

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

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
(Detroit & Mackinac Railway Company

Dispute: Claim of Employees:

1. That under the current agreement, the Detroit & Mackinac Railway Company violated Rules 27, 111, 114 and 115 of the Federated Shops Craft Agreement of September 1, 1949 and Article 7, "Wrecking Service", 1975 National agreement. That, Carman Edward Trudell, Raymond Donajkowski & Kenneth Blust, were denied compensation of pay, when on February 23, 1982 - Supervisor Richard Van Buskirk, traveled from Tawas Shops to Alpena yards and performed Carmen's work of rerailing Engine No. 975.
2. That accordingly, the Detroit & Mackinac Railway Company be ordered to pay the aforementioned Carmen, penalty time of eight (8) hours each, at time and one half, Carmen's rate of pay, for being denied the right to perform the Carmen's work of rerailing.

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.

The Claimants involved in the instant case are Carmen employed by the Carrier at Tawas City, Michigan, they also serve on Carrier's wrecking or derailment crew. On February 23, 1982, Engine No. 975 derailed at Alpena, Michigan, which is 67 miles north of Tawas City. The Claimants were notified some time before 5:00 P.M., to report at 7:00 A.M., (one hour early) the next morning, to travel to Alpena to rerail the engine. When they reported in the morning they were informed that the engine had been rerailed. They were compensated for the one hour early call at the time and one half rate. They claim an additional eight hours for each Claimant at the time and one half rate, account:

"Supervisor Richard Van Buskirk traveled from the Tawas shop to Alpena yards and performed Carmen's work of rerailing engine No. 975."

In support of their claim the Employees cite the following provisions from the following Rules:

"Rule 27 - Assignment

1. None but mechanics or apprentices regularly employed as such shall do mechanic's work as per special rules of each craft, except foreman at points where no mechanics are employed."

"Rule 111 - Classification of Work - Last sentence and all other work generally recognized as Carmen's work."

"Rule 114 - Wrecking Crew - Pertinent part

Regularly assigned wrecking crews, not engineers and firemen, will be composed of carmen, and will be paid for such service under Rule 7."

"Rule 115

When wrecking crews are called for wrecks or derailment, outside of yard limits, a sufficient (sic) number of the regularly assigned crew will accompany the outfit. For wrecks or derailments within yard limits, sufficient (sic) carmen, if available, will be called to perform the work."

"Article 7 1975 - Wrecking Service

1. When pursuant to rules or practices, a carrier utilizes the equipment of a contractor (with or without forces) for the performance of wrecking service, a sufficient (sic) number of the carriers assigned wrecking crew, if reasonably accessible to the wreck, will be called (with or without the carrier's wrecking equipment and its operators) to work with the contractor. The contractor's ground forces will not be used, however, unless all available and reasonably accessible members of the assigned wrecking crew are called. The number of employees assigned to the carrier's wrecking crew for purposes of this rule will be the number assigned as of the date of this agreement."

The Employees contend that:

1. They are entitled to compensation account not being allowed to perform this rerailment due to supervisor Buskirk performing it.

2. That the only exceptions to carmen performing rerail service is when done by trainmen when they could do it with a frog.

3. That Second Division Awards 5894, 1442, 2908, 6447, 7214 and 7607, support the position of the Claimants.

The Carrier contends that:

1. The derailment was minor in nature.

2. They were not deprived of any earnings and could not have earned more had they gone to the derailment.

3. While the function of rerailling may be generally recognized as carmen's work it is not restricted to carmen and that rule 111 does not give carmen the exclusive right to reraill service.

4. That trainmen have rerailed cars without the assistance of carmen and that Maintenance of Way employes have assisted trainmen in rerailling with no grievances filed by carmen.

5. That Rules 27, 114, 115 and Article VII of the 1975 National Agreement are not applicable.

6. That the carrier has no assigned wrecking crew.

7. That three employes were not needed.

8. That the employes have claimed excessive time and an excessive rate.

We shall deal with the contentions of both parties not necessarily in the order shown.

Insofar as the derailment being "minor in nature" the Agreement makes no exceptions and gives no definitions for alleged "minor derailment" so this Board has no knowledge of what constitutes a minor derailment, if there is any such thing, it does not however, appear to be minor enough to come under the category of a de minimum case.

The fact that the Claimants were not deprived of any earnings and may not have earned any more had they gone to the derailment is irrelevant, this Board has sustained countless cases where the employe or employes could not have earned more had they performed the work.

Carmen not having exclusive jurisdiction, in this case the carmen have made no claim to exclusive jurisdiction, and the Agreement itself provides exceptions, in defending against exclusive jurisdiction, the carrier is defending against something the employes have not claimed.

That trainmen have rerailed cars without the assistance of carmen, the employes have agreed that they have, this is an exception that the employes are agreeable to, but in the instant case, the train crews appear not to be involved. Maintenance of Way employes assisting in derailments with no grievances made by carmen, since no substantiation is provided this must be considered only an assertion and the carmen allege they have no knowledge of Maintenance of Way employes assisting in derailments.

