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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6438
Docket No. 6239
2-SOUTCM-'73

The Second Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

Parties to Dispute: (System Federation No. 21, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(
(Southern Railway Company

Dispute: Claim of Employees:

1. That under the current Agreement, Carman Paul H. Hancock, Knoxville, Tennessee, was unjustly deprived of his job as groundman on Derrick D-1 or Big Derrick, John Sevier Shop, Knoxville, Tennessee.
2. That accordingly, the Carrier be ordered to assign Carman Paul H. Hancock as groundman on D-1 or the Big Derrick, at John Sevier Shop, Knoxville, Tennessee, and that beginning February 26, 1971, he be paid all overtime beyond his bulletined hours, rest days, and holidays made by D-1, or Big Derrick, at six per cent (6%) per annum.

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 employees 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 were given due notice of hearing thereon.

Prior to 1950 Claimant, a Carman, was assigned to the Coster Shop of the Carrier at Knoxville, Tennessee and was a member of the wrecking crew working on the derrick stationed at that shop. In 1950 the derrick was transferred to Carrier's Sevier Yard at Knoxville. Members of the wrecking crew were given the option of transferring with the derrick. Claimant did transfer, was given a first shift repair track assignment, and continued as a member of the wrecking crew until approximately January 1970. At that time Claimant bid on a car inspector's job and, in accordance with the Agreement was awarded that position. Upon being assigned as an inspector, he was required to relinquish his position as a groundman on the wrecking crew. The Rules relating to the wrecking crew are as follows:

"152. Wrecking Crews:

Wrecking crews, including engineers and firemen, shall be composed of regularly assigned carmen and will be paid for such

service as per general rules. Meals and lodging will be provided by the Company while crews are on duty in wrecking service.

153. When wrecking crews are called for wrecks or derailments outside yard limits the regularly assigned crew will accompany the outfit. For wrecks and derailments within the yard limits sufficient carmen will be called to perform the work if their services are needed."

The Organization alleges that there are no Rules in the Agreement requiring a Carman to work any specific job in order to be eligible to work as a groundman on the wrecking crew. The Carrier claims that the practice for many years has been for wrecking crew members at the larger shop points to be assigned to the first shift on the repair track. Unrefuted evidence has been presented supporting the practice claimed by Carrier; however, the practice is not alleged to exist at smaller points where wreckers are assigned or at Birmingham, Alabama, a large shop where a local agreement was made. The record also indicates that the parties in 1955 discussed the possibility of establishing a separate sub-department for derrick crews but did not arrive at an agreement.

The Carrier relies in part on Second Division Awards 2560 and 3898. In both of those cases, however, the question of the availability of the Claimants for wrecking crew service was the central issue; in this case there is no evidence that Claimant was either inaccessible or unavailable for wrecking crew service. Award 2560 affirms the applicability of seniority for wrecking crew assignments.

With respect to the past practice argument raised by the Carrier, it is well established that a practice which is consistent, of long standing, is mutually acceptable, and is not contrary to the Agreement should govern. In this case the practice is not consistently followed throughout the Carrier's operations. Furthermore, we have held (Second Division Award 4591 and others) that: "Past practice does not now stop the Organization from enforcing a contractual provision". We find that the statement in Rule 152 "...Wrecking crewsshall be composed of regularly assigned carmen..." is clear and unambiguous; it does not require special assignment or other qualification for assignment to the wrecking crew. We said in Second Division Award No. 3873 "...custom or past practice are of no probative value in determining the meaning of a labor agreement if the wording thereof is clear and unambiguous." (See also Second Division Awards 1898 and 2210).

In Second Division Award No. 4304, dealing with a related problem, we held that "...the carrier has restricted the seniority rights of its carmen to two particular classes (Car Repairers and Carmen Carpenters) and has thereby violated the agreement of the parties." We concluded in that case that all carmen were eligible for wrecking crew assignments.

The Carrier also raises the argument that there is no rule requiring wrecking crew assignments be made strictly on the basis of seniority. Rule 17 states:

"17. Filling Vacancies or New Positions in the Respective Crafts:

When vacancies occur or new positions are created in the respective crafts, they will be posted and employees given preference thereto, efficiency and seniority to govern."

We can find no support for Carrier's position in either the Agreement or Board decisions. Wrecking crew assignments, even though intermittent, are regular assignments in the context of the agreement (See Rules 152 and 153). We shall reaffirm the principles enunciated in our conclusion in Second Division Award No. 5807, which closely parallels this case:

"Rule 18, of course contains no exceptions and, thus, on its face, does not open the way to barring any qualified Carman from a wrecking assignment. Nevertheless, as indicated by Awards 3898 and others, this Rule must be applied reasonably. As stated there, 'if a change of basic position were to develop a conflict so that continued availability for wreck crew duty was no longer possible his status as such would have to be discontinued.' But when men are reasonably available, there is no contractual basis for excluding them from a wreck crew assignment, in our estimation, merely because of possible difficulties in replacing them on occasion. Rather, such problems can best be resolved by mutual agreement of the parties as, evidently, has been done at other locations."

We find no provision in the Agreement requiring the payment of interest, should a claim against the Carrier be sustained. This Board has held on numerous occasions that such claims must be denied since we cannot award Claimant that which is not provided for by the specific terms of the Agreement (Second Division Awards 6261, 6357 and 5467 among others).

Based on the facts presented and the arguments adduced we conclude that Claimant should not have been removed from his position as a member of the wrecking crew. We shall sustain the claim, except for the interest payments.

A W A R D

Claim sustained, but no interest will be paid.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:

E. A. Killen

Executive Secretary

Dated at Chicago, Illinois, this 17th day of January, 1973.

DISSENT OF CARRIER MEMBERS
TO
AWARD 6433, DOCKET NO. 6239

Award 6438 is in serious error and we dissent.

There is no rule in the Agreement providing specifically that members of wrecking crews must be selected on the basis of seniority in the Carmen's craft. Neither Rule 152 nor Rule 17, cited in the Award so provides. In the record before the Board there was no dispute between the parties as to the practice followed through the years in manning wreckers at larger points on Carrier's system. It is well recognized that where rules may not be clear and unambiguous, the Board must then look to practice to determine the intent of the parties. This principle should have been adhered to herein and the claim denied in its entirety.

P. C. Carter

W. B. Jones

E. P. Hensley

A. M. Graham