

The Second Division consisted of the regular members and in addition Referee Tedford E. Schoonover when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
(Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That the Norfolk and Western Railway Company violated the Rules of the current Agreement and associated Rules, namely, Rules 29, 118, 125 of Agreement dated October 1, 1952, when employees other than Carmen performed rerailing work at Buffalo Junction, Buffalo, New York, on February 25 and 26, 1981.
2. That the Norfolk and Western Railway Company be ordered to compensate Carmen R. Wojtasiewicz for nine (9) hours and L. Lindner for seven (7) hours, both at the time and one-half rate of pay for February 25, 1981; also, that Carmen E. Wojtasiewicz and M. Skotnicki be paid seven and one-half (7-1/2) hours at the time and one-half rate of pay for February 26, 1981.

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 employees 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 carrier has a yard operation at Buffalo Junction which is located some 1.8 miles from the Buffalo Terminal facility. Six carmen are assigned at Buffalo Junction to perform program work on cars and other work as required such as repairing and maintaining freight cars.

On February 21, 1981, at 6:30 AM, Train 61XBA derailed five cars at Buffalo Junction while setting off on the main track. Two of the five cars were leaning to an extent they were in danger of turning over.

On February 24, 1981, Hoesch equipment was brought to Buffalo Junction from Conneaut, Ohio, a distance of some 115 miles and used in rerailing the cars on February 25 and 26, 1981. In denying the claim the carrier stated that:

"Assistance was provided by foremen in accordance with Safety Rule 1015 since the mechanics involved were not qualified to use Hoesch equipment."

Rules 29, 118 and 125 of the Labor Agreement were cited by the Organization in support of the claim. These rules are quoted as follows:

"RULE 29 - ASSIGNMENT OF WORK

None but mechanics or apprentices regularly employed as such shall do mechanic's work as per special rules of each craft, except foremen at points where no mechanics are employed.

This rule does not prohibit foremen in the exercise of their duties to perform work.

At outlying points (to be mutually agreed upon) where there is not sufficient work to justify employing a mechanic of each craft, the mechanic or mechanics employed at such points will, so far as capable, perform the work of any craft that may be necessary."

"RULE 118 - CLASSIFICATION OF WORK

Carmen's work shall consist of building, maintaining, dismantling (except all-wood freight-train cars), painting upholstering and inspecting all passenger and freight cars, both wood and steel, planing, cabinet and bench carpenter work, pattern and flask making and all other carpenter work in shops and yards, except work generally recognized as bridge and building department work; carmen's work in building and repairing motor cars, lever cars, hand cars and station trucks, building, repairing and removing, and applying locomotive cabs, pilots, pilot beams, running boards, foot and headlight boards, tender frames and trucks, pipe, inspection work and repairs in connection with air brake equipment on freight cars; applying patented metal roofing, operating punches and shears, doing shaping and forming; work done with hand forges and heating torches in connection with carmen's work; painting, varnishing, surfacing, decorating, lettering, cutting of stencils and removing paint (not including use of sand blast machine or removing vats); all other work generally recognized as painters' work under the supervision of the locomotive and car departments, except the application of blacking to fire and smoke boxes of locomotives in enginehouses; joint car inspectors, car inspectors, safety appliance and train car repairs; reclamation of car parts, oxy-acetylene, thermit and electric welding on work generally recognized as carmen's work; and all other work generally recognized as carmen's work."

"RULE 125

When wrecking crews are called for wrecks or derailments outside of yard limits, the regularly assigned crew will accompany outfit. For wrecks or derailments within yard limits sufficient carmen will be called to perform the work."

In describing the specific work performed by the foremen the Organization explains as follows:

"On February 25, 1981, General Foreman M. S. Bishop and Car Foreman R. J. Decker from approximately 8:00 A.M. to approximately 5:00 P.M. did place blocking and jacks and performed other carmen duties in rerailling cars derailed on the PRR Main at Buffalo Junction.

On February 26, 1981 General Foreman, M. S. Bishop and Car Foreman R. J. Decker from approximately 9:00 A.M. to approximately 4:30 P.M. did place blocking and jacks and perform other carmen duties in rerailling cars derailed on the PRR Main at Buffalo Junction."

The carrier denied the claim contending the work performed by the foremen is not generally recognized as belonging exclusively to carmen by rule or practice at Buffalo or at any other locations on the system. In further explanation, the carrier also stated:

"There were no carmen at Buffalo qualified to use and operate the Hoesch equipment, including the claimants, so General Foreman Bishop and Car Foreman Decker supervised and necessarily assisted in using the Hoesch equipment in this rerailling operation. At the same time, they thoroughly explained to the men assisting, including Local Chairman Kelley, the dangers involved in using this equipment and the proper way to use it. This was done in the interest of safety and for the purpose of training which, it is undisputed, was needed."

The carrier contends that Hoesch equipment is complex and potentially dangerous if operated by an untrained person. The carrier also maintains the supervisors had no choice but to instruct and assist with the equipment for the purpose of demonstrating its safe and proper use. There is no disagreement with these contentions nor the statement that it is incumbent on a foreman to see that employes under his jurisdiction know how to use in a prompt, safe and efficient manner the tools necessary for the completion of their job assignments.

If the foremen in this case had limited their activities to the well accepted functions of supervising, demonstrating and teaching it is doubted if this claim would have been filed. But the foremen did more. The carrier does not deny that the foremen placed blocks and jacks and operated the Hoesch equipment for two days from 8:00 AM to 5:00 PM on February 25 and from 9:00 AM to 4:30 PM on February 26. In connection with foremen placing blocks and jacks we note particularly the following statement of the Local Chairman:

"There is no possible way that the carrier can claim that men with over thirty years experience do not know how to place blocks and jacks. Carman Albert W. Kelley throughout the whole operation operated the power source and raising and lowering of the jacks although he had never operated the Hoesch equipment before."

