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Report

TO

THE PRESIDENT

BY THE

EMERGENCY BOARD

APPOINTED FEBRUARY 6, 1945

Under Section 10 of the Railway Labor Act

In re The Kentucky & Indiana Terminal Railroad Company, and certain of their employees represented by the Brotherhood of Railway Trainmen.

FEBRUARY 20, 1945

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REPORT OF EMERGENCY BOARD APPOINTED FEBRUARY 6, 1945, UNDER SECTION 10 OF THE RAILWAY LABOR ACT, AS AMENDED.

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Mr. Frank Williams was appointed reporter.

The board held public hearings beginning February 13th and concluding February 18th. The appearances were,

For the brotherhood:

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R. L. Herrell, Chairman of General Committee,
L. C. Willis, former Vice Chairman of General Committee,
C. D. Danner, Vice Chairman of General Committee, and
N. J. Gallagher, former Chairman of General Committee.

For the carrier:

Charles W. Milner, Esq., and
William T. Joyner, Esq.

At the close of the evidence the board conferred with the parties in an unsuccessful attempt to mediate the dispute. At the start of the hearings the carrier offered to arbitrate the disputes, and the brotherhood declined.

The several disputes presented to this board had been negotiated between the brotherhood and the carrier together with a long docket of other claims, all pending before the First Division of the National Railroad Adjustment Board. Many of the claims were adjusted by the parties, either by recognition by the carrier

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or withdrawal by the brotherhood. The remaining cases, some forty-three in number, were left on the docket of the First Division. Thereafter some of the cases now presented to this board were withdrawn from the adjustment board and a strike vote was taken thereon. That led to the intervention of the National Mediation Board and the appointment shortly thereafter of this emergency board.

We report our findings and recommendations as follows:

The carrier, which will be referred to in this report as the terminal company, owns and operates the terminal at Louisville, Kentucky, of three trunk lines. They are the Baltimore & Ohio Railroad Company, the Chicago Indianapolis & Louisville Railway Company (spoken of by the parties as the Monon), and the Southern Railway Company. The terminal company is owned by these three carriers. Its operations are confined to terminal operations and switching.

Six cases were named by the brotherhood for the consideration of this board in the course of the hearings. One case, number 5, was shown to be still pending before the National Railway Adjustment Board, and the Brotherhood thereupon in open hearing withdrew it from the consideration of this board, and stipulated that it would withdraw it from the adjustment board also. It is No. 18983 on the docket of that board. Evidence in the other cases was offered to this board. For the convenience of this report they will be discussed out of numerical order.

CASE NUMBER 3

The claim was stated by the brotherhood as follows:

"Protest of B. of R. T. General Committee on the K. & I. T. R. R. Co., against running light engines from the roundhouse to any point outside the immediate roundhouse area, without the use of a yardman pilot, such movements handled by hostler and hostler helper.

"Also claim for minimum day, foreman's rate for the men standing for the service on each trick, July 8, 1942, and all subsequent dates when such movements were made without yardmen pilots.

"Also claim for the appropriate extra man who lost time as a result of not calling a pilot, causing him to lose the vacancy that would otherwise have occurred, July 8, 1942, and all subsequent dates."

The brotherhood stated that this case was withdrawn from the adjustment board because award 7082 (docket 10724 of First Division) dated July 28, 1942, clearly required that the terminal company use a yardman pilot in all of its light engine operations, and the brotherhood ought not to be forced to re-litigate the mat-

ter. The brotherhood in particular relies on the final sentence of the finding which it says is exactly applicable to the present claim. The sentence is as follows: "In consequence, while there is no specific rule in the instant case which would require the carrier to use yardmen to do the ground work in connection with light engine movements through the yard, where, outside of the immediate roundhouse area, the conditions are such as to require ground work such work must be considered as pilot's work, and, except where trainmen are used to accompany the engine of their train to and from the roundhouse, yardmen should be used." It also relied before this board on a sentence in a letter from the superintendent of the terminal company dated June 25, 1942, as evidencing a promise to use yardmen to handle switches.

