

Award No. 3864

Docket No. 3496

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 the 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
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS**

DISPUTE: CLAIM OF EMPLOYEES: 1. That the Carrier violated the controlling agreement when Carmen W. A. Lloyd, C. A. Schuleter, B. Stone, H. Crain and H. E. Marshall were not called to accompany the wrecking outfit when it left St. Louis (Baden) Missouri at 3:00 A. M., on February 10, 1959.

2. That accordingly the Carrier be ordered to compensate the aforesaid employes six (6) hours each at the applicable time and one-half rate for the aforesaid violation.

EMPLOYEES' STATEMENT OF FACTS: At, St. Louis (Baden), Missouri, the carrier maintains a wrecking outfit, the assigned crew is composed of the following carmen:

"O. J. Verheaghe, Engineer, assigned hours 9 A. M. to 6 P. M., one hour for lunch, Monday to Friday inclusive, Rate of pay \$2,5475.

W. E. Lloyd, Lead Carman, assigned hours 9 A. M. to 6 P. M., one hour for lunch, Monday to Friday inclusive, Rate of pay \$2,575.

C. A. Schuleter, Carman Welder, assigned hours 9 A. M. to 6 P. M., one hour for lunch, Monday to Friday inclusive, Rate of pay \$2,5665.

B. Stone, Carman, assigned hours 9 A. M. to 6 P. M., one hour for lunch, Monday to Friday inclusive, Rate of pay \$2,505.

H. Crain, Inspector, assigned hours 9 A. M. to 6 P. M., Thursday and Friday. 4 P. M. to 12 midnight Saturday, Sunday and Monday, Rate of pay \$2,505.

H. E. Marshall, Inspector, assigned hours 3 P. M. to 11 P. M., Wednesday through Sunday, Rate of pay \$2,505."

rata rate account of not performing service on regular assignment. The claim as stated cannot be said to present the question which the Organization asks to be resolved. The only reference to pay at prorata rate for being held off assignment appears in the Joint Statement of Facts which is not a part of the claim. A claim cannot be supplemented or amended by the Petitioner on appeal, and such act is clearly beyond the power of this tribunal."

As the claim here is not for alleged work lost, but for travel and waiting time not required and performed, there is no merit or agreement support for claim as presented at overtime rate or otherwise. Award No. 1702, Second Division (Wenke), denied claim of wrecking crew at Des Moines, Iowa for travel and waiting time not required and performed when not called and used for wrecking service at Armourdale, as follows:

" . . . The penalty for work lost is the prorata rate of the position, that is, the rate which the occupant of the regular position to whom it belonged would have received if he had performed the work. **This would eliminate all traveling and waiting time** but would entitle the claimants to be paid at the rate of their position for all time paid Wrecking Engineer Frank Walters, either prorata or overtime, while he worked with outfit No. 95008 at Armourdale. . . ." (Emphasis ours)

The carrier requests the Board deny the claim.

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company of Texas, and each of them, deny each and every, all and singular, the allegations of the organization and employees 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 or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

Rule 73(c) provides that when wrecking crews are called for wrecks or derailments a sufficient number of the regularly assigned crew will accompany the outfit; and Rule 7 provides that they will be paid at time and one-half rate for working, waiting or traveling after the recognized straight time hours at home station.

In this instance the entire crew was necessary, for it was used; but only the engineer accompanied the outfit, which left by freight train at 3:00 A. M., and the other five crew members, the Claimants here, left by automobile after 9:00 A. M., their regular starting time at home station.

Under present transportation conditions the rule might properly be amended to provide that the required members of the crew either accompany

the outfit or overtake it in time to participate fully in its work. But if so, that is a matter for negotiation. The claim must be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of November, 1961.

DISSENT OF CARRIER MEMBERS TO AWARD NO. 3864

In the instant case five carmen, who were regularly assigned members of wrecking crew, were not called to accompany the wrecking outfit when it left St. Louis, Missouri at 3:00 A. M. on February 10, 1959. Only the engineer accompanied the outfit, which left by freight train at 3:00 A. M. The other five crew members (claimants) left by automobile after 9:00 A. M. their regular starting time at home station.

While Carrier Members do not agree with the majority to the effect that claimants should have accompanied the wrecking outfit, it is the opinion of Carrier Members that the majority further compounded their error in sustaining the Claim for pay at time and one-half rate for work not performed for the following reasons:

1. There is no rule contained in the applicable agreement which requires Carrier to compensate claimants at the time and one-half rate of pay for service claimed but not required and not performed.

2. The correct rule which has been applied in Awards of this Board too numerous to require citation is that the appropriate penalty will only be at the pro rata rate. For example, in Second Division Award No. 2700 (Referee Begley) claim was made by a Carman for 19¾ hours at the time and one-half rate of pay account not being called to accompany a wrecking outfit. It was held in this Award that "this claim will be sustained at the pro rata rate as the penalty is for time not worked." In addition, in Second Division Award No. 3259 (Referee Hornbeck) claim was made by members of a regularly assigned wrecking crew for 32 hours at the time and one-half rate of pay account not being allowed to accompany the wrecking outfit to the scene of a wreck. The majority held that the agreement had been violated, however, it was also held that "Claimants to be paid pro rata and not at time and one-half rate. See Awards Nos. 2700, 2802, 2859, 2956 and 2958, Second Division."

A survey of all the Awards of the National Railroad Adjustment Board reveals that in over three hundred Awards it has been uniformly held that the proper rate payable for work not performed is the pro rata rate, not the time and one-half rate. There is no sound reason why this principle should not have been applied in the instant case.

The Award is erroneous and we dissent.

W. B. Jones
F. P. Butler
H. K. Hagerman
D. H. Hicks
P. R. Humphreys