Award No. 2048
Docket No. 1839
2-GCL-CM-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee David R. Douglass when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 14, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

GULF COAST LINES

DISPUTE: CLAIM OF EMPLOYES: (1) That under the current agreement, the Carrier improperly augmented the wrecking crew with employes of an outside industry in rerailing WLE 26511 at Oaklawn, Louisiana on February 12, 1951.

(2) That accordingly, the Carrier be ordered to compensate Wreck Engineer F. T. Hackler for 8⅓ hours and Carman E. D. Taylor for 16⅓ hours at the time and one-half rate for February 12, 1951.

EMPLOYES' STATEMENT OF FACTS: The carrier maintains a wreck derrick at DeQuincy, Louisiana, and maintains a regular assigned crew, which includes Wreck Engineer F. T. Hackler and Carman E. D. Taylor (hereinafter referred to as the claimants). Both of these claimants are carmen holding seniority as such.

Car WLE 26511 was derailed on the N.I.&N. (one of the Gulf Coast Lines) at Oaklawn on February 12, 1951. A portion of the wrecking crew was called at 7:00 A. M., left DeQuincy at 8:00 A. M., arriving at Oaklawn at 1:00 P. M., worked the derailment from 1:00 P. M. to 5:00 P. M., left Oaklawn at 5:00 P. M., arriving at DeQuincy at 11:20 P. M. All travel was made in company truck. Wreck Derrick Engineer F. T. Hackler, who was working in the shop that date was not called, neither was Carman E. D. Taylor, a regular member of the wrecking crew, who was off on rest day. Prior to the departure of the wreck crew members from DeQuincy, it was learned that a drag line owned by a private contractor would be used instead of the wrecker derrick. The local chairman of the carmen protested the use of outsiders to Car Foreman Mr. Greer before the wreck crew departed, and stated that a claim would be made for the time regular wrecking crew members who were not used in the amount they would have earned had they been sent to the derailment. When the carmen arrived at Oaklawn, they discovered that the information they had prior to departure, i.e., that a contractor's drag line would be used, was correct. The dragline was present with two employes of the contractor, both of whom were used with the carmen in rerailing the car.

In Award 1744 your Board, without the assistance of a referee, denied a claim of carmen account of train and engine crew, under the direction of a trainmaster and yardmaster, rerailing two cars, your Board stating:

> "Under these circumstances, not calling the wrecking crew was not a violation of the controlling agreement."

Award 1757 covers a case where claim was presented contending: "That under the current agreement other than carmen were improperly used to rerail Engine 3711 on December 12, 1951." The following is quoted from the Opinion of Board in that case (Referee Carter):

> "The use of section foremen, section laborers or other employes to rerail a car or locomotive when a wrecker is not needed, does not violate the Carmen's Agreement. Other than carmen may properly rerail locomotives and cars, when a wrecker is not called or needed * * *."

The following is quoted from Opinion of Board in Award 1763 (Referee Carter):

> "Under the rule, carmen are entitled to all wreck crew work. It does not assign to carmen the exclusive right to rerail engines and cars where the wreck train has not been called."

All of the awards cited hereinabove, without exception, clearly confirm the position of carrier that it is only **when** the wrecking outfit is called and used that the carmen have any **exclusive** right to perform wrecking service, rerailing cars and engines.

In this case the wrecking outfit was not called and used, therefore, the carmen have no claim that they had the **exclusive** right to rerail the car in question. The carrier did, however, call and use a majority of the regularly assigned wrecking **crew,** which, as previously pointed out, and confirmed by the several awards hereinbefore cited, we had no contractual obligation to do.

Under these circumstances, therefore, there is no basis, merit or justification for the claim here presented in favor of the two claimants, and it should accordingly be denied.

In this connection attention is directed to the fact that the claim as presented in this case is for payment at the time and one-half (overtime) rate although no service was in fact performed by claimants as a result of which the claim is made. Assuming, but not conceding, that claimants should have been used, this Division of the Adjustment Board has ruled that time not actually worked cannot be treated at the overtime rate, and that under these circumstances payment at the pro rata rate is proper.

In this connection the following is quoted from findings of your Board in Award 1268:

> "We are, however, of the opinion that this claim should be sustained at the pro rata rate only. While it is true that if claimant had performed the work on his day off his rate would have been time and one-half, however, the penalty rate for depriving an employe of work is the pro rata rate of the position."

See also Awards 1269, 1530.

Many awards of the Third Division have also upheld and maintained the foregoing principle, some of which are: 3587, 3955, 5029, 5117, 5200, 5249, 5419 and others.

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 herein.

The parties to said dispute were given due notice of hearing thereon.

A portion of the regularly assigned wrecking crew was called at DeQuincy, Louisiana, to rerail a car near Oaklawn, Louisiana. The car was rerailed with the aid of a dragline, owned by a private contractor. Said dragline was manipulated by the contractor and one of his employes.

The portion of the wrecking crew, which was used, was transported to Oaklawn (a distance of 163 miles) from DeQuincy by truck. The carrier's derrick was not used because of the alleged condition of the track. The carrier further stated that it did not wish to leave important main line territory without protection of an available wrecking outfit.

Here a wrecking crew was called for a derailment outside of yard limits. The outfit was not utilized. However, in reading Rules 113 and 114, we consider that those rules give the work of rerailing a car to a regularly assigned wrecking crew when a wrecking crew is called. Further, it is contemplated that a sufficient number of the regularly assigned crew will accompany the outfit. It is our opinion that if the outfit is taken, the regularly assigned men must accompany the outfit in sufficient number to handle the job upon arrival. That portion of Rule 114 is restrictive in that it prohibits the carrier from sending some of the crew members with the outfit while transporting the remaining number by other means of transportation. That portion of Rule 114 does not provide that the outfit must be utilized in order to entitle regularly assigned men to the work **when a wrecking crew is called.**

The rules do not require the use of a wrecking crew in every instance of derailment. It is generally recognized that a road crew or a yard crew may perform the work of rerailing their own equipment when such may be done with the use of frogs and rerailers. It is further recognized that outsiders or crews from other railroads may be used to perform the work under certain conditions of emergency. (No emergency existed in the instant case.)

Here we have a portion of a wrecking crew called. This portion of the crew performed the work, **assisted by two outsiders.** The carrier alleged that the work could have been performed without the assistance of the dragline, but, when the dragline and two outsiders were used, the carrier augmented the regularly assigned wrecking crew with two men while two regularly assigned men were available and were not used. Inasmuch as the carrier elected to use two additional men, under the provisions of this agreement they should have used two regularly assigned wrecking crew members.

Inasmuch as the claimants were members of the regularly assigned crew, the payment of the claim should be in the amounts set forth in Part 2 of the claim.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of January, 1956.