Award 7082 shows that claim was made for switchman Zeller for one day's pay on February 13, 1939, and also pay for yardman for standing for service on each subsequent date when Monon engines were run from the terminal company roundhouse to the Louisville & Nashville depot via the terminal company tracks. The employees' statement of facts was as follows:

"On February 13, 1939, and several subsequent dates, Monon passenger engines were run from K. & I. T. roundhouse to L. & N. passenger station, approximately five miles **over main line of K & I. T. Railroad** without use of pilot. Hostler and Hostler Helper handling such engines." (Emphasis added.)

The employees before the adjustment board relied on the implication of the provisions of their agreement. That agreement states that the word "yardmen" applies to yard foremen, switchmen and pilots. Article I, Section (b) reads: "Regular pilots will receive not less than yard foreman's pay. Yardmen required to perform incidental pilot service during the day will receive yard foremen's rate for the entire day's work. The oldest available yardmen shall be called for this service."

The award (by James H. Wolfe, referee, and brotherhood members) sustained the claim on grounds which may be summarized as follows: The light engine movement in question required switches to be thrown. Throwing switches is yardmen's work. Throwing switches in this type of operation is that kind of yardmen's work which calls for a pilot. Article I, Section 1 (b) necessarily implies that yardmen's work will be performed only by yardmen. The supporting opinion stated that both parties assumed that the work done was of the type done by a pilot and that the carrier did not defend on the ground that the work did

not have the content of a pilot's work but rather on the ground that there was no requirement in the rule to call a pilot. The supporting opinion also said that "the definition of 'pilot', as given by the Standard Code of Operating rules, applies to other than yard pilots."

The terminal company's statements in the docket on which Award 7082 was rendered set forth in part that the practice of handling light engine movements by hostlers and hostlers' helpers had been in effect more than 29 years without protest; and that there was no requirement that the movement be handled by a pilot. It quoted the definition of "pilot" in the standard code of operating rules, viz:

"An employee assigned to a train when the engineer or conductor, or both, are not fully acquainted with the physical characteristics or rules of the railroad or portion of the railroad over which the train is to be moved."

The terminal company's statement also referred to several articles of its agreement with the engineers, foremen, hostlers and hostlers' helpers and to other matters, all which and perhaps some others were presented as evidence before this board.

At the hearings before this board the terminal company showed that from and after award 7082 was effective it had applied the award to the identical movement only. It took the position before this board that the award was erroneous, that there is no law or practice requiring that it apply the award to other cases, and that the content of a number of other awards on similar facts was such as to show that it was acting in good faith in contesting further claims so that the issue would come again before the adjustment board. It contended also that there are grounds on which the facts in award 7082 can be distinguished from other light engine movements on its property.

This emergency board does not consider that it should itself undertake the interpretation of existing agreements and rules. To do so would usurp the function of the adjustment board. The adjustment Board was created by the Railway Labor Act to deal with disputes growing out of grievances or out of interpretation or application of agreements concerning rates of pay, rules or working conditions, if not adjusted between the parties. The four divisions are occupied continuously with the disposition of such disputes. There are many cases interpreting the agreement here in issue or bearing on the right of others than yardmen to throw switches. Nearly fifty awards were cited to this board by the parties as relevant to this issue.

The divisions of the adjustment board are composed of representatives of the carriers and of the brotherhoods. Many cases are disposed of by these interested groups. A referee is called in only when they cannot agree.

This board believes that the present impasse may be fairly resolved as follows: Let the terminal company forthwith apply award 7082 to all light engine movements involving operations on main line tracks. Let the parties negotiate, if they will, as to the use of yardmen in light engine operations not involving main line movements and, if they do not negotiate or if they fail to agree, let either party carry the dispute before the adjustment board in the usual way.

The development of the case before this board forcefully supports this disposition of the matter.

We find that while both brotherhoods and carriers take cases to the adjustment board which appear to raise only issue already disposed of in earlier awards there is nevertheless a strong and natural feeling that principles established in a contested case before the board should be applied in like cases by the carrier involved.

