Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9976
SECOND DIVISION Docket No. 9118
2-C&NW-CM-'84

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

Parties to Dispute: ( Brotherhood Railway Carmen of the United States
( and Canada
(
( Chicago and North Western Transportation Company

Dispute: Claim of Employes:

1. That the Chicago and North Western Transportation Company violated Article V of the August 21, 1954 Agreement when Director of Labor Relations Fremon failed to give written reasons for denial of General Chairman Murphy's appeal dated November 15, 1979.

2. Carman Kenneth Gille, Green Bay, Wisconsin, was deprived of wages to which he is contractually entitled in the amount of 15 hours pay at the pro rata rate, account the Chicago and North Western Transportation Company called mechanics-in-charge to peform carmen's work at derailments at Eland, Wisconsin on August 25, 1979.

3. That the Chicago and North Western Transportation Company be ordered to compensate Carman K. Gille in the amount of 15 hours pay at the pro rata rate.

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 employes 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.

This is one of several claims progressed to the Board involving the Carrier's use of a "Mechanic-in-Charge" or "MIC" to perform carmen work away from the headquarter point in connection with derailments. Award 9198 was sustained on a procedural point, Award 9717 was dismissed on a procedural point, Award 9394 and Award 9716 were sustained because the facts involved the use of a contractor and it was found that Rule 127 was controlling and specifically required the use of a minimum of two "carmen" under such circumstances. This case is unique and distinguished from the others because: (1) it does not involve any procedural issues of any substance. It should be noted that while the statement of claim makes reference to violation of Article V of the August 21, 1954 Agreement, there is no treatment of this procedural contention in the Employes' Submission. In view thereof, essentially speaking, no procedural issue is before the Board; (2) This case is also distinguished because it does not involve the use of a contractor and therefore Rule 127 would not necessarily be controlling.

Some additional background is necessary. On this Carrier, Mechanics-in-Charge come under the Federated Crafts agreement, although not subject to certain rules of such agreement. They are monthly rated, and work 5 days one week, 6 days the next, for the monthly rate. Time worked outside assigned hours is paid for at overtime rate. For purposes of the Union Shop Agreement, incumbents of Mechanic-in-Charge positions are required to maintain union membership, and to the best of the Carrier's information maintain membership in the craft from which promoted. Almost without exception, Mechanics-in-Charge are selected from mechanics employed by the Carrier. Mechanics so appointed do not establish separate seniority as Mechanics-in-Charge, but retain and continue to accumulate seniority in their craft at home point.

In this case, the Carrier called the MIC Gary Dekan who was headquartered at Wausau, Wisconsin, to proceed to Eland, Wisconsin, to rerail three freight cars. He was joined by a Carman from Green Bay, Wisconsin. The Organization contends the Claimant should have been used in lieu of the Mechanic-in-Charge.

Generally, the Organization takes the position that the Mechanic-in-Charge is limited to the point employed. The Organization submits that Rules 10, 29, 53, and Memorandums of Agreement covering Rules 126 and 127 were violated. These rules read as follows:

> Rule 10: "An employe regularly assigned to work at a shop, enginehouse, repair track or inspection point, when called for emergency road work away from such shop, enginehouse, repair track or inspection point, will be paid from the time ordered to leave home station until his return for all time worked in accordance with practice at home station and will be paid straight time rate for traveling or waiting, except rest days and holidays, which will be paid for at the rate of time and one-half.
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> If, during the time on the road a man is relieved from duty and permitted to go to bed for five or more hours, such relief time will not be paid, provided that in no case shall he be paid for a total of less than eight hours each calendar day when such irregular service prevents the employe from making his regular daily hours at home station. Where meals and lodging are not provided by the railway company, actual necessary expenses will be allowed.
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> Employes will be called as nearly as possible one hour before leaving time, and on their return will deliver tools at points designated.
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> If required to leave home station during overtime hours they will be allowed one hour preparatory time at straight-time rate.
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> Wrecking service employes will be paid under this rule except that all time working, waiting or traveling on week days after the recognized straight-time hours at home station and all time working, waiting or traveling on rest days and holidays will be paid for at rate of time and one-half."

Rule 29: "None but mechanics and apprentices regularly employed as such shall do mechanics' work as per special rules of each craft.

