Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11905
SECOND DIVISION Docket No. 11683-T
90-2-88-2-170

The Second Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/Division of TCU
(
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

1. Carmen B. Pavlica, M. Broderick, Z. Urosevic, A. Antonijevic, M. A. Winter and L. Ivancevic, Proviso, Illinois, were deprived of work and wages to which they were entitled when the Chicago and North Western Transportation Company violated the controlling agreement on July 10, 1987 at derailment at Barrington, Illinois, when the Carrier failed to call the six Carmen Claimants to operate Maintenance-of-Way crane and assist contractor in rerailing ore cars DMIR 26715, 26729, 26626 and 26924.

2. Accordingly, Carmen B. Pavlica, M. Broderick, Z. Urosevic, A. Antonijevic, M. A. Winter and L. Ivancevic are entitled to be compensated in the amount of eight (8) hours pay at the time and one-half 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.

As Third Party in Interest, the Brotherhood of Maintenance of Way Employes was advised of the pendency of this dispute but chose not to file a Response with the Division.

Shortly after 12:30 A.M., on July 10, 1987, four cars of a sixty car train derailed in Barrington, Illinois. Carrier utilized the services and equipment of a contractor, Carmen from Janesville and a crane and forces from its Track Maintenance department in clearing the derailment. The Carmen's Organization claims that members of the Proviso Wrecking Crew should have been used.

Carrier contends that the Agreement permits using a contractor to clear wrecks as long as it assigns the required number of Carmen to assist the contractor and the crew. In this matter Carrier used four Carmen from Janesville to assist the contractor, as the wreck occurred in their territory. Proviso Carmen, assigned to the Wrecking Crew, do not have a superior right to the work. On the matter of using equipment and forces from its Maintenance of Way Department, Carrier argues that an Engineering Department crane was nearby, the blocked main line needed to be cleared for rush hour Suburban Passenger Service, thus the crane and crew were placed in emergency service to move one car to clear the mainline. This, Carrier contends, was the only work done by Maintenance of Way forces and is proper under emergency considerations.

We agree that the Agreement permits Carrier to use the services of an outside contractor in clearing derailments and provides for the assignment of a specific number of Carmen to work with the contractor. In the circumstances of this case the Agreement was not violated in connection with the work performed by the contractor, as the Rule does not require that the Carmen assigned to assist be from a specific location, nor does the Rule give preference to the work to Carmen assigned to a wrecking derrick over other Carmen in the jurisdiction of the derailment location. Accordingly, the Claim is without merit with respect to the work performed by the contractor and Janesville Carmen.

However, the situation is different with respect to the use of Maintenance of Way equipment and forces. We are not persuaded that a valid emergency exception, as contended by Carrier, is present, in the circumstances of this derailment. Every derailment or wreck which blocks busy lines is, by its very nature, an emergency situation which calls for quick remedial action. Emergency wreck situations are the underlying purpose of special wrecking crew rules within the Carman's Agreement. The Rule is designed to provide quick response by skilled Carmen, or an outside contractor, and its details set forth the parties clear understanding on work which may be performed by Carrier employees not within the Carmen Craft. The Rule is silent on the use of employees and equipment as a substitute for a wrecking derrick just because the employees and equipment happened to be nearby.

Our reading of the Carmen's Wrecking Rule does not persuade us that a correct reading would permit using both equipment and forces from other departments in wreck clearing operations, to the exclusion of available regularly assigned Wrecking Crew Carmen.

The first sentence of Rule 60 reads:

> "All or part of regularly assigned wrecking crews, as may be required, will be called for wrecks or derailments."

Standing alone, the Rule clearly requires that all or part of a regularly assigned wrecking crew will be called for wrecks or derailments. The number to be called depends on the number which may be required by the circumstances of the wreck. The Rule, though, does not seem to permit a situation that no Carmen from the Wrecking Crew be called. It would seem that at least part of the Crew must be called.

The second sentence or Rule 60 provides an exception when a wrecking derrick is not needed. The exception reads:

> "This does not preclude using other employees to pick up or clear minor derailments when wrecking derrick is not needed."

Carrier argues that its wrecking derrick was not used, accordingly, it was not required to utilize Carmen regularly assigned to the Proviso Wrecking Crew. However, the facts are that a wrecking derrick (or adequate substitute) was needed. The only reason that the derrick from Proviso was not used was because Carrier substituted a Track Department crane in its place. (Not using the Proviso wrecking derrick because a substitute from another department was available is different from a situation where a "wrecking derrick [was] not needed.")

The Rule specifically allows Carrier to use the equipment and services of a contractor and his employees in wreck and derailment clearing activity. Also the Rule specifically does not preclude using other Carrier employees in minor derailments when a wrecking derrick is not needed. The structure of the Rule is such that any use of enterprises and employees (contractor and Carrier) other than Carrier's Carmen in wrecking and rerailing clearing operations are exceptions to a requirement to use Carmen in such activity. These exceptions, being clearly defined, do not include use of a Track Department crane and forces as a substitute for a Carman manned wrecking derrick.

