Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11295
SECOND DIVISION Docket No. 11085-T
2-C&NW-CM-'87

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

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Chicago and North Western Transportation Company

1. Carmen B. L. Cole, C. Brownell, J. Sharpe, B. Johnson, D. Monaghan, A. Shank, M. Frommelt, P. Haworty (sic), A. Kitchen, S. Keahna, J. Comer, Jr. and J. Grice were deprived of work and wages to which entitled when the Chicago and North Western Transportation Company violated the controlling agreement when it improperly assigned train crews to perform Carmen's work of coupling air hoses and making terminal air brake test on March 2, 3, 4, 8, 9, 10, 15 and 16, 1984.

2. That the Chicago and North Western Transportation Company be ordered to compensate Carmen Claimants as follows:

B. L. Cole	March 2, 1984
D. Monaghan	March 8, 1984
A. Shank	March 9, 1984
M. Frommelt	March 9, 1984
S. Keahna	March 10, 1984
J. Grice	March 15, 1984

Claim is made for eight (8) hours at the time and one-half rate of pay for the above listed dates.

C. Brownell	March 3, 1984
J. Sharpe	March 4, 1984
B. Johnson	March 8, 1984
P. Haworth	March 9, 1984
A. Kitchen	March 10, 1984
J. Comer, Jr.	March 10, 1984

Claim is made for two (2) hours and forty (40) minutes at the time and one-half rate of pay for the above listed dates.

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 employes 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.

As Third Party in interest, the United Transportation Union was advised of the pendency of this case, but chose not to intervene in the dispute.

The Carrier operates three (3) freight yards in the Des Moines, Iowa Terminal, namely, at Hull Avenue, Bell Avenue and Short Line Yard. The dispute arises over the Organization's Claim that on March 2, 3, 4, 8, 9, 10, 15 and 16, 1984 the Carrier improperly assigned the train crews and switch crews to perform Carmens work of coupling air hose and performing air brake test. The Organization contends that the Claimants all of whom are Carmen, were available to work on all of the shifts on the above mentioned dates. According to the Organization, the improper assignment of Carmen's work by the Carrier violated Rules 14, 15, 30, 57, 58, 61 and 76, Article V of the September 1964 Agreement and Article VI, Sections c, d, e, and f of the Mediation Agreement, Case A, 9698 revising Article V of the September 1964 Agreement. Moreover, the Organization claims that historically, the work in dispute has been performed by Carmen.

Before considering the merits of the instant dispute, a threshold matter which has been raised by the Organization must first be addressed. The Organization asserts that it has "submitted statements that are supportive of our Claim, none of which have been refuted by the Carrier;" therefore, they "must stand as fact." The record does not support the Claim by the Organization. On the property, the Carrier's position was as follows: a) Section V of the 1966 Agreement provides that "[A]t points where Carmen are not regularly assigned, train crews are permitted to couple air and make initial terminal air test;" b) the work which is the subject of the Claim by the Organization "has historically been performed at Hull Avenue * * by Trainmen;" and c) "the facts in this case" indicate that the "claim does not have merit." Accordingly, it is denied for lack of support of schedule rules as to agreements. See June 10, 1984 letter by J. H. Koch, Assistant Vice President and Division Manager, and September 25, 1984 letter by Ann L. Reif, Labor Relations Officer (Exhibits B and E of Organizations's submission).

The Carrier's position on the property demonstrates that, it has refuted the Organization's claims although it has not done so, supported by factual data. Thus, the central query to be addressed is whether the Organization has satisfied its burden of proving that the Carrier has violated the Agreements between the parties. In the opinion of the Board, the Organization has failed to do so.

The issues raised in the instant dispute, primarily focus on Article V, Paragraphs (a) and (b) of the 1964 Agreement and Article VI, Paragraph (c) of the 1975 Agreement, which provide as follows:

> "Article V - Coupling, Inspection and Testing
>
> (a) 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 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 the carmen.
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> (b) 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 VI - (December 4, 1975 Agreement)
>
> (c) If as of July, 1974, a railroad had carman assigned to a shift at a departure yard, coach yard or passenger terminal from which trains depart, who performed the work set forth in this rule, it may not discontinue the performance of such work by carmen on that shift and have employees other than carman perform such work (and must restore the performance of such work by Carmen if discontinued in the interim), unless there is not a sufficient amount of such work to justify employing a carman."

The issues raised in the instant dispute have been addressed in previous Awards. In Second Division Award No. 10107 this Board enumerated the criteria which must be satisfied in order to sustain the Organization's Claim by stating the following:

> "The language of the 1964 and 1976 Agreements has been the subject of many previous awards which determined whether or not carmen were entitled to perform the type of work under consideration here.

Accepted as three criteria supporting Carmen's claims are the following:

1. Carmen in the employment of the Carrier are on duty.

2. The train tested, inspected or coupled is in a departure yard or terminal.

3. That the train involved departs the departure yard or terminal." See for example Second Division Awards Nos. 11033, 10679, 9932 and 6671.

