

Award No. 4197

Docket No. 3897

2-UP-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 105, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.—C. I. O. (Carmen)**

UNION PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Carrier violated the current agreement when on November 1, 1959 they sent Carman Helper P. G. Koth to assist in rerailling Box Car AT & SF 11285 on track No. 10 in the Spokane yards.

2. That accordingly the Carrier be ordered to compensate Carman P. R. Bialkowski in the amount of a call of 2 hours and 40 minutes at time and one-half the Carman's regular rate.

EMPLOYEES' STATEMENT OF FACTS: P. R. Bialkowski, hereinafter referred to as the claimant, is employed as a carman by the Union Pacific Railroad Company, hereinafter referred to as the carrier, at Spokane, Washington and holds seniority at that point as a carman with a date of 9-8-48.

On November 1, 1959 at approximately 10:00 A. M. one carman, Mr. E. L. Helgert and one helper, Mr. P. G. Koth were sent to the yards in Spokane to reraill Box Car AT & SF 11285. At this time a number of carmen employees were available both on and off duty, including the claimant who was available to be called.

This dispute has been handled with the highest designated officer of the carrier who has declined to adjust it.

The agreement effective September 1, 1949 as subsequently amended, is controlling.

POSITION OF THE EMPLOYEES: It is without dispute that Carman Helper Koth assisted in performing this work as evidenced by District Foreman Rau's letter of November 6, 1959. This, also, is borne out by Mr. Neuhart's letter of February 9, 1960.

In Third Division Award 7191 (Referee Carter), it was held:

“* * * They (outsiders) attained a right to perform extra and/or relief work where employed in the order of their employment date when regular employes with established seniority were **not available** to perform it under Rule 3(c). This latter provision clearly means that if regular employes with established seniority were not able to **perform it at straight time**, * * * these outsiders with employe status rights were entitled to perform it **before Carrier is required to use such employes with established seniority at the overtime rate.**” (Emphasis ours).

In that award, regular employes were not to be considered available if it was necessary to work them at the penalty rate.

In Third Division Award 7227, Referee Livingston Smith stated:

“This Board has held in numerous awards that a Carrier is not bound to pay the punitive rate for work done if the same can be accomplished at the straight time rate, within the framework of the collective agreement.”

In Special Board of Adjustment No. 173, Award 32, (Referee Gilden), it was held:

“When viewed in the context of Rule 38(c), it follows that the question of the availability of qualified employes, within the contemplation of the Agreement of January 7, 1953, must be approached from the standpoint of whether or not they are available to work the assignment at the straight time rate of pay. For authoritative precedents upholding this concept of availability see Award 7191, National Railroad Adjustment Board, Third Division, and Award 10, Special Board of Adjustment No. 169.

Inasmuch as the claimant herein was not available at his straight time rate of pay to work the 7:00 A.M.-4:00 P.M. Yard Clerk assignment at Salina, Kansas, on the date involved, a cause of action is not established.”

Also see Third Division Award 5331 and Special Board of Adjustment No. 169, Award 10.

For the reasons detailed herein, this claim has no merit and must be denied.

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.

Parties to said dispute were given due notice of hearing thereon.

On November 1, 1959, a box car was inadvertently shoved over a dirt bumper at the end of the track in the Carrier's Spokane (Washington) Yard

causing the derailment of one pair of wheels. The derailment was of a minor nature. It did not necessitate any raising of the car by jacks or wreck crane. The rerailling of the car only required the placing of a so-called Nolan frog over the rail. Carman E. L. Helgert and Carman Helper P. G. Koth both of whom were on duty at the time of the derailment were assigned by the Carrier to place the frog. Thereafter, a switch engine pulled the car over the frog and thereby, rerailed the pair of wheels.

The Claimant, Carman P. R. Bialkowski, who was on his regular rest day on the day in question, filed the instant grievance in which he contended that he should have been called instead of helper Koth to perform the work under consideration. He requested compensation in the amount of 2:40 hours at the applicable overtime rate. The Carrier denied the grievance.

1. In support of his claim, the Claimant mainly relies on Rule 138 of the labor agreement which reads, as far as pertinent, as follows:

“For wrecks or derailments within yard limits, **sufficient** carmen will be called to perform the work.” (Emphasis ours).

We note at the outset that we are not here called to pass upon, and do not pass upon, the question as to whether derailment work of the nature here involved exclusively belongs to the carmen's craft. The basic question which emerges in this case is whether the Carrier called sufficient carmen in accordance with Rule 138 or whether it should have called a second carman instead of carman helper Koth.

The evidence on the record considered as a whole has satisfied us that one carman was sufficient to place the Nolan frog over the rail. This finding is specifically supported by a statement of District Foreman Rau in which he declared that “. . . Carman Helgert demonstrated today that he could, and did, apply this Nolan frog alone in rerailling position without the use of any additional help. This man has done this many times in other derailments . . .” (see: Carrier's Rebuttal Brief, p. 6). There is nothing in the record which effectively contradicts Rau's statement. In other words, the work in question was not of such a nature as reasonably to justify the calling of a second carman. The assignment of carman Helgert was thus “sufficient” within the contemplation of Rule 138. Under these circumstances, the fact that the Carrier chose to assign carman helper Koth to assist Helgert is immaterial to the disposition of the instant claim. See: Award 3892 of the Second Division.

2. The Claimant argues further that the assignment of carman helper Koth to assist carman Helgert in placing the frog was violative of Rule 32 of the labor agreement. This Rule provides, as far as pertinent, that “none but mechanics or apprentices regularly employed as such shall do mechanics' work as per special rules of each craft.” The flaw in that argument is that, under the circumstances of this case, the simple task of assisting in placing the frog over the rail cannot reasonably be construed as “mechanics' work” within the purview of Rule 32. See: Award 1322 of the Second Division. Rule 136 of the agreement defines carmen helpers as “employes regularly assigned to help carmen. The salient point is that helper Koth merely helped carman Helgert in the performance of the work in question, as contemplated in Rule 136, but did not perform “mechanics' work” to the exclusion of a second necessary carman in violation of Rule 32.

In summary, we hold that the Carrier did not violate any provision of the labor agreement when it assigned carman helper Koth to assist carman Helgert in placing the Nolan frog over the rail.

AWARD

Claim denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION**

**ATTEST: Harry J. Sassaman
Executive Secretary**

Dated at Chicago, Illinois, this 27th day of May 1963.