

Award No. 6322

Docket No. 6079

2-BN-CM-'72

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 7, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

**BURLINGTON NORTHERN, INC.
(Formerly Great Northern Railway Company)**

DISPUTE: CLAIM OF EMPLOYES:

1. That the Burlington Northern, Inc. (former Great Northern Railroad Company) violated the controlling agreement when it called employes from the overtime call list in lieu of regular assigned wreck crew members.

2. That accordingly, the Carrier be ordered to additionally compensate wreck crew members, Carmen B. L. Knapp, M. J. Cislo, and R. Wlaznak in the amount of nine (9) hours at the time and one-half (1½) rate, for May 15, 1969, which represents the difference in the amount paid the Claimants for service performed on that date, and the amount they would have received had they been properly called as the regular wreck crew for wrecking service.

EMPLOYES' STATEMENT OF FACTS: At Great Falls, Montana, the carrier maintains a wrecking outfit and a regular assigned wrecking crew, composed of carmen, namely, Wrecker Engineer B. L. Knapp and ground men M. S. Cislo and R. Wlaznak.

On May 14, 1969, Cars G.N. 73200, G.N. 73482 and T.C.X. 8174 were derailed at Helena, Montana, a distance of 94 miles from Great Falls, Montana.

At five (5) forty (40) A.M., on May 15, 1969, the following day, three freight carmen, namely Ralph Porter, George Kohut and Steven Kalafat, Great Falls, Montana were called from the overtime call list to travel to Helena, Montana, to assist in rerailling the aforesaid cars.

Upon arrival at the scene of the derailment, they found Maintenance of Way derrick X 1803, Maintenance of Way Operator Wm. Douville and Assistant Car Foreman V. Menghini waiting.

The above Maintenance of Way derrick was called from Great Falls, Montana, to Helena, Montana, to reraill the aforesaid cars, where Maintenance

limited to recovering the amount he would have earned under the contract less the amount actually earned. Second Division Awards 1638, 2722, 3672, 3967, 4086, 4112, 4926, 5048, 5152, 5347 and 5492 are examples of awards on this principle, and excerpts from the Findings of a few of them will help to illustrate the point the Carrier is making:

Award 4926, (BM vs. NYNH&H, Referee Hall)

“* * * it appears that all the employes named in the Statement of Claim were gainfully employed throughout the period claimed, were deprived of no work and suffered no monetary loss. What they are asking for here is in the nature of a penalty for which there is no provision in the Agreement.”

Award 5152, (MA vs. C&NW, Referee Harwood)

“The Second Division has often held that, in the absence of a showing that claimant suffered loss in pay, a money claim is not valid. Here the job was bulletined, yet there is no record that Claimant Seely bid for it. Also, it appears that said Claimant has been steadily employed as a machinist and that he has suffered no loss in pay; neither is there a showing that he would have been called to work at overtime. See Second Division Awards 3672, 3967, 5083, 4086 and 4112.”

In Second Division Award 5492 claims of wrecking crew for time lost when not permitted to accompany the wrecker outfit were sustained for “the difference between what they received and what they would have received had they accompanied the outfit.”

With respect to the claim for 9 hours at punitive rate for service not actually performed, awards of all Divisions have consistently recognized that, even where right to service is established, the penalty for any time lost is the pro rata rate rather than punitive, and that overtime payment accrues only when overtime is actually performed. See Second Division Awards 3014, 3163, 3177, 3256, 3259, 3405, 3873, 4335, 4815, 4838, 5051, 5548, 5549, 5696 and 5894 on this particular point. This principle was summed up briefly and succinctly as follows in the Findings of Award 5894:

Award 5894, (CM vs. CRI&P, Referee Gilden)

“The pro rata rate, and not time and one-half, is the proper penalty for loss of work.”

In the light of the argument and evidence set forth herein the Carrier reiterates its opening contention that, since the wrecking derrick and outfit was not used in this case, there is no proper basis for claim in behalf of the claimant wrecking crew members. Needless to say, the claim should therefore 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.

On May 14, 1969, three cars were derailed at Helena, Montana. Carrier called three carmen from the overtime list and sent them from Great Falls to Helena with a highway truck the following morning. The cars were rerailed with the aid of a small maintenance of way crane.

The Claimants in this dispute are members of the wrecking crew located at Great Falls. The Employees contend that rules and precedent required that the wrecking derrick and crew be sent to Helena to reraill the cars.

This same question has been before this Board many times. Awards have consistently held that it is the prerogative of management to decide whether to call wrecking derricks and crews and wrecking crews do not have the exclusive right to all rerailling work.

Three Awards of this Board between the same parties should dispose of the instant dispute.

Second Division N.R.A.B. Award 4898 (McMahon) states:

"Carrier in exercising its prerogative of management, did not use the wrecking equipment from Minot, but used other employes to reraill the car with the use of other Carmen and Sectionmen and the use of a caterpillar tractor.

There is no evidence in the record here that Claimants had an exclusive right to work involved here. Nor is there evidence that Carrier acted in an arbitrary, capricious or discriminatory manner, in exercising its judgment to determine whether or not the use of the Wrecking Crew and its equipment were necessary to perform the work required here as alleged. The principles set out in Award No. 4190, this Division, are similar to the facts and circumstances here before us."

Second Division N.R.A.B. Award 5545 (Ritter) states:

"This Board is of the opinion that this claim is without merit. This Board has decided many times that the rerailling of locomotives and cars is not the exclusive work of carmen when a wrecker is not called or needed. See Awards 1482 (Carter), 1757 (Carter), and 4821 (Johnson). The last named Award, 4821, arose on this property and involved these parties. Awards 2722 (Ferguson), 4903 (Harwood), and 4393 (Williams) hold that the actual wrecking crew must be called only when the outfit, or wrecker, is called and that the need for calling the wrecker is a matter to be determined by the Carrier. Awards 4682 (Daly), 5032 (Weston) have determined that a winch truck does not constitute a wrecker or 'wrecking outfit.' Since this derailment occurred outside yard limits and for other reasons hereinabove set out, this claim will be denied."

Second Division N.R.A.B. Award 6177 (Simons) states:

"This Board is dismayed that it is compelled to consider a dispute over issues which have been adjudicated innumerable times over two

decades. The Board, though sorely tempted, will not, in the interests of brevity, cite the pertinent portions of the awards listed below, all of which in clear, unambiguous and definitive manner, repeatedly establish in decisive and controlling language, among other matters, the following:

1. That derailment work outside a yard is not exclusively the work of Carmen.
2. That a wrecking crew need not be assigned to a derailment when no wrecking outfit is used."

We hope that this Award and the Awards quoted above once and forever put this question to rest.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1972.