Award No. 5864
Docket No. 5770
2-EJ&E-CM- '70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Nicholas H. Zumas when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 20, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO — (Carmen)

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Elgin, Joliet & Eastern Railway Co. violated the Agreement when they unjustly denied Carmen G. Tkaczyk, R. Burroughs, J. DelRaso, H. Sybert, D. Hulbert, H. Page, L. Montello, A. Sefcik, and M. Lopez their right to Carmens work of rerailing M.I. 5790 covered hopper car on January 4, 1967.

2. That accordingly, the Carrier be ordered to compensate Carmen G. Tkaczyk, R. Burroughs, J. DelRaso, H. Sybert, D. Hulbert, H. Page, L. Montello, A. Sefcik and M. Lopez three (3) hours and forty (40) minutes at the time and one-half rate account of violation of the provisions of the controlling Agreement.

EMPLOYES' STATEMENT OF FACTS: The Elgin, Joliet and Eastern Railway Co., hereinafter referred to as the carrier, employs G. Tkaczyk, R. Burroughs, J. DelRaso, H. Sybert, D. Hulbert, H. Page, L. Montello, A. Sefcik and M. Lopez hereinafter referred to as the claimants as carmen at Joliet, Illinois.

On January 4, 1967, M.I. 5790 was derailed on track #2 at Ball Brothers Corporation in Leithton, Illinois, when the carrier called out three (3) section foremen and six (6) section men to rerail M.I. 5790. The section crew worked from 4:30 A.M. to 8:10 A.M., same date, in the rerailing of said car at Ball Brothers Corporation, wherein, depriving the claimants of their work as provided for in Rule 127 of the current working agreement, and letters of understanding, dated July 21, 1961 and April 28, 1965, thereby losing three (3) hours and forty (40) minutes at the time and one-half rate.

This dispute has been handled in accordance with the provisions of the agreement, with all officers designated to handle disputes, including the highest officer, all of whom have declined to make satisfactory adjustment.

The agreement as reissued June 15, 1950, and subsequently amended, is controlling.

Awards 4682 (Daly), 5032 (Weston) have determined that a winch truck does not constitute a wrecker or 'wrecking outfit'. Since this derailment occurred outside yard limits and for other reasons hereinabove set out, this claim will be denied."

During the processing of the subject claim on the property, the organization implied that the carrier admitted violation of the Agreement when Mr. R. E. Bray offered to settle the claim on April 13, 1967, by paying four carmen three (3) hours and forty (40) minutes pay each at the straight time rate of pay. This compromise offer should not be construed as an admission by the carrier that the agreement was violated in this instance. Referee Charles W. Anrod in Second Division Award No. 4334 held as follows:

"2. During the processing of the instant grievance on the property the Carrier offered to settle some of the claims in question. The Claimants rejected such offers. Nevertheless said offers have been introduced as evidence. The law is well settled that offers of compromise made in an attempt to settle disputed claims prior to referring them to this Board generally are not permissible evidence because even the mere introduction of such evidence would tend to impair future out-of-court settlements. See: Awards 3345 and 5658 of the Third Division; Frank Elkouri and Edna A. Elkouri, **How Arbitration Works**, Rev. Ed., Washington, D.C., BNA Incorporated, 1960, pp. 195-196, 213-214 and cases cited therein. We have, therefore, disregarded the Carrier's settlement offers in adjudicating this case."

The subject claim is further defective in the following respect: Even if it had merit, which it does not, it is defective because it is excessive. The organization is claiming three (3) hours and forty (40) minutes at the time and one-half rate of pay for nine (9) carmen. The facts are that only one (1) section foreman worked three (3) hours and three laborers worked two (2) hours each. Therefore, even if the claim had merit, which it does not, it would only be valid for the actual time worked by the foreman and the three laborers.

The carrier submits that it has shown that the work of rerailing cars outside of yard limits is not reserved exclusively to carmen.

There has been no violation of special rule 127 of the carmen's agreement or the memorandums of agreement dated July 21, 1961, April 28, 1965 and June 7, 1965.

The carrier respectfully requests a denial award.

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 apperance at hearing thereon.

On January 4, 1967, a car was derailed on track 2 at Ball Brothers Corporation in Lieghton, Illinois. Carrier utilized section foremen and sec-

tion men to rerail the car. The Organization contends that Carrier violated the Agreement between the parties as well as letters of understanding dated July 21, 1961 and April 28, 1965, when Carrier did not use carmen.

As the result of a long line of Second Division awards, it is clear under similar Agreements that unless a wrecking crew is called, carmen do not have the exclusive right to rerail cars. . . . within or outside of yard limits. Awards 1482, 1757, 2208, 2722, 3257, 4303, 4393, 4682, 4821, 5306 and 5637.

The question in this dispute is whether the letters of agreement referred to above in any way change or modify the Agreement between the parties.

The July 21, 1961 letter of understanding refers to the "work of rerailing cars within yard limits" and is therefore not applicable to this dispute since the derailment occurred outside of yard limits.

The April 28, 1965 letter of agreement dealt with procedures to be followed in rerailing procedures of the U. S. Steel Corporation at Gary Plant, Indiana, which, as the record indicates, was within yard limits. In addition, the following language in that letter agreement was agreed to between the parties:

> "When the responsibility for a derailment lies with an industry, the rerailment may be performed by the industry . . . without penalty. If the industry requests assistance from the Carrier, the controlling Agreement between the Carrier and the Carmen's Organization governs. Responsibility depends upon type of service, equipment condition, track condition, track location, action or negligence of the industry, etc.).
>
> If the responsibility for a derailment lies with the Carrier, the rerailment will be performed by Carrier's employes in accordance with existing agreements and understandings. (Responsibility will depend upon type of service, equipment condition, track condition, track location, action or negligence of the Carrier, etc.)."

Two final points should be made regarding contentions arising out of this dispute:

1. An offer of compromise or settlement of a similar claim by Carrier should not and cannot be construed as an admission of liability or violation of an agreement. To hold otherwise would be contrary to well established legal principles which are intended to encourage the settlement of disputes by mutual agreement before resorting to other remedies.

2. Failure on the part of the Organization to process claims to the National Railroad Adjustment Board cannot and should not be construed, as Carrier contends, as an acceptance of denial on the part of the Organization.

AWARD

The Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 12th day of March 1970.

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