Award No. 4480
Docket No. 4436
2-SAL-MA-'64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Jacob Seidenberg when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 39, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.—C. I. O. (Machinists)

SEABOARD AIR LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement other than machinist employed by the Carrier were improperly used to make repairs to Austin Western Crane No. 3 on March 29, 1962.

2. That accordingly, the Carrier be ordered to additionally compensate Machinist W. M. McKenzie in the amount of 6¼ hours pay for the above violation.

EMPLOYES' STATEMENT OF FACTS: At Hamlet Roadway Shop, as well as other points on this railroad, machinists for many years have been and are assigned to the overhauling and repairing of all types of roadway equipment used in the maintenance and repair of the Railroad Right-of-Way. The machinists employed in the roadway department are all contained on one roster, however, twenty of these men are assigned by bulletin to different locations on the system to perform repairs on any and all roadway maintenance equipment in need of such repairs. Three of these men are assigned to the Virginia Division and are subject to being moved to variable localities should the need arise.

On March 29, 1962, Austin Western Crane No. 3, rubber-tired and equipped with rail wheels, was being used to swap rail on curves at Millbrook, N. C. After completing replacement on one curve the crane was being moved to the next curve to change out rails when it was noted that the left front universal joint housing was loose and that bolts were missing. Instead of complying with the agreement and calling a machinist to perform this machinists repair work on the crane, the Mitchell Distributing Company, located at Raleigh, N. C. was hired and that outside concern sent one of its employes to Millbrook to perform the machinist repairs to the crane. This mechanic realigned the two parts of the housing, replaced all bolts missing from the housing and tightened the entire assembly.

Award 4082 denied such claim, holding that, "The record does not show that the claimant sustained pecuniary loss because of the violation." Second Division Award 4083 held:

> "The record does not show that the claimants sustained pecuniary damage because of the violation. It shows that they worked full time on that day, and does not indicate that overtime would have been necessary or that the claimants would have been entitled to such overtime. Claim 2 should therefore be denied."

Third Division Award 10963 covered this issue in detail and held:

> "In the instant case Petitioner has proven the violation. It has not met its burden of proving monetary damages. There is no evidence in the record that any Employe in the MW collective bargaining unit suffered any loss of pay because of Carrier's violation of the contract. . . . Therefore, for this Board to make an award as prayed for in Parts (2) and (3) of the claim would be imposing a penalty on the Carrier and giving the MW Employes a windfall — neither of such results is provided for or contemplated by the terms of the contract. To make such an Award, we find, would be beyond the jurisdiction of this Board."

Second Division Award 4112 also ruled contrary to the contention of the organization in the instant case that "it is up to the organization to decide who the claimant is." The referee in that award also stated that Rule 31 of the agreement required that "all claims or grievances must be presented in writing by or on behalf of **the employe involved,**" — not "on behalf of any member of the organization."

The organization has not in this case met the burden of proof which it has to sustain its claim. The adjustment board has held that, "Mere words that a violation has occurred are not sufficient without positive evidence to substantiate the allegations as made." The organization in its handling on the property presented no evidence whatever in support of the claim, simply making inconsistent and unsupported allegations. As held in Third Division Award 3523, without a referee, covering a case on this property, "The claimant in coming before this board assumes the burden of presenting some consistent theory which, when supported by the facts, will entitle him to prevail."

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.

The issue before the Division is whether there was an emergency situation present, and if it was, did it justify the Carrier in summoning an outside contractor to repair the damaged crane in lieu of the claimant.

The Division finds that the record is somewhat unclear as to where the crane became disabled and whether or not it was actually blocking the track, but that there is no doubt that the crane was inoperative and that it was delaying the track laying operations and upsetting a scheduled program of track repair work. The Division, while it does not seek lightly to invoke the word "emergency", believes that under all the facts of the record, the situation constituted an emergency, warranting decisive and expeditious action on the part of the Carrier.

The Division finds that there were no System Roadway Machinists available, and there is no dispute that the work in question belonged to them under the terms of the agreement, to do the necessary repair work. The nearest System mechanic was situated 65 miles away, working on other damaged equipment.

The Division further finds that there is no merit to the Organization's contention that under Rule 8 the Carrier was obligated to utilize the services of a Roadway Shop Machinist. The claimant was located 100 miles away; he was even further away than the machinist contractually entitled, by agreement of the parties, to do the repair work. For all practical purposes, the claimant was not "available" to render this emergency service. To so hold would be to impute a tortured and unreasonable interpretation to the rule in question.

In summary, the Division finds that record discloses that the damaged equipment created an emergency situation; that there were no contractually designated machinists "available" to repair the said equipment, and therefore under all the circumstances of this particular case, the Carrier was warranted in calling upon an outside contractor to make the necessary repairs.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 26th day of March, 1964.