This board believes that the procedure suggested will recognize and meet this feeling to the full extent that it is justified in this case. At the same time it will leave the terminal company free to retry the issues as to all its operations which it can in any material degree distinguish from those involved in award 7082. And it will leave all matters of interpretation of rules to the adjustment board where they clearly belong.

Light engine movements on the terminal company property are either within the immediate roundhouse area (and as to these the brotherhood agrees that no yardman is required to be on the engine), or within the yards but not on the main tracks, or within the yards and also on the main tracks. There is a substantial distinction between operations on the main line and those within the yard. Different safety rules and precautions apply

This board finds that there is no material distinction between the operation for which award 7082 was granted and the other light engine operations of the terminal company involving main line movements. The distances in all such operations are substantial. There are a number of switches to be thrown in each such case. In view of Rule 99 there is a basis for assigning an experienced man as a pilot, and in having three men on the engine.

It appears that in some cases on other carriers the yardmen assigned to accompany non-main line yard movements are classified as herders who in contradistinction to pilots (rating foremen's pay) receive pay in the lower brackets. There appears reason to suppose that the same considerations which have led elsewhere to the assignment of herders, where the use of yardsmen has been determined upon, might support their use in this case if the parties wished so to agree. We do not suggest that they should or should not so agree, or that the agreement does or does not permit their use. We do suggest that a movement in which herders might reasonably be used is substantially distinguishable from a main line operation.

We do not believe that the inclusive language in award 7082 which the brotherhood relies on conclusively establishes that the adjustment board will make the same finding on facts which are distinguishable from those shown in that case. It is important in determining the intended scope of the language in any opinion to consider the facts of the case. This principle we believe is deemed important by the several divisions of the adjustment board in determining the force, as precedents, of their own awards.

We do not intend to suggest in any way whatever that we have any view as to whether the adjustment board should limit the broad scope of the language if a different set of facts is presented. We confine ourselves strictly to the point that it is not unreasonable nor evidence of bad faith for the company to seek an opportunity to persuade the adjustment board to restrict the finding in a case where the facts are materially different from those on which award 7082 was based.

Another consideration supports the company's desire for further development of the matter before the adjustment board. The many awards discussed before this board indicate that the pertinent decisions of the adjustment board are not in accord and that recent decisions seem to show that a different interpretation may be evolving from that which prevailed earlier.*

In this state of affairs we deem it reasonable for the carrier to keep for itself the opportunity to seek a different result in those

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* The majority opinion in award 7082 noted that the division had in earlier decisions held that various classes of employees could not throw switches but that hostlers' helpers and firemen might. It then said, "The later awards have unconsciously recognized the illogicality of this distinction."

cases where the facts are materially distinguishable from those in the decided case. At the same time, however, we think, as already stated, that the carrier should extend the award to the main line operations and that the brotherhood should await the decision of the adjustment board on the other aspects of its claim.

In keeping with the foregoing, we think that the company should forthwith recognize and pay this claim number 3 so far as it applies to failure to use pilots in operations involving main line movements since the effective date of award 7082.

We do not think that the result is affected by the letter of Mr. Sutherland, terminal company's superintendent, dated June 25, 1942. In that letter Mr. Sutherland said:

"Item 2. 'Claim for penalty days account of yard patrolmen throwing switches at Ninth & Magnolia.' This is covered by Item 3 in your letter of June 14th as follows 'Settlement—Penalty claims withdrawn account practice discontinued, and Managements further promise that employees of no class except yardmen will be required to handle switches; except of course, road crews yarding their trains.' "

This letter was written after Docket No. 10724 had been submitted to the adjustment board and before award 7082 thereon was handed down. The company with utmost vigor had resisted the claim there made that hostlers' helpers could not throw switches as a part of light engine movements, and it is inconceivable that Mr. Sutherland, in writing as he did, was intending to make an agreement which would give away the company's entire position.

