Award No. 6113
Docket No. MW-6031

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated the agreement when it required the section foreman and trackmen at Stringtown, Oklahoma to perform switching service and refused to compensate them at the respective higher rates of pay in accordance with the provisions of Article 15, Rule 1 of the effective agreement;

(2) That Section Foreman W. J. Kennedy be paid the difference between what he was paid at the section foreman's rate of pay and what he should have received at the Local conductor's rate of pay for all time consumed in performing switching service;

(3) That the trackmen who were used to perform switching service be paid the difference between what they were paid and what they should have received at the Local Brakeman's rate of pay for all time consumed in performing switching service.

EMPLOYES' STATEMENT OF FACTS: The Southwest Stone Company has a rock-crushing plant located at Stringtown, Oklahoma. Shipments to and from this plant are made via the Carrier's transportation facilities.

Cars are loaded, then placed on track scales after which they are permitted to move by gravity to derails installed 730 feet beyond the scales. The derails are installed to prevent the cars from moving over an unprotected street crossing.

The 730 foot trackage space above referred to, often becomes fully occupied with cars, necessitating the movement of such cars to the 1220 feet of trackage which is available immediately beyond the derail and the crossing.

Except as expressly admitted herein, the Carrier denies each and every, all and singular, the allegations of the Petitioner's claim, original submission and any and all subsequent pleadings.

All data submitted in support of Carrier's position as herein set forth have been heretofore submitted to the employes of their duly authorized representatives.

(Exhibits not reproduced).

OPINION OF BOARD: The Carrier challenges the jurisdiction of this Board to determine this dispute.

Basically the reason given is as follows: The section foreman and section men making this claim are not parties to the Trainmen's Agreement between this Carrier and the Organization representing conductors and brakemen; that the Railway Labor Act specifically defines the jurisdiction of each of the four Divisions of the National Railroad Adjustment Board in Section 3, First (h). The First Division of the National Railroad Adjustment Board is vested with jurisdiction over disputes involving train and yard service employes of Carriers, that is conductors, trainmen, * * *. The Third Division to have jurisdiction over disputes involving * * * Maintenance of Way men, * * *. The jurisdiction being specifically designated to each of the four Divisions, it would not be within the authority of this Board to make a money award under the contract governing rates of pay, rules, and working conditions for train conductors, because the First Division is vested with jurisdiction over this class of employes, and if this claim would be allowed, this, the Third Division, would be determining a claim for a money award over which it had no jurisdiction.

From a review of the cited awards bearing on this jurisdictional question it seems apparent that Award 5702 of this Division and Award 1628, of the Second Division determine this issue. In the latter cited award, a comprehensive review is made of awards bearing on the question from the First Division, the Second Division, and the Third Division. No useful purpose would be served to review the same again. We also make reference to Awards 3489, 5702, and 5790 of this Division as determining this issue. Having so declared, this brings us to the merits of the claim in the instant case.

There is an Agreement between the parties dated September 1, 1949, and subsequent amendments and interpretations are by reference made a part of the statement of facts.

The record discloses that the Southwest Stone Company owned and operated a rock crusher serviced by the Carrier at Stringtown, Oklahoma. All cars handled into and out of this plant are handled by road and freight crews, both local and through freight, and no yard service or yard engine is maintained at this point. As cars are loaded at the loading bins or chutes at the crusher, they are dropped into a storage track and moved by crusher employes as far as the road crossing just north of the Carrier's station at Stringtown. In the event additional track room was required on this storage track for cars loaded at the crusher, the section gang moved cars by hand with pinch bars beyond road crossing north of the station to clearance point of storage track south of station.