Whether Rules 27, 114, 115 and Article VII is applicable to this case depends on the facts of the case and in any case must be considered as they are the governing rules agreed to by both parties.

Also whether or not the carrier has a wrecking crew is immaterial as wrecking and rerailment service is covered in the rules and carrier themselves assigned the Claimants to rerailment service in the instant case.

Three employes not needed, we believe this to be correct, but three were called and are Claimants, we will deal with this matter later.

That the employes have claimed excessive time and at an excessive rate, we will also deal with this matter later.

The carrier has described the events leading to this case as:

"Upon arrival, the superintendent motive power and equipment found the derailment was indeed minor in nature and promptly rerailed the engine with a few boards available in the vicinity."

This description of the work leaves much to be desired as we know of no way that a single individual could rerail a locomotive using only a few boards. Had the train crew been involved and the boards placed either in front or behind the wheels with the engineer then moving the engine either forward or backward raising the wheels on top of the boards to the point where they would ride naturally back on the rails it could probably be done, however, either in their submission or in the correspondence on the case the carrier makes no mention of the train crews being involved, according to all of carrier's statements including their submission the superintendent did it alone. Of course, he could have been a former engineer, but if he was it does not appear in the record. The fact remains however, that somehow the superintendent apparently did get the locomotive back on the rails.

Rules 111, 114, 115 and Article 7 of the 1975 Agreement read in part:

Rule 111 -

"and all other work generally recognized as carmen's work."

Rule 114 -

"Regularly assigned wrecking crews ... will be composed of carmen ..."

Rule 115 -

"When wrecking crews are called for wrecks or derailments ... a sufficient number of regularly assigned crew will accompany the outfit."

Article 7 -

"When pursuant to rules or practices, a carrier utilizes the equipment of a contractor ... for the performance of wrecking service, a sufficient number of the carrier's assigned wrecking crew, if reasonably accessible to the wreck will be called ..."

All the above rules refer only to carmen, strongly indicating that wrecking and rerailling service is carmen's work, and on page 5 of their submission, carrier states in part:

"While the function of rerailling may be generally recognized as carmen's work, rerailling is not restricted to carmen; thus, the interpretation of rule 111 does not substantiate the claim. Rule 111 does not give carmen exclusive right to reraill."

Thus Carrier does recognize rerailling as carmen's work but not exclusively, which carmen have not claimed, therefore, the question is what are the exceptions and is the superintendent included among those exceptions? The carmen themselves have agreed that train crews can reraill when "they can do it with a frog". Article VII of the 1975 National Agreement provides an exception under which in accord with certain agreed to conditions, the work can be subcontracted and Rule 27 first and second paragraphs provide three exceptions, they are:

1. Foreman at points where no mechanics are employed.
2. Foreman in the exercise of their duty.
3. Foreman in an emergency.

The Second Division of this Board in its Award No. 3972, Carmen vs. the C&O Ry Co., Referee Howard Johnson stated in pertinent part:

"When a provision is adopted with a specific exception the only rational conclusion is that no other exceptions are intended. That conclusion is the basis for the well established rules of contract and statutory construction that 'the specification of one thing is an exclusion of the rest', and that 'an exception affirms the rule in cases not excepted'."

In Second Division Award No. 6806, IAM vs. Clinchfield RR Co., with Referee Dana E. Eischen, it was stated:

"... under well established arbitral rules of contract interpretation, it is said that where the parties specifically mention items intended to be covered all things not mentioned were intended to be excluded (expressio unis est exclusion alterius). See Third Division Awards 4438, 8172, 11165, 13719 et. al."

The superintendent is not among the exceptions provided for in the Agreement, nor by past practice, therefore, and in accord with Awards 3972 and 6806, we find that the Carrier violated the terms of the Agreement when they used the superintendent instead of the Carmen or a Carman to reraill the locomotive. There remains only the remedy. The Employees claim eight (8) hours for each of three Claimants, but since the superintendent apparently accomplished this task sometime between evening and 7:00 A.M., the hours claimed is clearly just a guess and not a very good one. The Carrier alleges that the time required

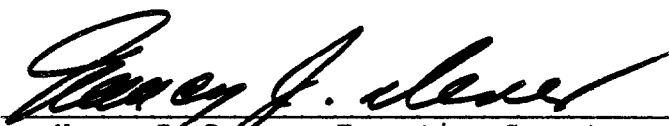
to travel to Alpena, rerail the locomotive and return to Tawas city, would require only three hours and thirty minutes, but this also seems most doubtful. We believe a reasonable time would be eight (8) hours and will so rule. The Claimants also claim the time and one half rate, however, this Board has almost consistently ruled that pay for time not worked is at the straight time rate. We see no reason to differ from that. We will therefore, order the Carrier to compensate the Claimants in an amount of eight (8) hours at straight time rate to be equally divided among them.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 8th day of August, 1984.