Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11433
SECOND DIVISION Docket No. 10938-T
88-2-85-2-35

The Second Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen of the United States and Canada
(The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM:

1. That the Baltimore and Ohio Railroad Company violated the contractual rights of Claimant herein, Carman Carlos F. Phillips, Jr., when on the date of October 22, 1983, Carrier allowed yard crew to perform their own air test on nineteen (19) cars, in track 15, Pit Yard, Hamilton, Ohio, first shift, while a carman was employed and was on duty, in direct violation of Rule 144 1/2 of the controlling agreement.

2. That accordingly, Carrier be ordered to compensate Claimant herein for all time lost as a result of the above described violation of Rule 144 1/2 as follows: eight (8) hours pay at the time and one half rate (equivalent to twelve (12) hours at $12.94 per hour or $155.28).

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 dispute but chose not to intervene.

The Carrier maintains a terminal at Hamilton, Ohio, which includes both Pit Yard and Wood Yard. At the time of this dispute, the Claimant was a Carman employed by the Carrier at Hamilton.

When this claim arose, the Carrier employed a Carman as Car Inspector at the Hamilton Pit Yard, assigned to the first shift on a seven day a week, 365 days a year basis. However, on October 22, 1983, the regular Car Inspector was on scheduled vacation. Because no engines were scheduled to work at

Pit Yard on that date, the Carrier "blanked" the Car Inspector position for October 22, that is, the Carrier did not assign another Carman to fill the position on that shift. If the position had been filled for that date, apparently Claimant would have been entitled to the assignment.

Although no engines were scheduled to work on October 22, 1983, at some point during the shift it became necessary for the Carrier to move a cut of 19 cars from Pit Yard to Wood Yard at Hamilton. The Trainmen who moved these cars were directed by the Carrier to couple the cars' air hoses, conduct an air test, and inspect the cars prior to their movement from Pit Yard. The Organization claims that this work is reserved exclusively to the Carmen's craft under the controlling Agreement, and that the Carrier was accordingly obliged under the Agreement to call Claimant for that shift and assign him to perform the coupling, testing and inspecting work. Consequently, the Organization demands that Claimant be compensated for 8 hours' work at the time and one-half overtime rate, due to the Carrier's asserted violation of the Agreement.

When the claim was first filed on the property, the Manager of the Carrier's Mechanical Department replied that a Car Inspector had been transported from the Carrier's New River Yard on the date in question to couple, test and inspect the 19 cars at Pit Yard. During subsequent discussion of the claim between the parties, it became evident that the work was in fact performed by the Trainmen, as asserted by the Organization, before the Car Inspector from New River Yard arrived at Pit Yard.

Therefore, the facts giving rise to the instant claim are not in dispute. The Carrier, however, contends that the controlling Agreement was not violated by assigning the work in question to Trainmen under these circumstances. The Carrier also argues that, even if there was a violation, the claim is excessive in seeking a full 8 hours' pay at the overtime rate; according to the Carrier, any remedy should be limited to straight time pay for only the number of hours required to couple, test and inspect the 19 cars in question.

The parties agree that, whether the Agreement was violated in these circumstances turns upon the provisions of Rule 144 1/2 of the Agreement. Rule 144 1/2 provides, in pertinent part:

> "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 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 the carmen.

* * *

> (c) If as of July 1, 1974 a railroad had carmen 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 or such work by carmen on that shift and have employes other than carmen 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." (Emphasis added)

As the Carrier points out, numerous Awards of this Board establish that three elements must be affirmatively established by the Organization to demonstrate a violation of Rule 144 1/2 in a case like this:

1. That carmen in the employment of the Carrier were on duty at the time in question;

2. That the train tested, inspected or coupled was in a departure yard or terminal at the time in question; and

3. That the train thereafter departed the yard or terminal.

See, e.g., Second Division Award 10021.

The Carrier argues that the first element above is not established here because no Car Inspector was on duty at Pit Yard on October 22, 1983, that position having been blanked for that date due to the regular Inspector's vacation and the expectation that no engines would work that shift. However, as the Organization points out, this Board has rejected such an argument in comparable circumstances. In Second Division Award 10117, the Board held that, if a carrier has Carmen regularly assigned to a particular shift at the terminal in question, it cannot assign inspection, coupling and testing of cars to Trainmen simply because the regularly assigned Carman is on holiday, without violating Rule 144 1/2.

The Carrier also contends, however, that the second and third elements of the Organization's proof are lacking because the 19 cars were not at a departure point and did not in fact depart the Hamilton terminal on October 22, 1983. Rather, those cars were moved only from Pit Yard to Wood Yard, remaining at all times within the limits of the Hamilton terminal. Here, the Carrier relies on several earlier Awards including Second Division Awards 10021, 6999, and 5368. These Awards hold that Rule 144 1/2 applies only to the coupling, testing and inspection of trains immediately prior to their departure from the Carrier's terminal, and not to the mere movement of cuts of cars from one classification yard to another within a terminal area.

In Second Division Award 5368, one of those relied on by the Carrier, it was said:

> "The burden of proving these elements [of a violation] is on the Organization. In the instant case, the evidence falls short of proving that the train 'departed' the terminal limits. . . . The entire movement of the train involved in this dispute . . . was within the terminal limit. There was no departure."

In replying to this claim on the property, the Carrier's Senior Manager of Labor Relations on May 3, 1984 specifically referred to Award 5368, among others, in contending that Rule 144 1/2 did not apply because the 19 cars in question "were only moved within terminal limits." In response, the Organization merely asserted that the Awards cited by the Carrier "do not fit squarely with the case at hand," without explaining why they do not. Nor has the Organization referred the Board to any countervailing authority which suggests that the Rule does in fact apply to the movement of cars within a carrier's terminal.

The Board must therefore conclude that this case is controlled by the precedent cited by the Carrier. Rule 144 1/2 does not apply because the cars in question here were moved only within the limits of the Carrier's Hamilton terminal and there was no "departure" involved. Accordingly, the Rule was not violated.

It is therefore unnecessary to decide whether the remedy sought in the claim is excessive.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of March 1988.