The Employes statement of facts is to the effect that the cars are loaded, then placed on track scales, after which they are permitted to move by gravity to derails installed 730 feet beyond the scales. The derails are installed to prevent the cars from moving over an unprotected street crossing. The 730 foot trackage space often becomes fully occupied with cars which necessarily requires movement of such cars to the 1220 feet of trackage which is available immediately beyond the derails of the crossing. In such cases passing trains are required to stop and move the cars that have accumulated in the 730 foot space to the other side of the crossing so as to permit the rock crushing plant

to continue operations. On occasions through trains have performed this service, although the work is generally recognized as work of local freight crews which very seldom arrive at Stringtown in time to move the cars.

On March 30, 1951, instructions were issued to Foreman W. S. Kennedy in charge of the section gang at Stringtown as follows: "Subject handling cars at Stringtown. * * * Each work day, after receipt of this letter, you will use your gang at 11:00 A. M. to pinch cars from the first road crossing, north of station at Stringtown, to clearance point to provide car space North of above mentioned crossing. Do not block directly behind the station and prevent access to freight warehouse." The Section Foreman complied with the above instructions. However, on April 3, 1951, Southbound Train No. 75 had instructions to, and did, move the accumulated cars the required distance beyond the derails. The same service was performed by the Northbound Train No. 78 on the following day. Beginning on April 5, 1951, this service was performed by the Section Foreman and his crew. On April 13, 1951, objection was made to the Carrier on the grounds the work being performed was not work of the track forces. On April 23, 1951, the Foreman was directed to cease pinching cars as previously directed, and was requested to acknowledge receipt of the letter so informing him. This was done by letter written by the Foreman.

Claim was made by the System Committee of the Brotherhood in behalf of the Section Foreman and crew for the difference in pay between their respective rates of pay and that of the local conductors and brakemans' pay, for all time consumed in performing switching service. The claim was denied by the Carrier's Superintendent in a letter to the Grand Chairman of the Brotherhood of Maintenance of Way Employes, on the grounds that the Carrier experienced a situation of an emergency nature which made it necessary for section men to "pinch" cars a short distance to clear the first road crossing north of the station.

The situation had returned to normal and the Section Men were ordered to cease doing this work.

The Employes assert that the service performed was more than the movement of one or two cars, in that it involved the movement of over twenty cars, usually four cars coupled at a time, one employe riding each car to set the hand brakes, one man to protect highway traffic at the crossing until the cars have passed after which he climbs on the rear car and assists in setting the brakes, line one switch when necessary to switch cars south of the station and to protect another highway crossing at the station; that the cars are required to be spotted so as not to restrict access to the freight warehouse; that all the work performed involved movement over two tracks and for considerable distance; that the services performed were identical in every manner with that of local freight crews, substituting, of course, man power for motive power; and that this type of work is historically and traditionally performed by train service employes.

Rule 1 of Article 15 is captioned "Composite Service." The rule provides: "An employe working on more than one class of work on any day will be allowed the rate applicable to the character of work prepondering for the day, except that when temporarily assigned by the proper officer to lower rated positions, when such assignment is not brought about by a reduction of force or request or fault of such employe, the rate of pay shall not be reduced. This rule not to permit using regularly assigned employes of a lower rate of pay for less than half of a work day period, to avoid payment of higher rates."

No violation of the Scope Rule is here involved. The claim is that the employes be paid the higher rate under the above rule on the basis they performed more than one class of service on the dates set forth.

Under the above rule, the right of the Carrier to have employes work on more than one class of work on any day regardless of the Scope Rule has been recognized by awards of this Board.

The Carrier asserts that the service performed by the Section Foreman and crew, pinching of cars, is not the exclusive work of employes engaged in any industry, craft, or class, and is nothing more or less than manual labor, not subject to train service work. In this connection, non-employes and employes of various classes and crafts have always performed such service in various ways, moving cars for loading and unloading, and after loading and unloading at various industries, coal mines, elevators, team tracks, and elsewhere, both where yardmen are and are not employed and on duty. For these purposes the cars have been moved by hand, truck, tractor, horse or mule teams, windlass, pinch bars, and bars especially constructed for moving cars, and by other means as the continuous operation of the loading and unloading of cars may have made such movement necessary.

