

PUBLIC LAW BOARD NO. 2212

AWARD NO. 4
CASE NO. 4

PARTIES TO DISPUTE:

UNITED TRANSPORTATION UNION

vs.

PORTLAND TERMINAL RAILROAD COMPANY

STATEMENT OF CLAIM:

Claim one basic day for each member of crew 61 working on the time slip date of June 17, 1977, account improper switching movement being made by persons not under Contract between PTRRCO and the UTU(S) at about 12:10 a.m.

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act as amended; that this Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter; and that the parties were given due notice of this hearing.

FACTS

Claimants performing yard work had pulled cars to the north end of Track No. 23. On returning southerly they found that industry employees of American Steel Inc. had moved cars out of the industrial site and lined switches so that the cars had fouled the lead thereby obstructing the southerly progress of the claimant crew.

POSITIONS OF THE PARTIES

The Organization contends that moving these cars onto the trackage of the Carrier and lining switches on the Carrier's trackage was a violation of the agreement reserving yard work to the crew. In addition, it was pointed out that by allowing the cars to foul the lead a dangerous condition had been created for the crew that was proceeding southerly especially since this was on a curve and during the darkness of night.

The Carrier contends that the movement made by the industry was an incidental use of Carrier-owned track and was done without the Carrier's knowledge or approval. When brought to the Carrier's attention, Carrier notified the industry in writing to refrain from using the Carrier's trackage to facilitate movement of cars within the industry without the Carrier's express consent. The Carrier also has argued that claimants are not proper claimants because they were on duty and under pay at the time of the alleged infraction.

FINDINGS

Each of the parties has presented many prior awards in support of their positions and although voluminous in quantity, they have been carefully reviewed and considered.

The Organization has argued that it is their practice to perform the work that was done by the industry crew. That is not material to the disposition of this claim because the Carrier acknowledges that the industry crew had no right to line switches or come on to Carrier trackage. Although the Organization asserts that the industry was not creating head room for movement within the industrial property but was actually positioning the cars for

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interchange, there is no evidence in the record to support this assertion.

Of the many prior awards submitted by the Organization language is found to indicate that: "While it may be difficult to take severe measures with customers, the repeated invasion of the Carrier's trackage was serious;---", and was repeated later in the month thereby resulting in a sustaining award. First Division Awards affecting seniority have indicated that switching on the Carrier tracks should be employed by Carrier employees and therefore support the claim; that denying yardmen the right to perform all service within the yard takes away from them what they are entitled to and that they shall be compensated; that: "It is neither fair nor just for this Division to be too easily persuaded that customer-relations justify an invasion of the seniority rights of Carrier employees, because the employees cannot effectively protect their rights against outsiders---". As to penalty claims, the Organization has submitted First Division Awards indicating that: "---The Union must have a way of policing its agreement with the Carrier and it appears that under a long line of awards by this Division the Board has found that the way is to compel the Carrier to compensate for rule violations." and, that: "While the Carrier cites awards to the contrary, we think that the great weight of authority is that where the evidence is clear that a rule has been violated, and claimant was available to do the work involving the rule violation, the claim must be sustained."; and, where the shipper took the matter into its own hands to move cars and since it is conceded that this was switching while a yard crew should have performed and one was on duty, available for the

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service the claim for a day pay is a valid one.

The Carrier has submitted prior awards such as PLB No. 333 Award No. 1 stating: "The Carrier is not an insurer against unauthorized acts of strangers. The Carrier's responsibility is determined on the basis of the exercise of reasonable care under the circumstances. When the Carrier learned of the trespass it took immediate action to prevent similar incidents, and none have occurred. Under these particular facts and circumstances we find that the claims lack merit." In PLB No. 189 Award No. 70 a denial award stated that the moving of cars by the industry from one spur track to another is plant switching even though the movement involved a traverse of some 95 feet of Carrier owned track. That Award stated also: "Not track ownership but the nature and extent of the work performance is the paramount consideration." In PLB No. 347 Award No. 108 a denial award stated that the claimants did not show that the work performed was with the knowledge or consent of the Carrier and that the work performed by the industry was on industry trackage, "except for incidental tailing outside the industry property." A First Division Award found that the division has held that: "----when encroachments of foreign crews in a Carrier's yard occur without its consent it assumes no responsibility"; also, in a denial award that the claimants were on duty and under pay at the time the movements were made giving rise to the claims for a minimum basic day's compensation was the sole ground on which the claims were denied. SBA No. 189 Award No. 29 in denying the claim held that if for no other reason, claimants could not seek penalty pay for not performing certain work while they were on duty and under pay; also, PLB No. 2266 Award No. 9

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denied the claim where the Carrier's position was that the claimant was an improper claimant because he was on duty and under pay.

The above-stated reference to First Division and PLB and SBA prior awards are samplings that have been taken from the prior awards submitted by both sides that throw light on this claim. The Organization's prior awards for the most part involve claimants who were available but not assigned and therefore may have been proper parties for the claim, and also indicate that some awards have held that a penalty may be appropriate to accomplish the policing of a contract. Samplings of the prior awards submitted by the Carrier indicate that when claimants are on duty and under pay that they are not entitled to compensation despite an obvious violation, and that the frequency and extent of the violation must be taken into consideration.

The Board believes that agreements with the Organizations are to be strictly observed and that violations are not to be permitted. The fact that the Carrier does not know that the violation is about to occur may be taken into consideration when there is no evidence that violations have previously occurred so that the Carrier may be on notice that they could occur again. It is also a fact that the employees may look only to their agreements and rules with the Carrier for their protection and that they have no recourse to the industry plant while the Carrier may, on the other hand, assert its rights against an industry that violates agreements with the Carrier.

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The record in this case does not contain evidence that a violation has previously occurred or that the Carrier had knowledge of the violation or that it had consented to it. Claimants were on duty and under pay. Accordingly, on the facts and circumstances of this case the Board finds that a violation did occur as alleged by the Organization and that such violation may not be disregarded. Nevertheless, claimants being on duty and under pay are not entitled to compensation. The Carrier upon learning of the violation took the only course of action available to it by notifying the industry in writing to prevent a repeated occurrence. It is not necessary for the Board to make any finding as to whether or not a penalty payment would have been appropriate to police the contract.

A W A R D

Claim Denied

Dated: *May 2,* 1983
Portland, Oregon

Irving T. Bergman

IRVING T. BERGMAN, Neutral Member

[Signature]

Organization Member

[Signature]

Carrier Member