

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

(Brotherhood Railway Carmen of the United States
(and Canada

Parties to Dispute: (

(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Dispute: Claim of Employees:

1. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company violated the provisions of the current agreement Rules No. 32(a) and 85, when they assigned a car foreman to operate the Holmes rerailing crane, while it was being used in a none emergency repair situation, at the Davies Yard, in Milwaukee, Wisconsin.

2. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to compensate relief operator, Carman S. Jenders, in the amount of three (3) hours and twenty (20) minutes pay at the time and one-half rate, or five (5) hours pay at the straight time rate, as called for in the minimum call Rule #8(f) of the current Agreement dated September 1, 1949, as amended.

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 employees involved in this dispute are respectively carrier and employees 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 5, 1983 a Car Foreman assigned two Carmen to change the wheels, springs and adapters on Milwaukee Car 4752 which was spotted on the rear end of Davies three track at the Carrier's Davies Yard in Milwaukee, Wisconsin. When the Carmen indicated that they were ready to move the lift, the Foreman asked one of the Carmen for instruction on how to operate the crane (known as a Holmes rerailing crane) and permit the Foreman to make the lift. The Foreman claims that he wanted to learn exactly how the crane

handled and operated. The Carman stood next to the crane and shouted instructions. The Foreman made the lift using the Holmes crane and the other Carman changed the car wheels. Generally, the crew operating the Holmes crane consists of two regularly assigned Carman and one relief man.

The Claimant herein is the relief man on the Holmes Crane. When not actually working on the Holmes crane, he works at regularly assigned Carman duties. On the day in question, the Claimant worked and was paid eight hours for his regularly assigned Carman duties.

The Organization argues that the Foreman did the work that should have properly been assigned to the Claimant and therefore violated Rules No. 32(a) and 85 of the Controlling Agreement. According to the Organization, there is nothing in the Agreement that permits an employee to teach his Supervisor, noting that Rule 32(b) only permits a Foreman to do Carman's work where the Foreman is instructing the employee. The Organization has questioned the need of the Foreman to have the instruction in light of his long experience. The Organization also argues that while the Claimant was compensated for eight hours work on the day in question resulting from his normal Carman duties, Claimant is nevertheless entitled to further compensation as requested, because, if the Foreman did not do the work, the Claimant would have had to work overtime outside of his normal eight hours. Such a request, according to the Organization, is not a penalty claim but is one that is make-whole in nature.

The Carrier asserts that no violation of the Rules existed, first, because nothing in Rule 85 specifically describes operating a crane to lift a box car as Carman's work; second, because the Foreman was merely learning how to operate the crane so that he could instruct his subordinates which is permissible under Rule 32(b); third, because although the Foreman may have operated the crane, he performed no repair work on the box car to make out a Rule 32(a) or Rule 85 violation; fourth, the crane operation was normally performed by two Carman and while the Foreman was being instructed by one of the regularly assigned Carman, the other regularly assigned Carman performed the necessary work on the car. Therefore no employee was denied work; fifth, since the Claimant worked a full eight hours and was compensated accordingly, there is no remedy for the Claimant. To make such an award as sought by the Organization would amount to an unjust enrichment or penalty that is not provided for in the Agreement.

This case is somewhat unusual, since it arises not from either of the two common issues in this kind of case: a Foreman doing work in a claimed emergency situation or a Foreman doing work and claiming to be merely instructing another employee. In those cases, the Foreman claims to merely be doing his own supervisory work and the parties dispute the bona fides of whether or not that is true. Instead, this Claim arises because a Foreman allegedly took instruction from the employee, rather than visa versa.

First, with respect to the Organization's questioning of whether the Foreman actually needed the instruction on the crane, we find nothing in the record to satisfactorily refute the Carrier's assertion that the Foreman was indeed receiving instruction from one of the Carmen and such was the reason he operated the crane.

Second, we have carefully examined the record to determine precisely what occurred when the Foreman performed the lift using the crane. We have found that, as a general rule, the crane crew consists of two Carmen and one relief man. The Foreman's unrefuted statement precisely describes the events:

"On May 5, 1983 I assigned Mr. J. Brunner and Mr. C. Lentz to change out the wheels, springs and adapters on car Milw 4732, which was spotted on the rear end of Davies three track. Some time later they motioned to me they were ready to make the lift on the south end of the car so that I could arrange to have the wheels delivered. I asked Mr. Brunner if he would instruct me on how to operate the crane and I would make the lift to learn exactly how the crane handled and operated. As there is only room for one person in the crane cab, Mr. Brunner stood next to the crane and shouted the instructions up to me. Mr. Lentz changed the wheels on the car. Except for the lift truck delivering the wheels, one ground man can very easily change the wheels alone when working with the Holmes crane. As evidence of this, Mr. Lentz and Mr. Brunner went on that day to also change out the springs on the south end of the car alone. They also changed the wheels, adapters and springs on the north end of the car with their only assistance coming from the lift truck deliveries of material.

It is important to understand that when changing wheels out with the Holmes 43, the ground man does not disconnect the car's trucks but rather chains them to the car. Therefore, when the car is lifted the wheels remain on the rail, the car body and truck are raised up together. When coming down, the ground man holds the wheels steady and the crane operator can very accurately lower the car down on the wheels. At that point the ground man applies the adapters and the operator lowers the car completely down.

Two men are normally assigned to work this type of job with the Holmes 43, as that is all the man power that is needed, as evident by the fact that these men completed the car alone and have worked many cars in such a fashion in the past."

We find the following part of the Foreman's unrefuted account to be most significant:

"As there is only room for one person in the crane cab, Mr. Brunner stood next to the crane and shouted the instructions up to me. Mr. Lentz changed the wheels on the car." [Emphasis ours]

Thus, the Foreman did not perform the work of another crane crew employe on the date in question to the detriment of that employe or any other employe. The Carman who would have been in the one man Holmes crane, was briefly relieved of his duties of physically operating the crane and instead shouted instructions to the Foreman on how to perform the lift. For all purposes, we are satisfied that the Carman, albeit removed, was nevertheless working in operating the crane and was compensated for his services. Nothing in the record demonstrates, and no Party asserts, that the Carman lost work or compensation as a result of the Foreman's taking instruction and working the crane.


In light of the above, we find it unnecessary to address any questions raised as to whether or not the operation of the crane was exclusively Carmen's work or whether or not the Claimant would be entitled to compensation for instruction, in light of the fact that he nevertheless received eight hours' pay for his work as a Carman on regularly assigned duties on that date. Nor do we find it necessary to address any of the other issues raised by the Parties. This somewhat unusual fact situation leads us to conclude that the Foreman's actions did not violate the Agreement so as to warrant any type of affirmative relief.

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 8th day of October 1986.