The Carrier contends before the above rule becomes applicable, first, an employe must work on more than one class of work on any one day. (2) The character of the work prepondering for the days is controlling in determining the rate of pay to be allowed. (3) That the service performed by the section gang in the instant case is neither switching service nor local freight service. (4) That Section Foreman Kennedy's time and labor distribution records for April 1951, show that four laborers were employed in this gang during the first part of April, and five laborers the latter part of April 1951, and that these laborers worked a total of three to five man hours in the aggregate each day involved, or an average of thirty-five minutes to one hour each per day performing this service. Therefore, under the facts adduced, the Rule above was not complied with in that no Claimant performed a prepondering amount of the work involved on any claimed date.

The Rule refers to "an employe," meaning each employe to prevail under the rule is required to do the character of work prepondering for the day, which is not the case here as shown by the evidence.

While contention is made by the Employes that the Carrier ignored paragraph two of the Rule, no evidence was offered by the Employes that these men were worked a half day period to avoid payment of the higher rate.

There is no doubt but that on most Carrier's lines it is common practice that pinching cars has been done by non-employes and employes in different classes or crafts. In this case, the Employes take no exception to this pronouncement, but cite authority to the effect that where cars are moved in such manner in substantial numbers, a different situation arises. Award 15132 of the First Division supports the Employes in such respect.

However, we have the Rule cited that distinguishes this case from the cited Award and other Awards cited.

Regardless of the equities involved, we are obligated to interpret the Rule as written. Therefore we are constrained to hold for the reasons given herein, the claim should be denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the claim is denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 26th day of February, 1953.

SPECIAL CONCURRING OPINION, AWARD 6113, DOCKET MW-6031

This claim called for the local freight conductor's rate of pay for the claimant section foreman and the local freight brakeman's rate of pay for from four to five trackmen. The Carrier's position that the pinching (movement) of cars which was done by the claimants "is not the exclusive work of employes engaged in any industry, craft, or class, and is nothing more or less than manual labor, not subject to train service work" (from Opinion of Board) is upheld by this Award, and the claim failed. On that basis for the Award, we place this special concurrence.

The dispute involved herein was whether the rates of pay of local freight train service conductors and brakemen are applicable to Maintenance of Way foremen and laborers. The Award found "That this (Third) Division of the Adjustment Board has jurisdiction over the dispute involved herein." On this finding of jurisdiction we depart from the author's expression of Opinion and his adherence to the Awards cited on that point. **Award 5702** of this Division and **Award 1628** of the Second Division cited as determining the issue of jurisdiction dealt with the violation of due process as to third parties and whether they were legally classifiable as indispensable, necessary, or proper to the proceedings there. No such question is present in this Docket. **Award 3489** dealt with the question of inducting a Maintenance of Way man into the position of, and using him exclusively as, a train service conductor. It is not dispositive of the jurisdiction question in this Docket and serves no good precedent on the point here. **Award 5790** is patently wrong as pointed out in the dissenting opinion. There the majority concluded that because want of jurisdiction was not pleaded, it could not be raised here. Jurisdiction of the subject matter cannot be subjected to the doctrine of waiver. In the instant Docket jurisdiction was challenged (see Opinion) for the reason that this Third Division cannot invade the exclusivity of the First Division and interpret a contract embracing the **rates of pay**, rules, **and working conditions** of local freight train service conductors and trainmen (U.S.C.A. Title 45, Sec. 153, First (h)) so as to entertain a petition contending that pinching cars is the exclusive work of local freight train service employes at local freight rates of pay. This is contrary to our statutory jurisdiction and is recognized by the very **Award 5702** cited by our author, viz.: "This Division has no jurisdiction of the classes of employes coming under the Second Division. Neither does it have authority to interpret and apply * * * the agreement they have entered into with this Carrier through the organization representing them."

/s/ E. T. Horsley

/s/ R. M. Butler

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. E. Kemp