Award No. 6127
Docket No. 5920
2-N&W-CM-'71

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee William H. McPherson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

NORFOLK AND WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Norfolk and Western Railway Company violated the Current Agreement when on December 8, 1967, they called and utilized an auxiliary wrecking crew and outfit, for the performance of wrecking service, in the re-railment of two (2) cars at the Coal Mountain No. 12 mining operation at Coal Mountain, West Virginia, in lieu of the regularly assigned wrecking crew stationed at Elmore, West Virginia.

2. That accordingly, the Norfolk and Western Railway Company be ordered to additionally compensate each of the following regularly assigned members of the Elmore Wrecking Crew, Derrick Engineer D. B. Lilly, Car Repairer G. B. Dehart and Helper Car Repairer W. G. Wolfe, in the amount of a call of two (2) hours and forty (40) minutes, at the overtime rate of pay, or four (4) hours at the applicable straight-time rate of pay, because of such violation of current agreement and the usurpation of work to which they were regularly assigned by others.

EMPLOYES' STATEMENT OF FACTS: The Norfolk and Western Railway Company (formerly VGN) hereinafter referred to as the carrier, maintains at Elmore, West Virginia, a point on carrier's line, located on the New River Division, a yard and repair track, where cars are inspected, serviced and repaired, also a wrecking crew and outfit with large derrick car and other necessary tools and equipment, this being the one and only wrecking crew and outfit, assigned to said New River Division and having serviced such Division for many years. Carman Derrick Engineer D. B. Lilly and Car Repairer G. B. Dehart also Helper Car Repairer W. G. Wolfe, hereinafter referred to as Claimants, were regularly assigned members of said wrecking crew on December 8, 1967.

On said date of December 8, 1967, carrier did call and/or organize and utilize an auxiliary wrecking crew and outfit, with large Derrick Car No.

"The Division also finds that even if the record discloses a breach of the Claimant's contractual rights, he is not entitled to the remedy sought, i.e., pay at time and one half for the holiday not worked. While the Organization has laid great stress on Award No. 870 decided in 1953, the Division must take cognizance that even at that time, that Award did not represent the majority thinking of this Division or other Divisions of the National Railroad Adjustment Board. Since that time a preponderance 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. See Award 5758 for similar incident on this 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.

On December 8, 1967, Carrier's maintenance of way crew, which was working in the vicinity, used its "clam shell" in rerailing two cars at the Coal

Mountain No. 12 mining operation. Claimants are members of the wrecking crew based some 44 miles distant at Elmore, West Virginia, who claim that they should have been called for this wrecking operation on the basis of Rule No. 114, which states in part: "When wrecking crews are called for wrecks or derailments outside of yard limits, the regularly assigned crew will accompany the outfit."

Carrier maintains that the Rule was not violated, since neither the wrecking crew nor the wrecking outfit was called, and that in any case the rule is not applicable since the work was not performed on Carrier's property.

We sustain the Organization's objection to the Carrier's statement that one of the claimants was off duty at his own request that day, since it was not discussed on the property, and Carrier's objection on the same grounds to the Organization's submission of court records of an easement granted by the property owner and lessee to the Carrier, although we are of the opinion that these records are irrelevant to this case, in that the easement is "for the purposes of constructing, operating, maintaining, repairing, replacing, rebuilding, and removing tracks and appurtenances thereto. . . ." (Emphasis ours.) The rerailing of cars on this property is not the exclusive right or obligation of the Carrier, and thus is not within the rights of its employes, in the absence of specific agreement.

Our denial Award 5946, involving the same wrecking crew and another off-property incident, is controlling for the reasons there expressed.

Our denial of this claim for the reasons stated does not imply that the Labor Agreement between the Parties is totally inapplicable to work performed by the Carrier outside its own property. Nor does it imply, on the other hand, that the claim would have been sustained if the incident had occurred on the Carrier's property.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 21st day of April, 1971.

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.