As Mr. Sutherland's letter states, the language relied on was drafted by the brotherhood. By its action and language used in presenting a number of claims after Mr. Sutherland adopted the language the brotherhood indicated that it did not consider this promise to affect claims for pilots on light engine movements.

CASE NUMBER 4

This claim (in the words of the brotherhood) is as follows:

"Claim of Foreman C. T. Evridge for minimum day foreman's rate, for 12-30-42, account of not being used to pilot B. & O. 63 to Depot, Southern Brakeman used instead."

It was agreed at the hearing that this was not a light engine movement. The issue involved cannot therefore be assimilated to those under case number 3. We see no reason why it should not be heard by the adjustment board in due course. We find that

the reasonable disposition of the case at this time is for either party forthwith to present it to the First Division, if it is not settled by negotiations.

CASE NUMBER 6

This claim (in the words of the brotherhood) is as follows:

"Claim of Yardman J. F. Hardesty for minimum day foreman's rate account of not being used 12-30-42 to pilot Southern engine 1265 from Youngtown to 7th Street Depot, hostler and hostler helper used instead."

This claim appears to be governed in principle by award 7082, and to involve a main line movement. Therefore, in keeping with the recommendations under case number 3, we believe that the claim should be recognized by the company and paid.

CASE NUMBER 1

The claim (in the words of the brotherhood) is as follows:

"Claim of Yardmen George Hardsaw and George Huckleberry for additional pay at yardmen's rate for March 23, 1940, and all subsequent dates, account of being required to perform switching service in foreign yard.

"Also claim for an additional day at their respective rates for the foreman and two helpers who were required to perform service of a similar nature in the same foreign yard on all dates between the date of the filing of the above claim, March 23, 1940, and April 29, 1942, the date Award No. 6691 was rendered."

The brotherhood withdrew this claim from the adjustment board because it felt that it was so clearly controlled by award 6691 that the company was unjustified in not paying it.

On April 5, 1940, L. C. Willis, by letter, presented four time slips making claim on behalf of himself as foreman and Messrs. Hardsaw and Huckelberry as members of his crew for a minimum day's pay on account of being required to bring back to the terminal company's yards from the L & N yards a cut of nine cars. Also a minimum day's pay from being required to couple air on L & N rail in order to bring back the cut. Mr. Willis at the time was a member of the Order of Railway Conductors. He stated in the letter of April 5, 1940, that he separated the claims because in negotiations for settlement there would be a difference in representations. Messrs. Hardsaw and Huckelberry were and are members of the trainmen's brotherhood. The Order of Railway Conductors presented the Willis claims before the adjustment board and on April 29, 1942, the first division entered award No.

6691 on his claims. It found, in effect, that both the claims were valid and it awarded pay to the claimant for bringing back the cut of cars. It denied an additional day's pay on account of the coupling of hose connected with the same operation. The company ended the practice complained of after the award was made.

Up to the time that award 6691 was entered, nothing had been done to progress the claims of Hardsaw and Huckelberry, which have been urged before this board, for handling the cut of cars. There was some evidence to the effect that these men or the brotherhood felt that Willis' case would sufficiently present the issue. However, the brotherhood had carried forward before the board the claim of Hardsaw and Huckelberry for coupling the hose (in the course of the same operation in which the instant claim arose). The adjustment board, at the same time it handed down the Willis award, made a finding on these claims of Hardsaw and Huckelberry, holding in award 6694 that they were valid, but granting no back pay. The company also called attention to awards 6689, 6690 and 6692, which recognized the claim of the brotherhoods that L & N crews should not be allowed to take cuts from the terminal company's yards.

Shortly after award 6691 was entered, the brotherhood presented for adjustment the instant claim of Hardsaw and Huckelberry, to be paid as Mr. Willis was under award 6691, for bringing back the cut from the L & N yards and for all such operations performed by these two employees and by any other employees from the date of the violation referred to in the time slips sent in by Mr. Willis in April, 1940, up to April 29, 1942, when award 6691 was rendered.

