Award No. 4229
Docket No. 3941
2-NYC&StL-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 57, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.—C. I. O. (Carmen)

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY (Wheeling and Lake Erie District)

DISPUTE: CLAIM OF EMPLOYES:

That in conformity with the current agreement The New York, Chicago and St. Louis Railroad Company, Wheeling and Lake Erie District, be ordered to make wreck crew assignments as advertised by bulletin, to the senior qualified employe, bidding on such positions, in this instance Mr. Clarence Groff.

That accordingly the Carrier be also ordered to compensate Carman Groff one (1) hour straight time for noon hour lunch time, and four (4) hours at rate of time and one-half from 4:30 P. M. to 8:30 P. M. for February 16, 1960 and all subsequent time the wrecker is used outside of his regular assigned bulletined hours, at rate of time and one-half at the applicable rate of pay, until he is assigned properly to wreck clearing service.

EMPLOYES' STATEMENT OF FACTS: On February 4, 1960, The New York, Chicago and St. Louis Railroad Company, Wheeling and Lake Erie District, hereinafter called the carrier, advertised in the carmen's craft at Brewster, Ohio for applicants desiring to fill a vacancy of groundman on Brewster wrecking outfit.

Freight Car Repairman Clarence Groff, hereinafter referred to as the claimant, was experienced in wrecking service as he had been called and worked in such services for the carrier on prior occasions.

The claimant made application for the position advertised and was the senior applicant. The carrier, however, assigned Carman R. Brediger.

The regular members of the wreck crew have always been selected on this basis, and it is neither reasonable nor possible to expect that the wreck whistle can be heard at Massillon, eight or nine miles away.

It is extremely important that regular wreck crew members be available in off hours on short notice. A man may be pinned beneath a car, life and property may be in jeopardy, and it is the very essence of the rules that the wreck train be able to move, and move quickly, at any hour.

Rule 66(C) makes provision for supplementing regular wreck crews with any available employes by any method of calling in an emergency, but rule 66(A)(1) is not susceptible to the interpretation urged by the employes that regular members of the crew may reside beyond the hearing limits of the wreck whistle and must be called by long distance telephone.

As the general text of rule 66 shows, telephones were in general use when the rule was negotiated, and if it had been the intention to measure the expected reporting time from the time called by telephone, it would have been simple to write rule 66(A)(1) accordingly.

The only bus service between Brewster and Massillon is a line that makes but a single trip each day and is otherwise undependable. The general mode of transportation is by private automobile with quite a number of share-the-ride arrangements. If the rule were amended as suggested, the crew, instead of being constituted of employes living within the hearing limits of the wreck whistle, might well be made up of employes living far beyond such limits and who would have to own or control automobiles for their personal use and even then could not reasonably be expected to report when there were adverse weather conditions, telephone was busy or out of order, or the family automobile was not available. In other words, they could neither hear the wreck whistle nor report within 45 minutes — both of which conditions of the rule must be given effect. Such a crew consist does not exist now and was not contemplated by the rule. To change the interpretation of the rule as contended for by the employes would do violence to the rule itself and long established practice thereunder and would cause unavoidable and unnecessary delays in wreck service.

The claim is without merit and should 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 waived right of appearance at hearing thereon.

The Rules do not limit wrecker service to employes living within hearing of the wreck whistle. However, Rule 66 (A) (1) limits such service to "employes who can reasonably be expected to report at the wreck train within forty-five (45) minutes after the wreck whistle is blown," and Rule 66 (B) provides that members when off duty "may be called by telephone, call boy or blowing of wreck whistle" and must report within 45 minutes

after such call is made. The Rules must be read together. Management discretion as to manner of call is not arbitrary, but is necessarily governed by circumstances and needs of the service. Obviously an employe off duty living over five miles away cannot practicably or efficiently be called by whistle or call boy.

The wrecker employe for whose vacancy in that service claimant was the senior bidder lived five or six miles away. The carrier states that the former missed several calls, but the Organization points out that his absences had not been so numerous as to cause his removal from the service, as might have been done, under Rule 66 (B).

Claimant resides only three or four miles farther away than the former occupant of the position, and the record does not disclose that the time required to travel that additional distance should reasonably be expected to prevent his reporting within 45 minutes after the whistle is blown or after a telephone call made promptly thereafter. On the contrary, the record shows that the normal driving time from his home is fifteen minutes, that he has been called for such service several times, has always reported within twenty-five minutes, and that other wrecker service employes live some fifteen miles from the shops.

Until awarded the position claimant is entitled to be paid for the extra time he would have received on wrecker service beginning February 16, 1960. Pay for time not worked is at straight time rate.

AWARD

Claim sustained to the extent indicated in the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 17th day of June, 1963.

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

(The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when the interpretation was rendered.)

INTERPRETATION NO. 1 TO AWARD NO. 4229

DOCKET NO. 3941

NAME OF ORGANIZATION: System Federation No. 57, Railway Employes' Department, A. F. of L. — C. I. O. (Carmen)

NAME OF CARRIER: The New York, Chicago and St. Louis Railroad Company (Wheeling and Lake Erie District)

QUESTION FOR INTERPRETATION: "Does the language in Award No. 4229 reading:

> 'Until awarded the position claimant is entitled to be paid for the extra time he would have received on wrecker service beginning February 16, 1960. Pay for time not worked is at straight time rate.'

"provide for the payment for the extra time the Claimant would have received until he was awarded the position on July 30, 1963."

"Extra time he **would have received** on wrecker service" obviously means the extra time claimant **would have received if awarded the position** upon his bid.

Thus the question presented is really this:

Would the Claimant have received extra time on wrecker service between February 1, 1961, and July 30, 1963, if awarded the position in 1960?

Rule 66 (a) (2) provides that:

> "Bids by employees holding regular positions (other than regular positions as freight car repairers) from which they cannot be spared will not be accepted."

The Carrier contends that regularly assigned employes other than freight car repairers cannot be spared for wrecker service; that such service has therefore been limited to freight car repairers, and that by voluntarily leaving that classification in February, 1961, claimant made himself unavailable for that service (and its extra pay) between that date and July 30, 1963.

The Employes do not concede that wrecker positions are limited to freight car repairers to the exclusion of inspectors; but the bulletin for this position was so limited. It called for "One (1) **Car Repairer** — To fill vacancy of Groundman on Brewster Wrecker Outfit. (W. Atkinson's Vacancy)." The acceptance of this limitation without objection would seem to indicate that it was not considered unusual or improper.

However, if claimant's bid to that position had been accepted in 1960 as the Award found that it should have been, there is no indication that the question of his availablility for wrecker service would later have arisen. Under the award he was allotted $488.33 extra pay for 11½ months, which would have amounted to $732.50 at the overtime rate if actually worked. Thus, in the absence of some compelling reason, like the abolishment of his position, which the record does not show, there is nothing to indcate that but for the wrongful rejection of his wrecker bid in 1960 he would have bid the inspector's position in 1961.

Consequently, the Carrier is not in position to claim that the latter bid disqualified claimant; for a party cannot take advantage of its own wrongful act.

Claimant is entitled to pay at straight time rate in accordance with the Award, for the extra time he would have received if on wrecker service during the entire period from February 16, 1960, to July 30, 1963.

Referee Howard A. Johnson, who sat with the Division as a Member when Award No. 4229 was rendered, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 25th day of May, 1964.