Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 12459
SECOND DIVISION Docket No. 12148-T
92-2-91-2-38

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

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/Division of TCU
(
(CSX Transportation, Inc.
(Baltimore and Ohio Railroad Company)

STATEMENT OF CLAIM:

1. That the Carrier violated current controlling Agreement Rules 138 and 142 when they used General Foreman Brode, Foreman Shrout, Laborer Jacobs, Pipefitter Moffett and Machinist McCarty to rerail Engine 8255. This was work that should have been performed by Carmen.

2. That the Carrier compensate Claimants J. O. Friend, J. G. Stewart, J. D'Angelo, R. E. Hamilton and E. T. Ridenour four (4) hours call time for depriving these employes of work which is contractually theirs to claim.

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 Parties in Interest, the International Association of Machinists and Aerospace Workers, the Sheet Metal Workers International Association, and the International Brotherhood of Firemen and Oilers were advised of the pendency of this dispute, but chose not to file a Submission with the Division.

The Carrier operates a locomotive repair facility at Cumberland, Maryland. At the facility, a turntable is utilized for placing locomotives on various tracks.

During the evening of December 3, 1988, Locomotive 8255 derailed 2 wheels while it was moving on the turntable. It was determined that Locomotive 8255 could be rerailed by the placement of wooden blocks and pulling it back on the rails with another Locomotive.

When the General Foreman instructed Carman Engelbach to rerail Locomotive 8255, he [Carman Engelbach] indicated that he would require help to perform the work. According to the Organization, a Foreman, a Laborer, a Pipefitter and a Machinist "helped" Carman Engelbach rerail the Locomotive.

The Organization's contention is confirmed by the General Plant Manager's letter dated February 9, 1989 to the Local Chairman in which he stated that "[T]he employees other than the Carman involved merely assisted with carrying the blocking to the locomotive."

It is the Board's judgment that the assistance provided to the Carman constitutes a violation of Rule 142 which provides as follows:

> "Make-up Wrecking Crews.
>
> When wrecking crews are called for wrecks or derailments outside of yard limits, a sufficient number of the regularly assigned crew will accompany the outfit. For wrecks or derailments within yard limits, sufficient carmen will be called to perform the work."

The second sentence of Rule 142 is relevant to the facts of this case. This sentence provides that "sufficient carmen will be called to perform the work" in situations involving "wrecks or derailments within yard limits." There was a "derailment within yard limits" that occurred on December 3, 1988. Blocking is an important method utilized for the purpose of rerailing. Under Rule 142 the act of carrying the blocking was required to be performed by "sufficient carmen" rather than by other crafts.

The Carrier contends that the assistance provided to the Carman was in response to his request for assistance. However, implicit in the Carman's request was his intent to receive assistance from his craft, namely, Carmen, rather than from other crafts.

The record discloses that it was the Carrier's "understanding that the rerailing of locomotives on the Turntable at Cumberland Shop has been performed by Hostlers and other employees in the past." The mere assertion of a unilateral "understanding" does not constitute reliable and probative evidence.

Furthermore, the issue in this case is not whether Carmen have exclusive jurisdiction of all rerailing work. Rule 142 is clear. It provides that "sufficient carmen will be called to perform the work" for "wrecks or derailments within yard limits." The Carrier failed to call sufficient Carmen to perform the work on December 3, 1988.

The Carrier characterizes the occurrence of December 3, 1988 as a "minor derailment." Rule 102 does not provide an exception for minor derailments. As stated in Second Division Award 222:

> "It is the opinion of the Division that Rule 120 contemplates, even in the case of a minor derailment, that when yard forces are unable to correct the condition, and it becomes necessary to call other employes and equipment, that the work then belongs to the carmen and that sufficient carmen and their helpers shall be called to perform the work, if available."

This Board turns to consider the Organization's claim for "four (4) hours call time" for the 5 Claimants. It is undisputed that it took approximately 45 minutes to perform the work in rerailing the locomotive.

The Board finds that the Organization's claim seeking 4 hours call time is excessive. Accordingly, the Board sustains the claim to the extent of 45 minutes compensation to be paid to each Claimant at the straight time rate.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of October 1992.

CARRIER MEMBERS' DISSENT
TO
AWARD 12459, DOCKET 12148-T
(Referee Cohen)

The Majority committed a grievous error by issuing a sustaining Award based on its finding that rerailing work within yard limits, specifically, within the shop area, was reserved exclusively to Carmen. The Majority's opinion that the language of Rule 142 clearly reserves such work to Carmen goes against many previous Awards interpreting the same or similar language.

For example, Second Division Award 10111 involved, as here, a derailment within the roundhouse area. That Award held:

> "There are no precedents or practices giving Carmen exclusive jurisdiction over the rerailing work in routine situations as here involved where the car was rerailed by the simple use of blocks. Derailments are common within the shop and yard areas and have been the subject of many Board Awards.

See also Second Division Award 4337, which involved a dispute on the former Baltimore and Ohio Railroad property:

> "From the face of Rule 142 it is apparent that the two sentences supplement one another. The first sentence relates to wrecks or derailments outside of yard limits and the second to wrecks or derailments within yard limits. The entire Rule clearly deals with the composition of make-up wrecking crews and thus is applicable only when such wrecking crews are called.
>
> In the instant case, no wrecking crew was called. Hence, the work performed in rerailing the car in question did not exclusively belong to carmen under Rule 142. In addition, no wrecking equipment was used, the operation of which could possibly have belonged to carmen under Rule 141 of the labor agreement."

Based on the reasoning of the above quoted Awards, Rule 142 did not give Carmen the exclusive right to rerailing work under the circumstances of this case. Rule 142 comes under the heading

"Wrecking Crews" and should be considered only in that context. When wrecking equipment is not used, as in this case, rerailing work should not be considered covered under Rule 142. Other Awards contrary to the decision of the Majority in this case include Second Division Awards 8650, 6599, 6454, 6361, 6345, 6159, 6030, 5946, 5864, 5860, 5812, 5768, 5637, 5621, 4931, 4901, 4833, 4823, 4822, 4821, 4674, 4569, 4362, 4337, 4197, 3730, 2792, 2343, 2208, 2050, 2049, 1763, 1757 and 1322.

It is well established by arbitral precedent that Carmen do not have the exclusive right to perform rerailing work within yard limits. This is particularly true in the shop/roundhouse area, where the disputed work occurred. Awards cited by the Organization in support of its position, besides being in error and in conflict with the majority of the Awards on the subject, do not address the specific issue of rerailing equipment within the shop/roundhouse area. However, that very issue is the subject of Award 10111, quoted above, as well as several other denial Awards on the former Baltimore and Ohio Railroad property, including 3859 and 3265.

Furthermore, the Organization did not prove any practice of using only Carmen for such work. In fact, the Organization belatedly dismissed the issue of past practice by merely stating at page 5 of its Submission that "two wrongs does (sic) not make a right." The consistent unrefuted practice on this Carrier has been to use Laborers and other shop forces to rerail cars and locomotives within the shop area and the Organization has not

proven, or even attempted to prove, otherwise (see especially Award 6361 regarding the importance of past practice in this type of case).

In view of the above, it is clear that there was no violation of any Rule of the Agreement and the claim, which appears to have been an attempt by the Organization to gain additional service rights for its members, should have been denied in its entirety.

Michael C. Lesnik
M. C. LESNIK

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