

Award No. 6071
Docket No. 5902
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 DISPUTES:

**SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

NORFOLK AND WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Norfolk and Western Railway Company violated the Current Agreement when on November 20, 1967, they failed to call or use, regularly assigned Wreck Derrick Engineer, Carman D. B. Lilly, or to allow him to Accompany the outfit, for the performance of wrecking service at Wyoming, West Virginia.

2. That accordingly the Carrier be ordered to compensate, regularly assigned Wreck Derrick Engineer D. B. Lilly, in the amount of eight (8) hours, at the applicable time and one-half rate of pay, for said date of November 20, 1967.

EMPLOYEES' STATEMENT OF FACTS: The Norfolk and Western Railway Company, hereinafter referred to as the carrier, maintains at Elmore, West Virginia, a point on carrier's line (formerly Virginian) a shop and yard where cars are inspected, serviced and repaired, and in addition a regularly assigned wrecking crew and outfit, of which D. B. Lilly, hereinafter referred to as the claimant, was a regularly assigned member, assigned wrecking crew and outfit on the New River Division, on which Division both Elmore and Wyoming, West Virginia are located, with Wyoming being situated approximately eighteen (18) miles from Elmore, West Virginia.

On the morning of November 20, 1967, there being a loaded Car NKP 61304, with wrung journal, and partially derailed, with one wheel having completely left the tracks and/or right of way, the wreck master and wrecking crew with the exception of claimant, were taken by track, with jacks, tools and equipment to the scene of derailment at Wyoming, while a self propelled derrick, with accompanying car upon which was loaded a spare track, to replace the derailed and damaged truck under said car at Wyoming, moved out of Elmore Terminal and to scene of derailment at Wyoming, said derrick car being manned and operated by a derrick engineer from the maintenance of way department, while claimant who was the regularly assigned wreck derrick engineer, was available, but not called or allowed to accompany the outfit.

Award No. 3259 of this Division, Referee R. G. Hornbeck, was:

"AWARD

1. Claim allowed.

2. 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."

Also, Award 4416, Referee J. M. McDonald:

"Before Rule 33 can come into play there must be a call and reporting. It does not govern the rate for work not performed which is the basis of the claim before us. The conditions which make the higher rate applicable have not occurred here, and we adhere to our former awards that the pro rata rate is the proper rate in a sustaining award for work not performed.

AWARD

Claim 1: Sustained.

Claim 2: Sustained, except that the compensation shall be at the pro rata rate."

Carrier has shown the following facts:

1. No "outfit" was called or used in lieu of the regular wrecking derrick.
2. Carmen do not have exclusive rights to the work in question.
3. By agreement, Rule 110, carmen are barred from claiming right to operate equipment assigned to other departments.
4. Claimant was not monetarily damaged.
5. Overtime payment for work not performed is not allowable.

Under the weight of evidence produced, this 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 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 waived right of appearance at hearing thereon.

Carrier's facilities at Elmore, West Virginia, consist of a yard and repair track at which Carmen are employed. Claimant was a regularly assigned member of a wrecking crew located at Elmore.

On November 18, 1967, Car NKP 61304 was partially derailed due to a wrong journal. This occurred near Wyoming or Mada, West Virginia, approximately eighteen miles from Elmore. This incident occurred between the switches of a siding and the car was left there.

On November 20, 1967, Carmen from Elmore were sent to make temporary repairs to the car. The damaged truck was removed from under the car and replaced with a new one. A Maintenance of Way Burro Crane was used to transport the new truck and lift and remove the damaged truck.

The Employees contend that the Agreement was violated and rely upon Rules 9(d), 30(a), 110, 113 and 114 of the effective Agreement

Rules Nos. 113 and 114 read:

"Rule No. 113

Sufficient carmen will be assigned to regularly assigned wrecking crew to perform such work as is generally recognized as carmen's work where sufficient men are available and will be paid for such service under Rule No. 9.

Rule No. 114

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

We find the work in question to be Carmen's work. Under the provisions of Rule 114, Carrier was required to call "the regularly assigned crew" to perform the work.

We find that previous awards of this Board have taken different approaches to damages in claims of this type. We believe the proper relief is the difference between what the Claimant earned on November 20, 1967, and what he would have earned had he been called to accompany the wrecking crew. See Second Division, N.R.A.B. Award 5492.

AWARD

Item 1 sustained.

Item 2 sustained for the difference between what Claimant earned on November 20, 1967, and what he would have earned had he been called to perform the wrecking work.

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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