Award No. 6159
Docket No. 5998
2-N&W-CM-'71

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.

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 Agreement and damaged Derrick Engineer G. B. Dehart, when on May 3, 1968, they refused to allow him to accompany the auxiliary wrecking outfit and perform the work of his regular assignment, Derrick Car Engineer and member of the Elmore Wrecking Crew.

2. That accordingly the Norfolk and Western Railway Company be ordered to additionally compensate regularly assigned Derrick Engineer G. B. Dehart, in the amount of four (4) hours at the time and one-half rate of pay, because of violation and resultant loss.

EMPLOYES' STATEMENT OF FACTS: The Norfolk and Western Railway Company, hereinafter referred to as the carrier, maintains at Elmore, West Virginia, a point on the New River Division (formerly VGN), a car shop and wrecking outfit with regularly assigned wrecking crew, of which Carman Derrick Engineer, G. B. Dehart, hereinafter referred to as claimant, was a regularly assigned member, same being the one and only wrecking crew assigned to the New River Division.

On May 3, 1968, the regularly assigned wrecking crew, with the exception of claimant, were called and/or dispatched from the Elmore Terminal, with an auxiliary derrick car and outfit, commonly referred to as clam shell, augmented by a derrick car engineer from the Maintenance of Way Department, for the sole purpose of performing wrecking service at Stephenson, West Virginia, a point on the Winding Gulf Branch (New River Division), approximately six (6) miles outside the yard limits of Elmore, in the rerailment of N&W Hopper Car No. 29908, which had been loaded with coal by the mining company, then derailed and turned over on its side, three (3) days prior to May 3, 1968.

In Third Division Award 10809 it was stated:

"Claimant is entitled to 7 hours and 45 minutes of pro rata time. We are not disposed to give the overtime rate for time not worked."

Also Fourth Division Award 1980:

"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 5857 for similar incident on this property.**

3. There is no rule or agreement providing for penalty payment under these circumstances.

4. The claimant suffered no monetary damages and is 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 May 1, 1968, railroad officials were informed by Mining Company officials at Stephenson, West Virginia, that Mining Company employes handling a loaded car of coal had lost control of the car, resulting in a derailment. The railroad officials were requested to bring equipment to the mine, transfer the coal to another car and retrack the car.

The Organization has filed the instant claim on behalf of the Derrick Engineer, whom they maintain should have been called as part of the regular wrecking service instead of a Maintenance of Way Engineer. They further allege that Carrier, by failing to call Claimant, violated Rules 114, 110 and 30 which, in pertinent parts, read as follows:

"RULE 114.

When wrecking crews are called for wrecks or derailments outside of yard limits, the regularly assigned crew will accompany the outfit. For wrecks or derailments within yard limits, sufficient carmen will be called to perform the work."

"RULE 110.

Carmen's work shall consist of * * * inspecting all passenger and freight cars * * * wreck derrick engineers * * * and all other work generally recognized as carmen's work."

"RULE 30.

(a) None but mechanics or apprentices regularly assigned as such shall do mechanics' work."

Carrier defends its action in this case by stating that the work in question was performed on property owned by the Mining Company, and not the railroad and further that the Claimant employe does not have exclusive rights to the work.

The Organization counters in its rebuttal statement by introducing as an exhibit an Agreement between the Mining Company and Carrier which they allege shows conclusively that the derailment and the work incidental thereto was performed on property controlled by and for all intents and purpose owned by the Carrier by virtue of said Agreement.

We have examined the aforementioned agreement and conclude that it is essentially an easement granting ingress and egress to the railroad company, Section V thereof stating:

"Section V. It is agreed that nothing herein contained shall in anywise affect, alter, or diminish the rights and liabilities of the Coke Company under said Coal Siding Agreement."

The Coal Siding Agreement, Section 7(d), provides:

> "d. The railway shall not be liable as a common carrier, or as bailee, for any property loaded into any car on said track until said car is attached to the engine or train of the party of the first part, to be moved by said train toward its destination; or until a bill of lading shall have been issued to the industry, or its assigns, or the shipper; and until said car is so attached or coupled up, or until said bill of lading is issued, the said car and its contents shall be deemed to be in the possession of the industry insofar as liability for the safety and care thereof is concerned; and the industry agrees to protect and save harmless the Railway from all loss or damage by reason of any damage or injury to said car, and/or its contents, while the same is in possession of the industry as aforesaid."

It is clear from the above cited excerpts of the Agreements between the Mining Company and the Carrier that the former is in complete control of the property and accepts responsibility for the cars and their contents while on the property. This case, therefore, fails on two counts; first, the work was performed on foreign property (see our Award 5857), and, second, the organization has not presented sufficient evidence to show that they and they alone have exclusive rights to the work performed. We will deny the claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 16th day of July, 1971.

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