At a point where it is proved to the satisfaction of the parties to this agreement that more than two hours work is done in any day or night shift in any one day based on the average of one week, a mechanic will be employed.

This does not preclude work being performed by car department mechanics-in-charge assigned to outlying points at which the force does not exceed five men, or in train yards."

Rule 53: "Mechanics' work as defined in the special rules of each craft will be performed by mechanics, regular and helper apprentices to the respective crafts."

"MEMORANDUM OF AGREEMENT BETWEEN THE CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY AND THE BROTHERHOOD RAILWAY CARMEN OF UNITED STATES AND CANADA COVERING AGREEMENT, USE AND COMPENSATION OF WRECKING CREWS

It is hereby agreed by and between the parties hereto that effective March 1, 1976 Rules 126 and 127 of Carmen's Special Rules as contained in the existing agreement are interpreted to apply as follows:

1. The existing practice of bulletining carmen's positions and separately bulletining 'wrecker service' positions, which are not in fact regular assignments, shall be discontinued. Hereafter at points where 'wrecking crews' are required specific assignments shall be bulletined to also protect wrecking service, and applicants therefor must be qualified for and accept the complete assignment (including wrecking service).

2. Subject to the exceptions contained in the second paragraph of Rule 127 it is understood and agreed that Rule 127 covers wrecking work at all wrecks and derailments on the right of way of the C&NWT, including operation of machinery involved in rerailing operation; handling all hooks and cables, making all hitches, securing and setting all blocking and foundations, setting outriggings, securing, handling, setting and operating jacks, setting and securing rerailers and other equipment used to clear up wrecks and derailments; Provided:

(a) At wrecks or derailments where the Carrier deems it necessary to employ equipment of outside contractors such as cranes, bulldozers, etc., to clear up wrecks or derailments, the contractor may furnish the operators of such equipment provided a minimum of 2 carmen employed by the C&NWT are utilized in wrecking service at the scene during the hours the contractor's equipment is operated. In the event additional men are required they will be taken from the carmen class.

(b) Where the use of the contractor's equipment as set forth in (a) is contingent upon the contractor furnishing personnel other than actual operators of such equipment, it is agreed that the carrier will provide one carman for each man (other than operators) furnished by the contractor (including in such count the 2-man minimum set forth in (a)) with maximum of 6 men. Where contractor furnishes over 12 men other than operators than the maximum of C&NWT carmen will be increased to 8.

(c) The above requirements are contingent upon the carmen employes being reasonably accessible to the wreck.

NOTE: In determining whether the carrier's assigned wrecking crew is reasonably accessible to the wreck, it will be assumed that the groundmen of the wrecking crew are called at approximately the same time as the contractor is instructed to proceed to the work.

3. Where carmen are to be used in wrecking service from points where wrecking service crews are assigned, carmen assigned to such required wrecking service or alternate men shall be used if available. If additional men are required they shall be called in seniority order from the list furnished by the local chairman.

4. Carmen engaged in wrecker service shall while so engaged be compensated at their regular rate (straight time or overtime as the case may be) from time reporting at headquarters, until released at headquarters, subject to release for rest provisions at wreck site, with premium pay of 30 cents per hour for wrecker engineer and 25 cents per hour for remainder of wrecker crew. This premium pay is an arbitrary and is not subject to escalation; nor does it vary whether time paid for is at straight time or penalty rate. Any and all requirements that the wrecker crew accompany the 'wrecker,' or that time paid for continues until wrecker returns to headquarters are eliminated.

5. In determining what constitutes wrecking service it is understood that time traveling to wreck site from headquarters, and wreck site to headquarters constitutes wrecking service, and is to be paid for as time worked. It is further understood that carmen may be used as 'escort drivers' or to actually drive either the Carrier's or Contractor's equipment to or from wreck sites, and that the wrecker rate above set forth covers such service.

6. The premium pay set forth in Item 4 hereof applies to operators and carmen of the 'wrecking trucks' of the carrier when such trucks are engaged in wrecking service.

7. The existing agreement between the former M&StL and the BRC of the United States and Canada which provided for payment at overtime rate for any wrecking service outside yard limits, which agreement was continued in effect for former M&StL carmen subsequent to placing such carmen under the C&NW agreement (Green Book) is cancelled.

