Award No. 1322

Docket No. 1253

2-IC-CM-'49

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Glenn Donaldson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION No. 99, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

ILLINOIS CENTRAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1—That under the current agreement the service rights were violated of Carmen-Wrecking Crew Members T. C. Parsons, T. A. McGehee, J. H. McMemar, B. C. McGee and G. C. Arnold, when an equal number of other than carmen were used to rerail I. C. Car No. 97704 at Helvetia, Louisiana, on November 5, 1947.

2—That accordingly, the carrier be ordered to additionally compensate these carmen employes for the aforesaid rerailment service at the time and one-half rate from 3:30 P. M., as though they had proceeded to, rerailed the car, and returned to their home point at 10:00 P. M. on November 5, 1947.

EMPLOYES' STATEMENT OF FACTS: The carrier maintains at Baton Rouge, La., a regularly assigned wrecking crew consisting of the aforesaid named carmen, hereinafter referred to as the claimants, who are regularly employed on the repair track during the hours from 7:00 A. M. to 12:00 Noon and from 12:30 P. M. to 3:30 P. M.

On November 3, 1947, I. C. Car No. 97704 was derailed at Helvetia, La., about 34 miles from the home point of these claimants, and the carrier made the election to have this car rerailed during the hours of 5:00 P. M. to 8:00 P. M. on November 5, 1947, by the crew operating local train No. 97 and a crew of 4 section men. This is affirmed by the submitted copies of statements signed by Conductor A. V. Holmes, Section Foreman W. R. Thornton, Section Laborers Madison Milan and Tommy Miles, respectively, identified as Exhibits A, A-1, A-2 and A-3.

The agreement effective April 1, 1935, as subsequently amended is controlling.

POSITION OF EMPLOYES: It is submitted that there is nothing between the covers of the aforesaid agreement which authorized the carrier to substitute train service employes and section men to rerail the car in question. The train crew obviously could not rerail this car by its own efforts, and therefore the combined force of the train crew and the section men, with the power of the engine, were required and utilized three hours to effect the rerailment of said car. This unquestionably constituted the substitution of facilities for wrecking equipment as well as a substitution

Third—2436:

"Where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforcible to the same extent as the provisions of the contract itself. See Awards Nos. 507, 1257 and 1397."

The NATIONAL TRANSPORTATION POLICY of The Interstate Commerce Act states in part:

"It is hereby declared to be the national transportation policy of the Congress . . . to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation . . .", and

Section 15a(2) of the Act prescribed in part:

"In the exercise of its powers to prescribe just and reasonable rates the Commission shall give due consideration . . . to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical and efficient management to provide such service."

In the annual report of the I.C.C. for 1948 the Commission said the railroads should do "much more" in the fields of increased efficiency and reduction of operating costs. The Commission further said it was aware of "the many efforts which railroads individually and to some extent collectively are making to increase the efficiency of particular operations", but it added, "Opportunities of this kind extend from the multitude of minor day to day operations to large scale change in practices which require both careful planning and substantial capital investments. A thorough searching out of better ways of doing these lesser things which constitute a railroad's day's work must be undertaken. Bold experimentation with new devices seems to be required in some instances."

The claim here is for five carmen from 3:30 P. M. until 10:00 P. M. at the time and one-half rate. This aggregates 48¾ hours for what? No repairs were made to the car, and no work was performed which can be construed as being guaranteed to carmen under any rule of the agreement. The request is, therefore, the antithesis of the policy of the Congress as related in the Interstate Commerce Act and the interpretation thereof by the Commission and of awards by your Board, and is made to deprive management of its rights under the agreement and to read into these rules by interpretation something which they do not contain. Consequently, this is a negotiable matter between the parties under the provisions of Rule 151 and The Railway Labor Act.

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 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.

The parties to said dispute were given due notice of hearing thereon.

The question of the jurisdiction of the National Railroad Adjustment Board to entertain this case is raised by the carrier. Such claim is founded upon the following: that the work in question of rerailing a car was done at the request of and on the private property of a shipper and that the agreement with System Federation No. 99 does not cover work performed off the property of the carrier.

The record would indicate that all the employes undertaking the work were regularly employed by the carrier; that they came upon the job and acted under the orders and at the direction of an official representative of the carrier while performing the work, and presumably were paid by the carrier. The question whether or not the carrier was subsequently reimbursed by the shipper, while unanswered by the record, is irrelevant. Under common law rules pertaining to the relations of master-servant, the men would remain employes of the carrier under the circumstances of this case. The intention of the parties that work performance rather than place of performance should govern their relations would seem to be indicated from the following paragraph appearing on the cover page of the Schedule of Rules, reading:

> "It is understood that Section A of this agreement **shall apply to those who perform the work specified therein,** as employed in the Maintenance of Equipment Department." (Emphasis supplied)

Accordingly we find that the Board has jurisdiction of the case at hand.

