Award No. 6070
Docket No. 5895
2-N&W-CM-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Don J. Harr when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

NORFOLK AND WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Norfolk and Western Railway Company violated the Current Agreement when on December 16, 1967, they called a train and engine crew, with a wrecking outfit for 4:30 A. M., and dispatched same to scene of a derailment, but failed to allow the regularly assigned wrecking crew, to accompany the outfit and/or, to allow the regularly assigned Wreck Derrick Engineer, to perform the work of his regular assignment.

2. That accordingly the Norfolk and Western Railway Company be ordered to compensate Car Repairer G. B. Dehart and Helper Car Repairer W. G. Wolfe, in the amount of a call of two (2) hours and forty (40) minutes each, at the time and one-half rate of pay and Derrick Engineer D. B. Lilly, eight (8) hours at the time and one-half rate of pay because of such violation and the resultant loss to Claimants.

EMPLOYES' STATEMENT OF FACTS: The Norfolk and Western Railway Company (formerly VGN) hereinafter referred to as the carrier, maintains a yard and repair track with facilities for the inspection and repairing of cars, also a wrecking outfit and crew with large derrick car and necessary tools and equipment, at Elmore, West Virginia, a point on Carrier's line located on the New River Division, this being the one and only wrecking crew and outfit regularly assigned to said division, having serviced such division and territory for many years. Carman Derrick Engineer D. B. Lilly, Car Repairer G. B. Dehart and Helper Carman W. G. Wolfe, hereinafter referred to as claimants were regularly assigned members of said wrecking crew on December 16, 1967. Their regular assignment in the shop was 7:00 A. M. to 3:30 P. M., Monday through Friday.

On Saturday, December 16, 1967, carrier did call a wrecking outfit, which included Engine No. 170, with a large Derrick Car No. 514861, also train and

in 1953, the Division must take cognizance that even at that time, that Award did not represent the majority thinking of this Division or other Divisions of the National Railroad Adjustment Board. Since that time a preponderance of the Awards have continued not to follow the reasoning in Award No. 870 and have held instead that 'the right to perform the work is not the equivalent of work performed insofar as the overtime rule is concerned.' The Division believes that what is true of penalty pay for overtime work is equally true of overtime pay for holidays not worked. The majority rule followed by the Division is well grounded in the law of damages and should be maintained."

Other Awards setting forth the same principle are: Third Division 10721, 13177, 10809 and 13177; also Fourth Division 802, 1099, 1632 and 1178.

Regarding the request of Messrs. Dehart and Wolfe for two (2) and seven-tenths (7/10) hours at the overtime rate account not accompanying the outfit, carrier avers that no "outfit" was called. The wrecking outfit at Elmore consists of a derrick car, idler car, panel car, block and tie car, tie and rail car, tool car and bunk-diner car. None of these cars were removed from Elmore on this occasion and by no stretch of the imagination can the maintenance of way clam shell used be called a comparable outfit. Webster's New International Dictionary, Second Edition, defines "outfit" as "the tools or instruments comprised of any special equipment." A clam shell is not considered special equipment.

Carrier has conclusively shown that:

1. Wrecking outfit was not called; therefore, wrecking crew not needed.

2. Agreement in effect on carrier's property not applicable off carrier's property.

3. There is no rule or agreement providing for penalty payment under these circumstances.

4. The claimants suffered no monetary damages and are not entitled to additional payment

5. Payment for work not performed is not allowable at the punitive rate.

Under the weight of evidence produced, the claim has no merit and the carrier requests a denial in its entirety.

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.

On December 15, 1967, Carrier was advised by coal company personnel that two empty coal hoppers had been derailed by the mine operators at Coal Mountain No. 9 mining operation. On December 16, 1967, Carrier sent a Carman and a Carman helper to Coal Mountain No. 9 to assist in the retracking of those cars through the use of a Maintenance of Way clam shell.

The Organization alleges a violation of Rule 114 of the Agreement which reads:

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

The Carrier contends that the work was performed on non-Carrier property and Rule 114 is not applicable.

This question, involving the same parties, has been before this Board on other occasions.

Second Division, NRAB Award 5946 (Zumas) states:

> "The Board is again faced with the question which had arisen previously on this property between the same parties: Does the Agreement between the parties extend to work performed on non-Carrier property?
>
> In Awards 5857, 4212, 2992 and 2213, the Board held that it did not unless specifically provided for in the Agreement."

See also Second Division, NRAB Award 6032.

In the Employes' rebuttal, they state:

> "* * * said rights have not been denied by Carrier since it is a matter of record in the deed books of said County and Carrier has said Easement or Deed to all Mining Properties where tracks are constructed and provides for the return of such parcel or strip of land to the land owner, when no longer used for the purpose described and defined therein. * * *."

The injection of Carrier's Easement or Deed to all Mining Properties where tracks are constructed is untimely. This was not discussed during the handling on the property. Any public records could have been produced by the Employes to support their position.

We will deny the Claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 15th day of December, 1970.

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