Award No. 5051
Docket No. 4872
2-L&A-CM-'67

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. 3 (59), RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

LOUISIANA AND ARKANSAS RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier's failure to call the full regularly assigned wrecking crew of the Shreveport, La. wrecking outfit to assist the Port Arthur, Texas wrecking outfit in rerailing operations on January 3, 1964, at Port Arthur, Texas, was improper under the current Agreement.

2. That, accordingly, the Carrier be ordered to compensate the following four (4) members of the regularly assigned wrecking crew, Shreveport, La. seven (7) hours each at time and one-half rate: C. L. Rothenberger, T. Massey, W. R. Wyatt, and L. C. Lazarus.

EMPLOYES' STATEMENT OF FACTS: The Carrier maintains a force of carmen, a wrecking outfit, and a regularly assigned wrecking crew at Deramus Yard, Shreveport, La. Carmen regularly assigned to wrecking service on January 2, 1964, were as follows:

L. L. Brun – Wrecking Engineer
C. L. Rothenberger – Groundman
O. A. Warren, Jr. – Operator and Groundman
T. Massey – Groundman
W. R. Wyatt – Operator and Groundman
L. C. Lazarus – Groundman

whose regularly assigned hours were from 7:30 A. M. to 11:30 A. M. – 12:00 Noon to 4:00 P. M.

On January 2, 1964, at approximately 11:00 P. M., Wrecker 06, stationed at Deramus Yard, Shreveport, La., accompanied by L. L. Brun, regularly assigned wrecking engineer, was ordered to Port Arthur, Texas to assist in rerailing cars derailed at that point. The regularly assigned crew

This would **eliminate all traveling and waiting time** but would entitle claimants to be paid the rate of their position for all time paid Wrecking Engineer Frank Walters either pro rata or overtime while he worked with outfit No. 95008 at Armourdale. See Award 1362 to the same effect." (Emphasis ours.)

Additionally, the Third Division, in Awards 13236, 13237, 13326, 13334 and 13390 has held that where the agreement contains no provision for imposition of penalties and the record contains no evidence of damages suffered by claimants because of the violation of the agreement, claimants are entitled only to "nominal damages" — see following excerpt from Award 13237:

"The Awards of this Board are in confounding conflict as to the Board's power to issue a monetary award in cases where it has not been proven that Claimants suffered monetary damages because of a violation of an Agreement. They run a gamut from: (1) if the violation be proven it is of no concern to a Carrier to whom the prayed for monetary damages, as prayed for, are awarded; to (2) the Board has no power to assess a penalty. Consequently we must look to and be bound by judicial pronouncements in cases where the issue has been raised.

To the best of our knowledge the highest court in which the issue of penalty against damages has been adjudicated is **Brotherhood of Railroad Trainmen v. The Denver and Rio Grande Western Railroad Company**, — F 2d —, (C.A. 10, decided November 19, 1964). Therein the court held that in the absence of proof of special damages, the Board, 'as in "other civil suits"' is limited to awarding 'nominal damages', since the Agreement, as here, 'contains neither a provision for liquidated damages nor punitive provisions for technical violations'. Further, the court held that 'The Board has no specific power to employ sanctions and such power cannot be inferred as a corollary to the Railway Labor Act'. Accepting the Tenth Circuit's decision as the law, unless and until reversed or modified by the Supreme Court, we find our power is limited to awarding Claimants nominal damages which we set in the amount of ten dollars ($10) each."

The Brotherhood of Railroad Trainmen filed petition for writ of certiorari to the United States Supreme Court to review the judgment of the United States Court of Appeals for the Tenth Circuit (referred to above) which was denied by the Supreme Court on April 26, 1965.

In view of all the foregoing, carrier respectfully requests that claim be denied.

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.

Rule 95 provides that:

> "When wrecking crews are called for wrecks or derailments outside of yard limits, the regularly assigned crew will be used."

In this instance the Shreveport wrecking crane was called to assist the Port Arthur crew to rerail a loaded tank car which was too heavy for the Port Arthur outfit to handle alone.

The Shreveport crew was called, but the call was cancelled. The wrecking engineer accompanied the crane and idler to Port Arthur on the night of January 2, 1964, and Warren, another member of the Shreveport crew, was sent by car at 6:30 A. M. on January 3rd. The two outfits rerailed the tank car by 4:00 P. M., and Warren arrived back at Shreveport by car at 10:00 P. M.

The Claimants worked their regular 7:30 A. M. to 4:00 P. M. shift on January 3; thus Warren was paid for 7 additional travel hours, which they also would have received if called.

The Carrier contends that the crane was merely loaned to the Port Arthur wrecking crew; but that contention cannot be sustained, for the crane was operated by its own engineer and crew member Warren, who were called and used in the rerailing in cooperation with the Port Arthur crew.

The Carrier contends further that as the derailment occurred within yard limits at Port Arthur the incident was governed by that part of Rule 95 which provides that:

> "For wrecks or derailments within yard limits, sufficient carmen will be called to perform the work".

However, this Division has long held that with regard to such provisions as Rule 95, "yard limits" means the home yard limits of the wrecking crew. Awards 857, 1702, 2185, 2404, 3365, 4154, 4280, 4675, 4785 and 4786. Consequently the claim must be sustained, but at pro rata rate.

AWARD

Claim sustained at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of February, 1967.

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