The derailment in question consisted of a freight car being shoved over the end of a shipper's spur track. Because the shipper's Diesel had insufficient power to rerail the car, the carrier's representative, upon request of the shipper, directed the crew of a local train to rerail the car with the assistance of the section crew. Claimants, being carmen, constituted a regularly assigned wrecking crew and were located thirty-four miles distant where they were regularly employed on the repair track during the hours from 7:00 A. M. to 12:00 Noon and from 12:30 P. M. to 3:30 P. M.. The claimants contend the work took three hours and was done between the hours 5:00 P. M. and 8:00 P. M. The carrier contends that the work was done in an hour and a quarter starting at 3:30 P. M.

Here we are presented with the case of a nearby section crew being called in lieu of the wrecking crew located at some distance to assist with a minor rerailment—minor, in that nothing more was needed than to obtain and place frogs two or four times (the testimony is conflicting), which was done by the section hands, and applying the pulling power of the locomotive. No repairs to the car were entailed, but only to the track which is undisputedly trackmen's work.

Several past awards of this Division are cited in support of claimant's contention that there has been an infringement upon their jurisdiction herein. The most recent of the cited awards is No. 1298. This, a referee case, decided in February, 1949, involved the alleged improper augmentation of a wrecking crew with four section force employes to expedite the rerailment of a **locomotive and four refrigerator cars.** The job took 5½ hours. Award No. 1126, also cited, involved a section crew assisting in the rerailment of a **locomotive where all of its wheels were on the ground.** Companion Awards Nos. 1127 and 1128 also involved work of rerailing **locomotives.** Award No.1123 presents the case of a rerailment of **three freight cars** where carrier used maintenance of way employes and others instead of the regularly assigned wrecking crew for a job taking fourteen hours to complete. Award No. 1090 involves the use of a locomotive crane to load a **wrecked flat car** for return to the shops for repairs. We have no such case here. The car was not overturned or damaged. It had merely over-shot the end of a spur track and a simple job was involved in rerailing it.

We have no dispute with prior holdings of this Division. We reiterate that wrecking work in general belongs to carmen. We do not desire to be understood as subscribing to the theory advanced by the carrier here that "it is a prerogative and responsibility of the carrier, depending on the nature of a wreck or derailment, to use or not to use a wrecking outfit and wrecking crews in connection with wrecks and derailments." On the contrary, the past Awards of this Division abound with instances where the carrier has applied such a doctrine at its risk and to its financial detriment.

While only of historical significance, the presentation made by the Railway Employes' Department of the A. F. of L. before the U. S. Railroad Labor Board in 1921, in support of proposed Rule 157, calling for wrecking crews composed of regularly assigned carmen, is of interest in showing the employes' understanding of the underlying basis for the rule. From page 585, I quote the following excerpts from such statement:

> "The service to be performed under the rule is generally in connection with carmen's work. There are very few wrecks or derailments where car equipment is not damaged. For this reason it requires the services of experienced carmen to make the necessary repairs * * *'
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> * * * 'The practical carmen know at a glance on arrival at the wreck just what is necessary, just where and how to make the hitch for the lifting, rolling or dragging, of the wrecked equipment, because of the fact that he, as a mechanic, knows the weight to be raised and the strain, each part of the equipment will stand.'
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> * * * 'In many cases the lives of the traveling public and the employes depend upon the wrecking crew. Such people as may be caught under, or pinioned down by the wreckage, would be saved or have their lives crushed out by the proper or improper making fast of the cables, for the handling of such wreckage. * * *' "

Certainly the instant case does not fall within the scope and purposes of the rule mentioned above. We would indeed lose all sight of the salutary reasons why, over the years, wrecking work has been concentrated in carmen if the general rule was to be applied without exception. Such application would invite attack upon and possible destruction of the rule.

The work involved in the instant case is not expressly covered in the scope rule, Rule 127. The claim must rest upon the concluding phrase, i. e., practice, in respect to which carmen jurisdiction in wrecking and derailment work is recognized only in a general sense, subject, we believe, to practical exceptions such as that made here.

The word "When" in the sentence from Rule 131, providing:

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

is a conditional word, indicating that the parties contemplated that in some circumstances wrecking crews would not be called to the scene of wrecks and derailments.

The placing of a frog or rerailer, under the circumstances of this case, cannot reasonably be brought within the scope of mechanic's work within the intendment of Rule 33.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 26th day of July, 1949.