8. Nothing contained herein shall be construed as to deprive other shopcraft employes of work covered by their classification of work rules. Neither does anything contained herein effect the rights of M of W employes in connection with the performance of M of W work at wreck sites.

9. Existing wrecking service positions will not be rebulletined as a result of this agreement.

10. The above Memorandum Agreement constitutes the election of the General Chairman under Article VII - Wrecking Service of the National Agreement. Case No. A-9699 effective January 12, 1976 and the provisions of this Memorandum Agreement will apply in lieu of such Article VII."

The Carrier takes the position that the Agreement of May 23, 1939, which established Mechanics-in-Charge specifically stated that they will "be permitted to do any and all mechanics work." Further, it is the position of the Carrier that from 1939 to approximately the time the instant claim was initiated that Mechanics-in-Charge at outlying points have performed car and motive power work at points other than where headquartered, that such performance has been known to the Organization, and that the propriety of such use had not previously been questioned. For instance, at the time negotiations were held leading up to the May 23, 1939 Agreement, the Carrier's records indicate there were a total of 32 working foreman (subsequently called Mechanics-in-Charge) employed by the Carrier in its Car Department. They attach as a Carrier Exhibit, a statement dated February 23, 1939 showing the locations at which assigned and the work performed by each. The Carrier calls the Board's attention to the fact that of the 32 Mechanics-in-Charge, 23 or 72% of such Mechanics-in-Charge performed road work, i.e. took care of bad order cars set out at points other than at the headquarters of the assignment at the time of the 1939 agreement. The Carrier's records clearly indicate that during the negotiations resulting in the May 23, 1939 Agreement, organization representatives never at any time contested the practice of Mechanics-in-Charge performing road work. They also emphasize that such Mechanics-in-Charge have in fact continued subsequent to May 23, 1939, to perform road work as indicated on their Exhibit A.

The Carrier also mentions that in an August 6, 1980 letter the Carrier made the following statements which they suggest remained unchallenged by the Organization:

"We have MIC's stationed at the following locations with assigned road and work areas 15 to 150 miles from stations where assignment is started and completed. Some of these positions have been in existence for the past 30 years. Their work assignment covers all phases of carmen's work which includes inspection, measurement of open-top loads and repairs.

Stations are: Wood Street, 40th Street, West Chicago, Sterling, Rochelle, Irondale, Fremont, Ames, Missouri Valley, Madison, Wisconsin, Crystal Lake, Harvard, Lake Geneva, Adams, Altoona, Appleton, Antoine, Rhinelander, Wausau, Marinette, Manitowoc, New Ulm, Tracy, Fort Dodge, Eagle Grove, Norfolk, Rapid City, Belle Fourche and Worthington."

The Board has considered the arguments of the parties and have arrived at a number of threshold conclusions. The Carrier asserts that without rebuttal that Mechanics-in-Charge have done work away from their headquartered point. When this is considered in conjunction with the 1939 Agreement--which recognized the practice in effect at the time of Mechanics-in-Charge doing road work--there can be little doubt that MIC's can, generally speaking, do mechanics work on the line of road away from their headquarters point.

However, beyond this threshold consideration it must be asked whether there is any specific exception elsewhere in agreements between the parties which could be considered as reserving work in conjunction with derailments to Carmen to the exclusion of MIC's. In Award 9394 such a specific exception to the more general 1939 Agreement was found in the 3-1-76 Memorandum of Agreement relating to Rules 126 and 127. This exception related to derailments where contractors were utilized.

A further review of the Agreement including Rules 126, 127 and the Memorandum related thereto fails to reveal any specific exception which would reserve work on the line of road in connection with derailments to Carmen under the circumstances.

The second paragraph of Rule 127 clearly would allow the use of employes such as the Mechanic-in-Charge. Rule 127 from the Agreement reads:

> "All or part of regularly assigned wrecking crews, as may be required, will be called for wrecks or derailments.
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> This does not preclude using other employes to pick up or clear minor derailments when wrecking derrick is not needed."

It is also noted that the Organization challenged the practicality of the Carrier's having not sent two carmen from Green Bay as opposed to transporting two separate employes from two separate points. The assignment of employes so long as it is consistent with the Agreement is clearly within the prerogatives of the Carrier. Therefore, the Board will make no finding on this point.

In view of the foregoing, the claim is denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of June, 1984