

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Chicago and North Western Transportation Company

Dispute: Claim of Employees:

1. That the Chicago and North Western Transportation Company violated Article V of the August 21, 1954 Agreement when Director of Labor Relations Fremont failed to give written reasons for denial of General Chairman Murphy's appeal dated December 4, 1979.
2. Carman Kelly Tobin, Green Bay, Wisconsin was deprived of wages to which he is contractually entitled in the amount of 7 hours pay at pro rata rate, account the Chicago and North Western Transportation Company called a mechanic-in-charge to perform carmen's work at derailment at Rothchild, Wisconsin, on September 12, 1979.
3. That the Chicago and North Western Transportation Company be ordered to compensate Carmen Kelly Tobin in the amount of 7 hours pay at pro rata rate.

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 employe 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.

On September 12, 1979, Mechanic-In-Charge Gary Dekan, headquartered at Wausau, Wisconsin, proceeded to Rothschild, Wisconsin, to assist in the re-railing of derailed freight cars SOU 531206 and BN 222340. The Claim basically contends that the Claimant should have been used for this service in lieu of the Mechanic-In-Charge. The Organization contends that Rules 10, 29, 53, 126, and 127 were violated by the Carrier.

Before proceeding further, there is a factual question in the record which must be resolved. This factual question relates to whether a Contractor was used in re-railing the cars in question. In the Organization's appeal to the Director of Labor Relations dated December 4, 1979, the following assertion was made:

"On September 12, 1979, Mechanic-In-Charge G. D. Dekan stationed at Wausau, Wisconsin, proceeded to the derailment at Rothschild, Wisconsin, to assist in the re-railing of the derailed freight cars SOU 531206 and BN 222340 in which Contractor and his equipment were used."
(Emphasis added)

The same assertion was made in the Organization's submission as presented to the Board. The factual issue relating to whether there was a Contractor used is critical because there is specific language in the Agreement regarding the obligations of the Carrier in factual situations in which Contractors are used for derailments. If a Contractor was used, the issue primarily relates to whether the Carrier violated Rules 126 and 127 as interpreted by the memorandum of the Agreement of March 1, 1976, because this Agreement precisely speaks to the use of Contractors in derailments and therefore is controlling. Thus, if a Contractor was used, the decision must rest solely on an interpretation of Rules 126 and 127. However, if a Contractor wasn't used, an entirely different issue is manifest and that is whether the Agreement was violated when a Mechanic-In-Charge was called away from his point of employment in lieu of a Carman to do other than Contractor-assisted roadwork.

Based on the record, it must be concluded by the Board that a Contractor was used in connection with the re-railing of these cars. This conclusion is primarily a result of the Carrier's failure to make a specific rebuttal to the Organization's factual assertion that a Contractor was used. There is no rebuttal to this assertion by the Carrier in its correspondence or in the Carrier's submission. As previously noted, the Organization made this assertion first in their December 4, 1979, letter to the Carrier. The following represents the Carrier's entire response by the Director of Labor Relations to the December 4, 1979, letter of the Organization:

"I note that the circumstances in this case are similar to those in C&NWT File No. 75-13-110 concerning which I wrote you on January 4, 1980, denying claim therein. Accordingly, for the same reasons given you in C&NWT File No. 75-13-110, the claims in the instant case are denied due to lack of support of schedule rules and agreements."

Notably, there is no refutation of the factual assertion regarding the use of a Contractor. The Claim was handled in conference August 6, 1980, and the Carrier wrote the following letter subsequent to the conference:

"Reference: C&NWT File No.: 75-13-108, 109, 110, 111
Conference Held: August 6, 1980

Dear Sir:

The above identified cases which were discussed with you on the date indicated.

For reasons previously given and further discussed in

conference, the claims here involved are again denied for lack of support of schedule rules and agreements."

Again, it is noted there is no response to the assertion regarding the Contractor. This was the last correspondence by the Carrier before the claim was appealed to the Board. The Carrier's submission did make reference to Mr. Dekan proceeding to Rothschild to assist "the Carman assigned to the Cline truck in the re-railing of the derailed freight cars...". However, this statement even read liberally cannot be read as a refutation of the Organization's factual assertion. Its ambiguity leaves open the distinct possibility that the Cline truck was owned and operated by Contractor, although assisted by one Carman from Green Bay. There are no other statements in the Carrier's submission which could even be remotely construed as a refutation. Their submission is quite short and primarily is comprised of a short reference to the arguments contained in another Second Division case which has similarities to the instant case. This short reference indicated that the Carrier wished that the submission in the other case be incorporated and considered in the instant case. It is the Board's finding that there is nothing procedurally improper about the nature of the Director of Labor Relation's response to the Employee's December 4, 1979, letter or the form of the Carrier's submission in this case. It is permissible to defend the Claim based on a reference to another case. However, there is also a danger involved and that is that by doing so, critical and unique facts may be ignored that would distinguish similar but not identical cases. Based on the record before the Board, it must be concluded that a Contractor performed the work in question with the assistance of one Carman and the Mechanic-In-Charge.

Inasmuch as the Contractor was involved in the derailment, it is clear that the contractual language specifically relating to such a situation would control. The March 1, 1976, memorandum Agreement relating to Rules 126 and 127 state in part:

"Item # 2(a) - Provides that a minimum of two (2) carmen be on the scene of a derailment if contractor equipment is utilized and the carmen are reasonably accessible to the wreck. 'Reasonably accessible' is defined in Item 2(c)."

Inasmuch as only one Carman was called and inasmuch as the language of the memorandum of Agreement is clear, in that it specifically provides that two Carmen are to be called when a Contractor is used, the Claim must be sustained.

It should be noted, however, that this decision is premised on the use of a Contractor and has no bearing on the use of Mechanics-In-Charge for work away from their point of employment for work not involving Contractors.

A W A R D

Claim sustained.

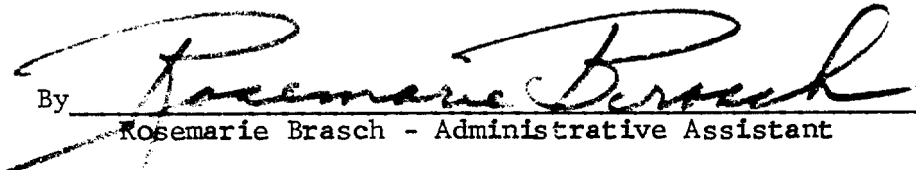
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Award No. 9394
Docket No. 8968
2-C&NW-CM-'83

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 9th day of February, 1983.