

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

(Brotherhood Railway Carmen of the United States
(and Canada
Parties to Dispute: (
(Soo Line Railroad Company

Dispute: Claim of Employees:

1. That under the current agreement the Soo Line Railroad Company is in violation of Rules 27, 28, 94 and 98 of the Shops Craft Agreement, as amended, when Carman W. Fish, the assigned Shoreham Shops Wrecker Engineer, was not allowed to work his bulletin position to operate the Carrier's wrecker to assist the assigned wrecker crew members who were called to rerail NAHX 60418 on March 13, 1984 within yard limits. Instead the Soo Line Railroad Company secured an outside contractor's mobile wrecker crane, operator and groundman to assist the assigned Shoreham Shops wrecker crew members.

2. That accordingly, the Soo Line Railroad Company be ordered to compensate Wrecker Engineer W. Fish for two (2) hours at straight time and one-half (1/2) hour at time and one-half at carmen's rate of pay for loss of compensation of pay on March 13, 1984 for Carrier's violation of the agreed to rules.

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 employes 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 Claimant, a Carman Wrecker Engineer, in service at the Carrier's Shoreham Shops, was not allowed to work his position on March 13, 1984 to rerail a hopper car that had derailed within the Carrier's yard limits. The Carrier used an outside contractor and the contractor's off rail derrick (as opposed to the Carrier's wreck derrick) to rerail the car. In addition, the Carrier utilized two (argued by the Organization) or three (argued by the Carrier) Carmen to assist the contractors. The Organization argues a violation of Rule 98.

Rule 98 has been revised. Originally, the Rule stated:

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

The revised Rule reads as follows:

1. Wrecking crew will be composed of Carmen, including Engineer, will be assigned by bulletin, and will be paid under Rule 10.
2. When a wreck occurs outside yard limits, equipment designated by the Carrier will be used, and a sufficient number of the regularly assigned crew will be called to accompany such equipment.
3. In case of emergency, should the Carrier use the equipment of a contractor (with or without operators) a sufficient number of qualified Carmen will be used as follows:
 - (a) If a regularly assigned wrecking crew is located at a point nearest to the scene of the wreck, a sufficient number of the regularly assigned wrecking crew will be called to work with the contractor as groundmen. If, after the Carrier has assigned all its regularly assigned wrecking crew members and additional groundmen are needed, additional Carmen from any location determined by the Carrier, will be called and used as additional groundmen.
 - (b) If at the point nearest the scene of the wreck, the Carrier does not have a regularly assigned wrecking crew, but has Carmen employed, the Carrier may dispatch a sufficient number of qualified Carmen from that point in lieu of calling a wrecking crew. If a sufficient number of Carmen cannot be obtained from groundmen, consistent with service requirements, Carmen from other points will be used.

4. For wrecks or derailments within yard limits, a sufficient number of Carmen will be called to perform this work.
5. When the Carrier elects to call a contractor for any wreck, it is understood that the necessary wrecking crews and/or Carmen, as nearly as possible, will be called so as to arrive at the wreck at about the same time as the contractor's crews.
6. This rule shall not be construed to prevent train or engine crews from rerailing cars and/or locomotives with frogs and/or blocking which is immediately available to the train or engine crew."

The Organization argued that Rule 98 calls for a sufficient number of Carmen to be called for wrecks within the yard. Carrier employees could have performed the work faster than the contractor. They noted the contractor was called at 10:15 A.M., and the work was not finished until 2:00 P.M.; therefore, cost was no factor, and there was no emergency. The Organization cited numerous Awards in favor of the Organization rendered since the revision of Rule 98.

The Carrier argued it has the right to decide to use its own equipment or not and that Rule 98 only covers crewing and cited Awards in support of that contention. The Carrier noted it used three Carmen and that the Rule states that the entire wreck crew need not be used, and Section 98.5 specifically allows the Carrier to use outside contractors. The Carrier agreed that no emergency existed but stated if the wrecking equipment is not used, then the Wrecking Engineer need not be called. The Carrier is under no obligation to call the entire crew. The Carrier stated that it could spot a car immediately if it used the off rail derrick. Finally, Award 10963 and its Dissent were provided to the Referee. In this Award, the Board found that due to the non-exclusivity of the work to the Carmen's craft and the practices that existed, the Claim in that case was denied.