The company contended before this board that in view of all the circumstances the awards of the adjustment board indicated that it would not be required by the board to pay the instant claims. The company says that, prior to the time when award 6691 became known, there was no such presentation of claims to it on behalf of Hardsaw and Huckelberry as would furnish a basis for a retroactive award of pay. It says further that even if the time slips of Hardsaw and Huckelberry were adequate to carry their pay back to the date specified in those slips, they do not support the claim of all other employees to go back to that date.

The claim for all the employees is in the range of $28,000, so it will be understood that the point is of importance to both parties.

We cannot find that there is adequate reason for not waiting for the decision of the adjustment board on this claim. The prac-

tice, as stated above, has been discontinued so there is no question of a continuing violation. The question is whether certain employees shall receive, in effect, a money judgment. It is regrettable that the docket of the first division is as congested as it is*, but we feel sure that all the parties to this case will agree that that fact alone is insufficient reason for an emergency board attempting to perform the adjustment board's functions either by interpreting agreements or attempting to apply to particular new facts principles and precedents worked out by that board over a period of years.

We cannot find that the terminal company is unreasonable in seeking an adjudication of the points raised by it. The awards which have been cited clearly show that there are points which the company reasonably may wish to urge before the adjustment board. We express no opinion whatever as to how the adjustment board will or should decide the case or the applicability of its precedent awards. We do say that it is the function of the adjustment board and not an emergency board to rule on this matter under the circumstances.

This record fails to show that the question here presented, of whether retroactive payments should be made under these circumstances, has been decided by the adjustment board in a dispute involving this carrier or these parties. In this respect this case number 1 differs from case number 3, already discussed.

CASE NUMBER 2

This claim (in the language of the brotherhood) is as follows:

"Claim of Foreman P J. Carrico and crew for day's pay at time and one-half for May 27, 1942, and subsequent dates, when extra board was exhausted, account of foreign line crews delivering cars in interchange past the regular interchange at Panama to Youngtown, and delivering both to Panama and Youngtown, in violating of awards 6689-6690."

At the hearing before this board, it was developed by the terminal company that this claim was still pending before the first division of the adjustment board. The representatives of the brotherhood thereupon stated that they would withdraw the claim from that board. This board feels, however, that since this claim was pending before the National Railroad Adjustment

* The Louisville Courier-Journal on February 18, 1945, carried an Associated Press dispatch from Washington, D. C., stating that the President has asked Edward J. Connors, Vice President of the Union Pacific Railroad, to recommend a plan to clear up the backlog of cases before the First Division of the National Railroad Adjustment Board.

Board at the time this hearing was concluded, this board should not consider it and it should be adjusted by the adjustment board, where it is now pending.

CONCLUSION

We believe that the principal difficulty leading up to the appointment of this board was the question of whether a pilot is required on light engine movements. The position which both parties took as to the application of award 7082 is, under all the circumstances, entirely understandable. It is not unreasonable to hope and expect that, with an adjustment of that claim under way, as herein recommended, the parties would both be content to await the determination of the other claims by the adjustment board in regular course.

The great virtue of the Railway Labor Act, claimed for it by the brotherhoods when it was under consideration in Congress and demonstrated in its operation, is its permissive character. Earlier emergency boards have pointed out the substantial responsibilities of both management and employees to continue to make successful the operation of the voluntary procedures provided in the act.

The board was impressed by the fair presentation of the cases before it by both the brotherhood and the terminal company. It ventures to hope that with the help of the suggestions of this board, as herein set forth, the parties, proceeding in the same spirit of fairness demonstrated before it, will be able to dispose of the other cases, if not by negotiations, then before the adjustment board.

CERTIFICATION

In accordance with the provisions of the Stabilization Act of October 2, 1942, as amended by Section 202, approved June 30, 1944, we hereby certify that the recommendations of this board do not involve a wage increase, but an interpretation of the existing agreement between the parties.

[Signed] ERNEST M. TIPTON, *Chairman*
[Signed] H. S. HAWKINS, *Member*
[Signed] ARTHUR E. WHITTEMORE, *Member*

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