

The Second Division consisted of the regular members and in addition Referee Robert G. Williams when award was rendered.

Parties to Dispute: ( System Federation No. 121, Railway Employees'  
( Department, A. F. of L. - C. I. O.  
( (Carmen)  
(  
( Texas and Pacific Railway Company

Dispute: Claim of Employees:

1. That the Carrier improperly used employees of a private company and their equipment to assist carmen in clearing up derailment of T&P 820056 on August 20, 1974, within yard limits.
2. That accordingly, the Carrier be ordered to additionally compensate Carman J. W. Boyd in the amount of three (3) hours at the time and one-half rate of pay.

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.

The threshold question in this case is whether the Memorandum of Understanding of December 13, 1941 remains in force and effect. This memorandum was not included among the numerous memorandums printed with the agreement. The Carrier has not offered any additional evidence to show the December 13th memorandum was cancelled. The Organization cites Rule 101(b) to support its contention that this memorandum remains in force. Rule 101(b) provides that:

"Any omission herein of agreements or agreed to understandings which have not been superceded or cancelled will not serve to cancel or affect the application of such omitted agreements or understandings. Any errors or omissions in the reproduction of National Agreements or memorandum agreements will not change the original agreement.

Under this rule the party contending that a memorandum is cancelled or superceded must produce evidence to that effect. The mere assertion that the memorandum was not included in the agreement does not show such a cancellation. If it did, Rule 101(b) would be rendered ineffective in preserving omitted memorandums.

The basic issue in this case is whether the Carrier violated the December 13, 1941 memorandum when it used an outside contractor's crane and operator to rerail T & P 820056 within yard limits on August 20, 1974. This memorandum provides, in part:

"... In case of derailments within yard limits, at points where carmen are employed, if yard forces can rerail or correct the condition, they may do so.

If yard forces are unable to correct the condition and it becomes necessary to use other forces, a sufficient number of Carmen and Carmen Helpers on duty may be used, if available, and if not available, sufficient Carmen and helpers will be called."

In this case the Carrier called two Carmen to repair track and rerail a car using re-railing blocks and switch unit. These attempts were unsuccessful, so the Carrier employed an outside contractor to use its mobile crane and operator to perform this work. There was no evidence that the Claimant was capable of performing the work done by the outside contractor.

The December 13, 1941 memorandum does not prescribe the method or equipment that must be used in case of derailments. It merely requires that Carmen will be used if yard forces cannot correct the derailment within yard limits. In this case carmen were used to perform the work that was within their capabilities. The Carrier still retained the prerogative to determine the equipment to be used for correcting the condition. If carmen had been capable of operating such equipment and yard forces were unavailable or unable to perform the work, then carmen would be entitled to such work within yard limits. The Claimant, however, was not in such a position. The claim therefore must be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By   
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 31st day of July, 1978.