Award No. 4964
Docket No. 4734
2-SP&S-CM-'66

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 DEPARTMENT NO. 7, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY (System Lines)

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier violated the controlling Agreement when Carman C. F. Clarendon was not called to perform wrecking service on June 3, 1963.

2. That accordingly the Carrier be ordered to compensate Carman C. F. Clarendon for eight hours at straight time rate, and two and a quarter hours at time and one-half rate.

EMPLOYES' STATEMENT OF FACTS: The Spokane, Portland and Seattle Railway Co., hereinafter referred to as the carrier, maintains at Portland, Oregon, a wrecking outfit and regularly assigned wrecking crew composed of carmen, of which Carman C. F. Clarendon, hereinafter referred to as the claimant, is regularly assigned as wrecking engineer. On June 3, 1963, carrier called the Portland wrecking outfit, X5 wrecking crane, and the regularly assigned crew, including the claimant for a derailment at Bush, Oregon, for 7:30 A. M. Subsequent thereto, carrier cancelled the call for the X5 wrecking crane and the claimant and elected to substitute its crane X35 and operator who was not a carman therefor, which was working at Salem, Oregon.

The Portland Wrecking Crew with the exception of the claimant was transported by truck to Bush, Oregon, leaving Portland at 7:30 A. M., cleared up the derailment with crane X35 and returned to home point at 5:00 P. M. same date.

Claimant, the regularly assigned wrecking engineer of the Portland Wrecking Crew, was not permitted to accompany the wrecking crew and operate crane X35 which was substituted for the regular wrecking crane X5, in clearing up the derailment.

fied contingencies; but, the contract now before us contains no such provision.

Having determined that the National Railroad Adjustment Board may not impose a penalty, unless expressly provided for in a collective bargaining contract, we now come to analyzing Petitioner's prayer for a monetary Award as set forth in Parts (2) and (3) of its Claim. These Parts set forth a formula for computing a monetary Award without regard to actual net losses, if any there be. The fulcrum is resolution of the issue as to whether such an Award would be a penalty.

In contract law a party claiming violation of a contract and seeking damages must prove: (1) the violation; and (2) the amount of the damages incurred. A finding of a violation does not of itself entitle an aggrieved party to monetary damages.

In the instant case Petitioner has proven the violation. It has not met its burden of proving monetary damages. There is no evidence in the record that any Employe in the MW collective bargaining unit suffered any loss of pay because of Carrier's violation of the contract. The inference from the record, if any can be drawn, is that the MW Employes were steadily employed by Carrier during the period of the project. Therefore, for this Board to make an Award as prayed for in Parts (2) and (3) of the Claim would be imposing a penalty on the Carrier and giving the MW Employes a windfall — neither of such results is provided for or contemplated by the terms of the contract. To make such an Award, we find, would be beyond the jurisdiction of this Board.

Upon the basis of the foregoing findings, reasons and conclusions Parts (2) and (3) of the Claim must be denied."

Respondent submits that the claim in this docket must be denied and so requests your honorable Board.

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.

Four freight cars were derailed at Bush siding, near Salem and about 71 miles from Portland, Oregon, at about 3:30 A. M. At 4:30 A. M. the Chief Dispatcher ordered out the Portland wrecking outfit and crew, including Claimant, the engineer. It developed that a self-propelling locomotive crane was already at Salem and could handle the derailment. Claimant was therefore released at 5:30 A. M. and was paid four hours at wrecking engineer's rate, pursuant to Rule 8(b). He also filled his regular repair track assignment beginning at 7:30 A. M. at the same rate.

The rest of the Portland wrecking crew left by truck at 7:30 A. M., to handle the rerailment with the help of three carmen from Albany yard, about 25 miles south of Salem, who had been sent out by truck at the same time; they finished the rerailing and were back at Portland by 5:00 P. M.

Rule 67 provides:

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

The Carrier's position is that the outfit did not go, and that Rule 67 therefore did not apply. But with the exception of the Claimant the wrecking crew was called and used for the derailment, together with a crane substantially similar to the wreck outfit derrick, although smaller.

Under these and comparable circumstances this Division has properly held that wrecking service belongs to the wrecking crew when a derrick or similar equipment is used, unless the use of a substitute for the crew's derrick is necessitated by an emergency. See Awards 1327 and 4186. This incident was apparently not such an emergency, since the Carrier did not have either the Portland wrecking crew or the Salem carmen and crane start work until four hours after the derailment, by which time the wrecking outfit could normally have made the 71 mile trip. Claim 1 should therefore be sustained.

Claim 2 is for eight hours at straight time rate and 2¼ hours at overtime rate. Even aside from the fact that pay for time not worked is at straight time rate, this claim is for less than the twelve hours' pay which Claimant has already received for the day involved. Claim 2 must therefore be denied.

AWARD

Claim 1 sustained.

Claim 2 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 14th day of October, 1966.

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