



**Award No. 5857**

**Docket No. 5742**

**2-N&W-CM- '70**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**SECOND DIVISION**

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

**SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYES'  
DEPARTMENT, A.F. of L.-C.I.O.  
(Carmen)**

**NORFOLK AND WESTERN RAILWAY COMPANY**

**DISPUTE: CLAIM OF EMPLOYES:**

1. That the current Agreement, particularly Rules 9 (d), 110, 113, and 114 thereof, were violated when other than regularly assigned Carman Derrick Operator and Assistant were used in wrecking service on January 24, 1967.
2. That accordingly, the Carrier be ordered to pay Derrick Operator G. B. Dehart and Assistant Operator D. B. Lilly four (4) hours each, at the rate of time and one-half for said violation.

**EMPLOYES' STATEMENT OF FACTS:** Carmen Derrick Operator G. B. Dehart and Assistant Operator D. B. Lilly, hereinafter referred to as claimants, are regularly employed as such by the Norfolk and Western Railway Company, hereinafter referred to as the carrier, at Elmore, West Virginia, at said point there is a regularly assigned wrecking crew and outfit, same being the one and only regularly assigned wrecking crew on the New River Division. Claimants were regularly assigned Members of such wrecking crew, one as derrick engineer and the other assistant Derrick engineer.

The auxiliary wrecking outfit was called and departed from said terminal at 10:40 A. M. January 24, 1967, with engine numbers 1548 and 1579. Also, a large derrick car number 514861, idler car number 527614 and other car number 514226 from the department of maintenance of way, with derrick men from said department accompanying the outfit and operating said derrick car in the performance of wrecking service in the rerailing of NKP car number 79716 and N&W car number 36869, at Bolt Mine supply track, a point on the carriers' system, near Elmore, which management has neither refuted nor denied. The wrecking operation was completed at approximately 4:30 P. M. with outfit returning to Elmore terminal at 11:15 P. M., though other members of the regularly assigned wrecking crew were transported by truck to the scene of operation, for the performance of their regularly assigned duties, claimants were not permitted to accompany the outfit, nor were they sent by truck to perform the work of their assignment, operating the derrick which work was performed by other than carmen. Thus claimants were damaged in the amount claimed.

Division or other Divisions of the National Railroad Adjustment Board. Since that time a preponderant of the Awards have continued not to follow the reasoning in Award No. 870 and have held instead that 'the right to perform the work is not the equivalent of work performed insofar as the overtime rule is concerned.' The Division believes that what is true of penalty pay for overtime work is equally true of overtime pay for holidays not worked. The majority rule followed by the Division is well grounded in the law of damages and should be maintained."

Other Awards setting forth the same principle are: Third Division 10721, 13177, 10809 and 13177; also Fourth Division 802, 1099, 1632 and 1178.

Carrier has conclusively shown that:

1. Wrecking outfit was not called, therefore, wrecking crew not needed.
2. Agreement in effect on carrier's property not applicable off carrier's property.
3. There is no rule or agreement providing for penalty payment under these circumstances.
4. The claimants suffered no monetary damages and are not entitled to additional payment.
5. Payment for work not performed is not allowable at the punitive rate.

Under the weight of evidence produced the claim has no merit and the carrier requests a denial in its entirety.

**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.

From the submissions it is clear that the work which is the subject of this dispute was performed on the property of the Bolt Mining Company and not on property owned and controlled by Carrier.

There are numerous awards of this Division which hold that the contractual rights in the Agreement between the parties do not extend to work performed on foreign property unless specifically provided for in the Agreement. See Second Division Awards 2213, 2992 and 4212.

**A W A R D**

The Claim is denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
By Order of Second Division

**ATTEST: E. A. Killeen**  
**Executive Secretary**

**Dated at Chicago, Illinois, this 12th day of March, 1970.**