

Award No. 3688

Docket No. 3440

2-MKT-CM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 8, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

MISSOURI-KANSAS TEXAS RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the current agreement other than Carmen were improperly used to rerail box cars, C&S 13781, NP 15289, GM&O 8005 all loads and CB&Q 26931 empty box on April 17, 18 and 22, 1958.

2. That accordingly the Carrier be ordered to compensate four (4) Carmen on April 17, five (5) Carmen on April 18, and one Carmen (1) Carman on April 22, 1958, designated by the Organization in the amount of eight (8) work days' pay at the applicable rate of pay.

EMPLOYEES' STATEMENT OF FACTS: The carrier maintains at Waco (Bellmead) Texas a car repair track and a train yard force, a steam derrick 120 tons capacity and a regular assigned crew also a mobile derrick 15 tons capacity that is equipped with two 50 ton air packs that weight 392 pounds each, air compressor and other equipment necessary in rerailing service.

On April 16, 1958, at 10:45 P. M., south bound freight train No. 81, burned off journal on empty box car CB&Q 26931 derailing three (3) other loaded box cars C&S 13781, NP 15289 and GM&Q 8005 on the main line in the town of West, Texas, blocking the main line but an adjacent track was cleared and was used for other trains to move around the derailed cars. West, Texas is a distance of 15.5 miles from Waco (Bellmead) Texas.

On April 17, 1959 at 7:30 A. M., Mr. C. H. Dick, master mechanic, called Mobile Derrick operator C. A. Pochyla, carman, and F. B. Smith, carman who is one of the regularly assigned crew members to the 120 steam derrick to proceed to the derailment at West, Texas, they left the repair track at 7:45 A. M., in the Mobile Derrick, Mr. C. H. Dick going in his car, they arrived and went to work at 8:45 A. M., assisted by section forces employes Nicholas Rizo, P. W. Johnson, Ed Grayhassel and A. D. Sealy who were on hand.

Two loaded cars C&S 13781 and NP 15289 were rerailed on this date by

Carrier has shown throughout the handling of this claim by the testimony of a responsible carrier officer who was present and directed the work of rerailing the cars in question, that the only work performed by the laborers at the scene of this derailment was common labor which has always been performed by laborers at the scene of wrecks in the past. Nothing has been presented to refute that showing.

Clearly the facts of record justify a denial of the instant alleged claim, and the carrier respectfully requests the Second Division to deny the claim.

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, deny each and every, all and singular, the allegations of the organization and employes in alleged unadjusted dispute, claim or grievance.

For each and all of the foregoing reasons, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, respectfully request the Second Division, National Railroad Adjustment Board, deny said claim and grant said Railroad Companies, and each of them, such other relief to which they may be entitled.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier and 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.

An automotive truck equipped with a derrick and an air compressor was sent to rerail four derailed cars outside yard limits with two carmen, who were members of the wrecking crew. Four section laborers and their foreman were present. While the evidence is conflicting it is admitted that they "assisted in lifting jacks and blocks" which were used in the rerailing. The weight of the evidence is that they also placed and operated jacks, set blocking and made hitches. There is an affidavit stating that on the three days in question the laborers worked a total of 15 hours each "assisting Wrecker Crew"; but the affidavit shows that 48 ML ties and 14 switch ties were put in, and 300 feet of track surfaced, the basis is not shown for affiant's opinion as to what constituted assisting the Wrecking Crew, and on the first day he states that each laborer "worked 7 hours assisting Wrecking Crew," although it was at the scene only 6½ hours, including the lunch period.

While in some respects the circumstances and Rules were somewhat different in Awards 1298, 2048, 3560 and 3629, the cases are essentially the same in that a wrecking crew was called, was therefore entitled to the work and should have consisted of a sufficient number of carmen, and that the section men were not "taken as additional members of the wrecking crew," but were there in another capacity.

In award 1298, under circumstances and Rules not essentially different from those of the present claim, this Division used the following words, which

except for rule numbers and other slight differences are entirely applicable to this case:

"By the specific term of Rule 106(a) of the controlling agreement, regularly assigned wrecking crews, excepting the cook, must be composed of carmen. Since the section men in this case were not assigned as additional members of the wrecking crew, the exception provided in Rule 106(c) has no application.

"The substance of Rule 106(a) is that the wrecking crew shall perform all services incidental, or necessary, to the proper completion of a given task. All the required operations in wrecking service, both simple and complex, subject to the provisions of Rule 106, are, by contract, a part of the carmen's craft. To permit the less important work to be assigned to persons outside of the carmen's ranks is to whittle away the significance and purpose of the rule."

"If the four section force employees had not been present at the site of the derailment, all work would have been performed by the wrecking crew. If the size of the wrecking crew was not sufficient to handle the job, Rule 106(a) requires the assignment of other carmen. It is concluded, therefore, that the use of the section men in lieu of carmen in the instant case was a violation of Rule 106(a).

"The record is not clear in disclosing either the precise amount of time spent by the section men in assisting the wrecking crew, or the identity of the additional carmen who should have been assigned to such wrecking service. On this account, the case is returned to the parties to enable them to jointly determine the amounts of compensation due, and the persons entitled thereto."

In Award 3014 which was not similar except that there also the objection was made that the Claimants were not named, it was left to the parties to determine on the property the persons entitled thereto, as in Award 1298.

AWARD

Claim 1. Sustained.

Claim 2. Remanded for settlement consistent with the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February, 1961.

DISSENT OF CARRIER MEMBERS TO AWARD No. 3688

In our opinion the majority, erroneously sustained the position of the Employees in the instant case. We say this for reason that it is clear that the majority based its decision upon "evidence" contained in two affidavits and one letter which were introduced into this case for the first time in the Employees rebuttal statement (Employees exhibits Nos. 1, 2, and 3). These documents were neither presented to and handled with the carrier during the progressing of this claim on the property nor were they included in the Employees initial submission. Therefore, these documents were inadmissible as "evidence"

and their contents should have been totally disregarded in the adjudication of this case. Notwithstanding, however, what these self-serving statements, or affidavits, imply, they do not indicate that the work performed by the Section men in the instant case was beyond the limitations set by this Division in interpreting wrecking service rules. In other words the record in this case does not contain any factual evidence to the effect that the work performed by the Section men was in violation of any rule, or rules, in the controlling agreement.

For the reasons set forth herein the Carrier Members are of the opinion that the majority erred with the issuance of this Award.

W. B. Jones

H. K. Hagerman

D. H. Hicks

P. R. Humphreys

T. F. Strunck