

UNITED TRANSPORTATION UNION

AND

THE MONONGAHELA CONNECTING
RAILROAD COMPANY

STATEMENT OF CLAIM:

Claim for "8 hours in behalf of the First-Out-Available extra Conductor and two Brakemen, account of Duquesne Slag Products Co. Hi-Lift LW 752, a piece of off-track equipment, did move four cars placed on spot for loading on #35 and the 'upper runner'. This occurred on June 4, 1975 on the 7:00 A.M. to 3:00 P.M. turn. The car numbers were PRR665170 PLE72587 PLE73504 PLE61787. See Article 10, Consist of Crews".

OPINION OF BOARD:

The instant dispute involves the movement of four railroad cars by a customer-owned (Duquesne Slag Products Company) "Hi-Lift" on #35 Track and the "upper runner", a short stretch of #35 Track owned by Carrier and located immediately adjacent to Duquesne Slag Storage Yard on the north side of the Monongahela River.

Certain background facts are undisputed.

Duquesne Slag's Storage Yard serves primarily as a dumping and processing point for slag waste produced in the blast furnaces at the Pittsburgh Works of Jones & Laughlin Steel. Hot slag from the furnace is transported in ladles by the Carrier to cooling pits located downriver from the Storage Yard, emptied onto the ground and there air-cooled. In turn, Duquesne Slag, utilizing off-track equipment, loads the slag onto an enclosed conveyor belt which carries

the slag to the Storage Yard where it is crushed and sorted by size. After such processing, the slag is loaded into trucks or railroad cars and sold by Duquesne Slag to its various customers.

Prior to 1972, the Storage Yard was serviced by the Carrier via a spur track (R-24) owned by Duquesne Slag and running parallel to the Carrier's #35 Track. Empty railroad cars were deposited by the Carrier on R-24 and, after being loaded by Duquesne Slag (utilizing its own employes and equipment), were picked up and disposed of by a Carrier crew as directed by the customer.

In 1972, Duquesne Slag decided to handle the bulk of the work of hauling slag from the Storage Yard by truck rather than rail. As a result, R-24 Track was no longer needed and it was lifted and removed in the spring of that year and thereafter, slag waste earmarked for intra-plant use was loaded and shipped out of Duquesne Slag's Brady Street processing facility, located some two miles downriver.

It is also undisputed that on the date of claim, Duquesne Slag notified the Carrier that Jones & Laughlin (the principal customer serviced by Carrier) was in need of four carloads of slag for its Blast Furnace facility and that the Slag Company intended to procure said slag from its stockpile at the Storage Yard. It was agreed that the "upper runner" would be utilized as the slag loading point and Carrier dispatched a crew which procured four empties and placed them on the "upper runner" section of R-35.

Thereafter, a Duquesne Slag equipment operator arrived on the scene and proceeded to load the two cars nearest the storage pile by use of an

off-track rubber tire front-end loader, commonly known as a Hi-Lift. Then, because (according to explanation of Carrier) the Hi-Lift operator was unable to position his equipment to load the two remaining empties because of the obstruction of a large pile of ties and rails on the ground near the loading point, he shoved the draft of cars in a westerly direction along the "upper runner" to a point where the remaining empties could be reached and thereafter concluded the loading operation. The loaded cars were subsequently picked up by a Carrier crew and delivered to Jones & Laughlin.

Organization claims that all four cars were moved and spotted for loading by means of the Hi-Lift equipment in violative denial of and usurpation of work to which UTU employees were rightfully entitled.

We believe that determination of this controversy should be dependent on two principle elements in the present circumstances. One of these is whether the work in question was protected by "scope" rights (i.e. contractual grant of exclusivity of this work to covered employees) or in their absence, unbroken commitment for such by practice. The other involves the question of the Carrier's right to have "outsiders" (in this case, D. Slag Hi-Lift operators) do work on Carrier equipment and property, usually done by covered employees).

As to the first of these considerations, Employees contend that such assurances of exclusive job possession are present in Article 10 of the Agreement and may be inferred from Article 17 (the Seniority section).