Upon complete review of the evidence, the Board finds that Rule 98, Section 4 is controlling. The Board notes the rerailing did not occur as provided in Section 98.6. In this case, the derailment was within yard limits; therefore, a sufficient number of Carmen must be called to perform this work. The Carrier chose to utilize a contractor's services and contractor's equipment, which is consistent with Rule 98.5. The question remains, did the Carrier have the obligation to attempt to call out the Claimant consistent with the language in Rule 94 (Classification of Work) and Section 98.5 of the Controlling Agreement. The Board finds that the language in the Controlling Agreement is clear and that the Claimant should have been given, under that language, the opportunity to perform this work. Clearly,

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Award No. 11132
Docket No. 11133
2-SOO-CM-'87

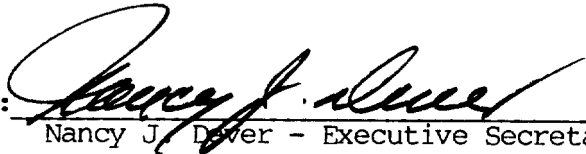
from the record the Carrier did not offer the Claimant that opportunity. Whether or not the Claimant would have worked is immaterial. The Carrier should have made the offer, which it did not. A sufficient number of Carmen were not called in this instance. Therefore, the Claim will be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 21st day of January 1987.

CARRIER MEMBERS' DISSENT
TO
AWARD 11132, (DOCKET 11133)
Referee McAlpin

There is a maxim that this Board should not render a decision that requires the parties to engage in futile activity. The decision visited upon the parties here has ignored reality and the contractual rights of the Carrier under the Agreement.

It is subscribed by the Majority that:

- a. There was a derailment within yard limits and that Rule 98(4) governed;
- b. That under Rule 98(5) Carrier did have the right to use "outside contractors";
- c. Claimant is a derrick engineer, and has consistently refused to perform any other work. See Second Division Awards 8395, 10974 and 10995, involving the same individual;
- d. Members of the wreck crew were used as groundmen.

While Second Division Award 10963, cited by the Majority, was not on all-fours with this dispute, it did cite Award 10111, involving the same parties, which concluded that "Rule 98 contains no language that specifically states that all re-railing work is exclusively reserved to the Carmen". See also Second Division Award 10744 between these same parties in this regard.

Also, Award 10963 cited Award 10111 with approval that there had been a long practice, confirmed by Awards of this Board, that had upheld the Carrier's position prior to the 1980 contract change, and that:

"When this language (old rule) is contrasted with Rule 98, supra, it is evident the old language is almost identically picked up in Paragraphs 2 and 4."

The Organization Dissented to Award 10963 on the basis that:

"....there was no mutually accepted practice that allowed Carrier to assign rerailing work to other than Carmen...."

If the Carrier had the contractual right to use of an outside contractor under the rule, and the wreck derrick was not needed, where is the contractual requirement that Claimant be offered employment as a groundman.

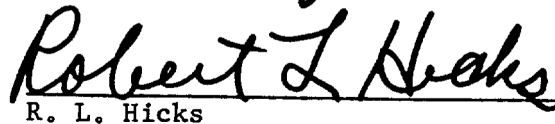
Rule 98(5), relied upon by the Majority, only says that "necessary wrecking crews and/or Carmen...." (emphasis added). The decision does not point to how the Claimant was necessary in this case.

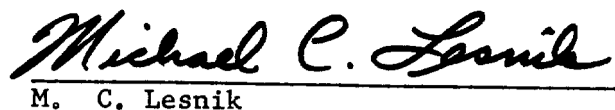
What purpose is served by concluding that an individual who has consistently refused to work except on the wrecker, be called as a groundman. The answer is: none.

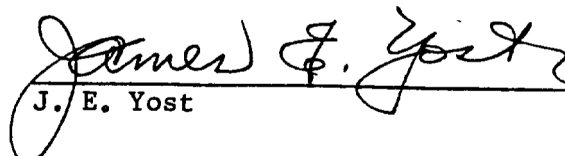
We Dissent:


P. V. Varga


M. W. Fingerhut


R. L. Hicks


M. C. Lesnik


J. E. Yost