The record before this Board warrants the conclusion that the cars in question were intra-yard movements or transfers rather than trains departing the departure yard or terminal. Accordingly, the third criterion, namely, that the train involved depart the departure yard or terminal, has not been satisfied. Since the requirements of the third criterion have not been met by the Organization, there is no need to determine whether the other criteria have been satified. See, for example, Second Division Award No. 10107.

In the alternative, assuming that the work in question was reserved to Carmen, the Organization failed to satisfy the requirements of Article VI, Paragraph (f) of the Agreement. Article VI, Paragraph (f) provides a mechanism by which disputes over whether or not there is "sufficient work" to justify the employment of a carman can be resolved. In order to invoke the agreed upon procedure in Paragraph (f), the General Chairman of Carmen is required to request the parties "to undertake a joint check of the work done." It is enough to state that there is nothing in the record to indicate that the General Chairman submitted such a request. See, for example, Second Division Awards Nos. 10242 and 11023.

The parties have submitted numerous Awards in support of their respective positions all of which have been carefully examined. However, decision is a function of the Interpretation of the relevant provisions of the Agreement as they apply to the particular facts. Clearly, the Organization has failed to satisfy the burden of proving that the Carrier has violated the Agreement between the parties. As a result, the Claim is denied.

A W A R D

Claim denied.

Award No. 11295
Docket No. 11085-T
2-C&NW-CM-87'

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 15th day of July 1987.

LABOR MEMBERS' DISSENT TO AWARDS

11295 THROUGH 11305

SECOND DIVISION DOCKETS NOS. 11085T, 11095T, 11096T, 11097T, 11098T, 11099T, 11100T, 11101T, 11102T, 11104T and 11105T

(REFEREE HYMAN COHEN)

The Majority grossly erred in their erroneous Decisions resulting in these Awards when they failed to recognize the full Agreement in effect on this property.

While they recognized and quoted Paragraphs (a) and (b) of the 1964 Agreement and Paragraph (c) of the 1975 Agreement they failed to read obviously, Paragraphs (d) and (e) of the same 1975 Agreement which as quoted below recognize that in some cases, such as this case, there may not be a Carman on duty in a particular yard, but may be on duty in another yard, within the same terminal, the Carrier cannot discontinue the use of Carmen at that location:

"Article VI December 4, 1975"
Paragraph (d) and (e)

This Board has, by Awards to Dockets involving identical incidents, held that if Carmen are employed in the same terminal which may have more than one yard, such as in this case, the necessary criteria is considered met, that Carmen are on duty, they stated:

in Award 9932

"What is at issue here are factual considerations, disputed between the Carrier and the Organization, as to whether the established criteria were met. There is no question that Carmen are on duty and available in the Louisville Terminal. The Carrier states that at the East Louisville Yard there are no Carmen assigned. However, the Organization has shown to the Board's satisfaction that the East Louisville Yard is within the yard limits of the Louisville Terminal. The Organization's statement that Carmen are called for duty on occasion to the East Louisville Yard was not disputed."

The Majority further erroneously found that :

"The record before this Board warrants the conclusion that the cars in question were intra-yard movements or transfers rather than trains departing the departure yard or terminal."

The Majority had been provided with precedent Awards 10679 and 11203 on this same issue and completely ignored their value, there had been no argument made, on the property, that the three criteria had not been met, nor was there any question raised as to the need for a "joint check."

The employes were not seeking the establishment of a position in this case, they were only seeking to maintain the work in accordance with the Agreements, both parties were aware of the amount of work, so there was no need for a joint check.

Because these decisions are so erroneous the Employes vigorously dissent.

R. A. Johnson

M. J. Cullen

D. A. Hampton

R. E. Kowalski

Mark Filipovic

CARRIER MEMBERS' ANSWER
TO
LABOR MEMBERS' DISSENT
TO
AWARD NOS. 11295 TO 11305
(REFEREE HYMAN COHEN)

The Organization's Dissent restates the same trite nonsense that has been uniformly found unpersuasive before this Board.

The Organization states that they are citing "Paragraphs (d) and (e) of the same 1975 Agreement which as quoted below..." and then do not do so.

However, on the property the Organization had argued that the yard had been "shut down" and one must find that there was not sufficient carman work to justify "employing a carman" under Paragraphs (d) and (e).

Even if it could be found that some "Carmen were on duty..." Award 11295 pointed out:

> "The record before this Board warrants the conclusion that the cars in question were intra-yard movements or transfers rather than trains departing the departure yard or terminal. Accordingly, the third criterion....has not been satisfied".

Dissenters cite the foregoing as being an erroneous finding, but do not attempt to explain why, on this record, that conclusion is in error.

Finally, as we did in our Answer to the Dissent filed in Awards 11208-11211, we refer to Second Division Award 6177 which expressed "....its bewilderment that the issues presented herein are before the Board for still another Award."

P. V. Varga

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

J. E. Yost