We find Article 10 to be primarily and predominantly on its announced subject - "consist of crews" - rather than a traditional scope rule. However,

it does make certain statements concerning the "duties" of crews and, concerning what role yardmen do or do not have when on-track self-propelled cranes are used. But Article 10 does not deal with the use of off-track Hi-Lifts whether using Carrier's cars on or off Carrier-owned trackage.

But does a history of unbroken exclusive assignment of such work exist, amounting to a mutual understanding that the parties are committed to assign it for such circumstances to trainmen employed by Carrier? Unquestionably, in general, the parties have displayed by their practice and expectations that all movement of their cars on their property is to be arrogated to their trainmen.

Carrier contends that the question of exclusivity of past performance should be examined with respect to the particular characteristics of the work done - an isolated exigency, the unusual nature of the obstruction on the tracks while the Hi-Lift operators were going about their proper and unchallenged business, causing them to make the car movements, the latter being of a limited and incidental nature (a movement of no more than two car lengths, according to Carrier).

As to history, the parties reveal that Organization has in the past presented at least three claims for activities similar to the instant ones. They were all denied and none were pursued to ultimate adjudication. On the other hand, Organization submits evidence of past allowance of one claim made by it for a Conductor and two Brakemen (for eight hours pay) when (according to settlement letter of Carrier dated June 7, 1968) " a customer owned piece of off-track equipment moved two cars on Carrier owned trackage

rather than have Carrier crews accomplish the movement". No further information is given as to the extent of the movement involved. On the other hand, Carrier's Brief contains some details concerning the three claims which were allowed to die (T70-212, 239 and 246) but it is also difficult to determine to what extent those situations had characteristics essentially the same as here.

Thus, we do not have a conclusive history concerning an unbroken or mutually accepted practice either way on such "incidental" movements of the kind, extent and particular circumstances involved here.

Organization also raises the consideration that work done by individuals not employed by Carrier of a kind usually done by Carrier's employees is "sub-contracting" and, according to them, a device to evade the application and benefits the Collective Bargaining Agreement to those covered by it. (Much the same considerations apply to Organization's contention of violation of the seniority clauses.) It is therefore, in that sense, a subversion and undermining of said Agreement and should be disallowed on those grounds alone.

We must first note that there is no Agreement clause barring sub-contracting. Nevertheless, it has been held that even absent such contractual proscription, farming out of work to others may be regarded as violative. But it is doubtful whether the subject work had the characteristics of a deliberate substitution of others for one's own employees (usually either to non-union or lesser paid employees) and on a significant and future

job-threatening scale, the usual hallmarks of situations in which such violation has been declared.

It will thus be seen that the Board is deprived of absolute Rule practice and arbitral precedent as aids in deciding this issue. We are therefore compelled to decide on consideration of equitable rights and expectations for the situation which is involved here. The principle considerations in such an analysis are the extent to which, by considerations of fairness and reasonable manageability, Carrier (1) should, and (2) could, have supplied its own personnel to have done the work in question.

We regard as significant for these considerations (1) that Carrier admits that it was consulted in advance by Duquesne and agreed with them to have the Hi-Lift sent to the upper runner to work on the four cars there and (2) that it is quite clear from the record that Carrier knew or should have known, in advance, that there were obstructions on that side which would impede access to at least some of the cars unless they were moved. From this, we read the conclusion that Carrier both could and should have (albeit with some trouble and inconvenience) arranged in advance for trainmen to join the Hi-Lift operators, for the purpose of having the former move the cars as necessary.

For these reasons, we will find for Claimants for these particular circumstances. The question of remedy is complicated by three factors: (1) the absence of a specific penalty rule for such violation (we do not agree with Union that the Basic Day rule is applicable), (2) lack of fact concerning the extent of time taken by the Hi-Lift operators to do the moving at issue,

and (3) the extent, if any, to which other (and which) employees were deprived of work by the subject activities.

Under these circumstances, we believe that we will be fulfilling our duty for remedy of this violation and discouraging future repetition by awarding two hours' pay to Claimants.

AWARD:

Claim partially sustained in that there shall be paid to Claimants a total of two (2) hours' pay each for circumstances involved, such payments to be made within thirty (30) days.



LOUIS YAGODA, CHAIRMAN



J. L. HADLEY, CARRIER MEMBER



E. F. BREHANY, ORGANIZATION MEMBER

DATED: February 6, 1979