The Carrier did not contend the carmen were untrained in placing blocks and jacks. The carrier defense on this aspect of the claims was that such work is not generally recognized as carmen work. Such a defense misses the point because this derailment was within yard limits and thus is particularly subject to the provisions of Rule 125. In such situations the rules require that a sufficient number of carmen will be called to perform the work and clearly contemplate that the rerailment work will be done by carmen. Rule 29 requires that mechanics regularly employed shall do mechanics work. The mechanics in this situation were carmen.

On this point, the similarities between this case and Award 7214 are pointedly relevant:

"It is the opinion of this Board that Award No. 4770 decided the issue involved in this dispute when this Board stated, in part:

'If the derailment had been outside yard limits, the Superior Wrecking Crew should under Rule 88 have been called. But since it was within yard limits and the wrecker was not used, "sufficient carmen" with seniority at the point should have been called.

The work of cleaning the derailed cars from the tracks was wrecking service, and the use of maintenance of way employees in lieu of Carmen was improper."

Also, Second Division Award Nos. 4317, 4332, 3405, 5034 and 7017 uphold the theory that when Carrier violates the Agreement, there must be some provision to promote compliance.

Therefore, this Claim will be sustained."

Again in Award No. 9116 the Board stated in part:

"The Organization claims that the crew should have been initially assigned to perform the work, based on Rule 103(c), which reads in full as follows:

'(c) Within yard limits, when the wrecker is used, the necessary number of members of the wrecking crew will be called to perform the work. For wrecks or derailments within yard limits, sufficient carmen will be called to perform the work.'

Argument as to whether Carmen have exclusive jurisdiction of all rerailing work is not the pertinent issue here. As to the specific circumstances -- 'within yard limits' -- Rule 103(c) is clear and unambiguous, directing the calling of Carmen for such work. (Other portions of Rule 103 are concerned with such work outside of yard limits.)

Award No. 8612 (McMurray), concerning the same parties, the same rule, and virtually the same circumstances, found the Organization's position correct. That Award in turn referred to Award No. 7606 (Lieberman), also involving the same parties and the same rule. The Board finds no basis to arrive at a different conclusion from that in the two cited awards.

A W A R D

Claim sustained."

The placing of blocks and jacks is an integral part of righting cars in a derailment and is reserved to carmen as provided in Rules 29 and 125. The actions of the foreman in placing blocks and jacks were in clear violation of the rules. While the circumstances insofar as their operation of the Hoesch equipment are not so clear there is a strong indication that their actions in operating the equipment over the two-day period was more in the nature of stepping in to get the job done than in supervising and training the carmen on the job in the proper and safe use of the equipment. While carrier contended that none of the carmen was qualified to operate the equipment the Organization noted that two of the carmen, i.e., Rindos and Adamczak had worked the equipment before. While the evidence is not sufficient to determine the carrier violated the rules as alleged insofar as foremen operating the Hoesch equipment the circumstances call attention to a similar case covered in Second Division Award 9117 which involved the same rule in similar circumstances:

"Rule 26 reads in pertinent part as follows:

'RULE 26 - ASSIGNMENT OF WORK

(a) None but mechanics or apprentices regularly employed as such shall do mechanics' work as per special rules of each craft, except foremen at points where no mechanics are employed.

(b) This rule does not prohibit foremen in the exercise of their duties to perform work.'

The Organization contends that when the Supervisor operated the crane on the three days in question, he was in violation of Rule 26, Paragraph (a). He was actually doing Mechanics' work and that is not allowed at points where Carmen are employed.

Carrier contends that the Supervisor was teaching the Carmen working with him how to operate the crane. Under Rule 26, Paragraph (b), he has the right to do so.

It is well established that Supervisors have the right to perform Mechanics' work while instructing employes in proper procedures or when assistance for instruction purposes is requested by employes. This Board has so stated in numerous awards.
(See for example Second Division Award No. 8072, A. Weiss.)

A review of the record of this case, however, does not substantiate Carrier's position that the Supervisor was teaching the Carmen working with him how to operate the crane. While the record does reveal that the two Carmen working on the days in question could not operate the crane, that fact does not justify the Supervisor stepping in and operating the crane just to get the work done. Nothing in this record, other than Carrier's own statement, supports Carrier's position that the Supervisor was teaching or instructing the Carmen involved in the operation of the crane. The record reveals that the Carmen were handling the wheels and placing them on the truck and guiding them into the truck frame. They were engaged in their own work and were not watching the Foreman operate the crane."

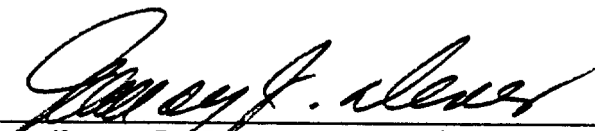
In conclusion, the evidence is clear that carrier violated Rule 125 by reason of the foreman placing blocks and jacks, work reserved in this kind of situation to carmen. While we agree that it is appropriate to assess a penalty as a deterrent we do not find any basis for claims at overtime rates. Numerous Second Division awards uphold the principle of a penalty to promote compliance.

A W A R D

Claim sustained in part as discussed above. Carrier directed to pay four hours at straight time rates in effect on February 26, 1981 to Carmen R. Wojtasiewicz, L. Linder, E. Wojtasiewicz and M. Skotnicki in settlement of the claim.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: _____


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 19th day of September 1984.