classification. Another case is instructive here, in which a claim by Carmen was denied because the Board found that Carmen, having first salvaged certain parts of freight cars, went on to claim the subsequent scrapping work which had been given to an outside contractor. This is Award No. 7960 (Weiss), which is quoted at length:

"Both parties in their Submissions and during the processing of the claim on the property referred to a prior case -- the Mina case. Carrier's position is that in the Mina case it used a contractor to salvage usable parts, which it acknowledged was Carmen's work. However, the cutting up of the cars for scrap loading, also performed by the contractor, was not considered Carmen's work and no claim was made for that work in the handling of that case.

The instant case is distinguishable, according to Carrier, in that Carmen (not the contractor) salvaged the usable parts. Unlike the Mina case, therefore, the instant claim involves only the cutting up of cars for scrap. And on that issue, Carrier submitted a list showing, over a 5-year period, that it had used contractors for cutting up for scrap, cars involved in derailment.

"In sum, on the basis of the disposition of the Mina case and the Carmen's Work Classification Rule, Carrier denies that the work in question is reserved to Carmen.

A close reading of the record supports the finding that the disputed work was not a salvage operation but a scrap process, and that the contractor was used only after members of the Carmen craft had completed the salvaging of parts operation. No probative evidence has been submitted by Petitioner that the contractor used by the Carrier performed salvage work or that cutting up of scrap is either contractually reserved to Carmen or that such work belongs to Carmen or that such work belongs to Carmen on the basis of past practice. Carrier's records and itemization of use of contractors over a 5-year period effectively refutes Petitioner's allegations. Accordingly, we will deny the claim."

Returning now to the present claim, the Board finds, consistent with past awards, that the Carrier was within its rights to dispose of the damaged cars by sale to an outside contractor who came into full possession of the cars -- except for those parts marked for salvage. As to the salvaged parts, the Board finds, again consistent with past findings, that this was Carmen's work, and that Carmen were improperly denied the right to perform that part of the work relating to dismantling for the purpose of salvage.

The claim calls for payment of "equal number of man hours as spent by Morrison Marine Construction Company employees cutting up twenty-three (23) scrap cars and saving of reusable parts". As will be seen from the above, the claim is not sustainable to this extent. The claim is sustained, however, only to the extent of the number of hours, divided among the identified Claimants which would have approximated the time to salvage those pieces of equipment designated by the Carrier for salvage. The number of hours is best determined by the parties themselves.

A W A R D

Claim sustained to the extent determined in the Findings.

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 30th day of April, 1980.