It is basic that when certain exceptions are provided in an Agreement provision none others may be implied. The pick up operation, involved in this derailment, was not minor. A wrecking derrick (or suitable substitute) was needed to clear the main line. The Rule cannot be fairly read to "not preclude using other employees" because the other employees used, substituted their own crane for one which Carmen would have normally used.

As we read the second sentence of Rule 60 the involvement of a wrecking derrick goes to the definition of what is considered a minor derailment - not which department has control over the equipment. Other employees may be used in clearing minor derailments when such equipment "is not needed." Such equipment was needed in this case, thus Carrier was precluded from using other employees in the operation.

The use of Maintenance of Way forces and equipment, to the exclusion of members of the Proviso Wrecking Crew, violated the Carmen's Agreement. Accordingly, as a remedy for the violation, each of the six Claimants, named in the Statement of Claim, shall be allowed four hours pay at straight time rates.

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 1st day of August 1990.

CARRIER MEMBERS' DISSENT
TO
AWARD 11905, DOCKET 11683-T
(Referee Fletcher)

In this award, the Majority has taken it upon themselves to ignore the essence of an emergency situation. In the instant case, the blocked main line was one of the main commuter arteries leading into the City of Chicago. This artery had to be clear for the morning rush. The Majority stated that the rule was silent on the use of employees and equipment as a substitute for a wrecking derrick just because the employees and equipment happen to be nearby. Since the rule was silent, it is clear that this rule did not prohibit the Carrier from acting as it did under the emergency. The Majority clearly has disregarded a well-established dictum in the railroad industry. Special Board of Adjustment 356, Award 124, stated this very succinctly:

> "It is of axiomatic principle that the Carrier is not limited except where expressly limited by the terms of its contract with the representatives of its employees."

Under the circumstances of the instant case, Carrier only used the maintenance of way forces to clear one track while a contractor was used to fully open the other tracks as is permitted by the contract. Under the emergency situation relative to the commuter traffic, this was clearly a reasonable course on the Carrier's part.

Additionally, the Majority has taken it upon himself to rewrite the contract, something which the Board lacks the power to do. As noted at page three, the second sentence of Rule 60 states:

"This does not preclude using other employees to pick up or clear minor derailments when wrecking derrick is not needed." (Emphasis added)

The Rule does not read, "Wrecking derrick or suitable substitute." If the framers of this Rule, as it was written in 1985, had intended that anything other than the wrecking derrick, as commonly known in railroad usage, was to come under this Rule, they would have clearly so stated. What they clearly did state was: "when wrecking derrick is not needed," period. They allowed for no other inclusions or substitutes. The Majority has clearly usurped powers that belong to the Carrier and Organization acting in concert. Therefore, based on the foregoing, this Award is flagrantly erroneous and has no precedential value whatsoever.

We Dissent.

P. V. VARGA

M. W. FINGERHUT

R. L. HICKS

M. C. LESNIK

J. E. YOST

CARRIER MEMBERS' DISSENT
TO
AWARDS 12122 - 12130, DOCKETS 11905, 11913, 11914,
11934, 11936, 11990, 12037, 12116, 12117
(Referee Fletcher)

In 1986, the Contracting Parties entered into a National Agreement providing for a specific rate of pay for those involved in Intermodal Service. The purpose for negotiating such a provision was to enable the railroads to compete with trucks and other modes of transportation handling Intermodal traffic. It was never the intent of the contracting parties that such ability to compete with other modes of transportation would fluctuate on a day to day basis but was to provide a level and stable platform from which the railroads could confront the other transportation modes.

In these cases, the Majority has correctly found that Barstow, California, one of nine locations on this railroad performing Intermodal work, was covered by Section 1(b) of Article IV of the November 19, 1986 Agreement. All of the Claimants held positions that were engaged in work in connection with Intermodal equipment and they had been compensated in accordance with Section 2 of Article IV almost two years prior to the filing of the first case here involving December, 1988. The Majority also properly concluded that the language, "preponderantly engaged" does not, "limit employees such as Claimants to work exclusively in connection with intermodal service."

The only issue in these cases was:

> "...at what point is the Carman no longer working on a position 'preponderantly engaged in work in connection with the operation of intermodal facilities.'"

While the Majority states as a fact that:

"The Agreement gives us no guidance..."

as to how to evaluate "preponderantly engaged" it has nevertheless concluded that such is to be done on a daily basis. This conclusion is wrong for the following reasons.

First, as noted above, there is NO CONTRACTUAL BASIS for such a conclusion. The positions involved were bulletined and were awarded as INTERMODAL POSITIONS having a regular five day work week. As the Majority has noted, "Unless it is demonstrated the work on a particular intermodal position is not somewhat consistent..." (Emphasis added), said position is an intermodal position compensated at the intermodal rate. Therefore, in order to assert entitlement to other than the intermodal rate, it must be demonstrated that the work of a position is sufficiently erratic to warrant it NOT being included under the rubric of "preponderantly engaged." In these cases there is no evidence of any position being shown as being such an erratic position that it was not entitled to be identified as an intermodal position.

Furthermore, the Majority's conclusion that, "when more than half the work day...is spent in connection with intermodal service," identifies an intermodal position, does severe violence to the concept of assigning positions by bulletin in this industry. One example will prove the point. An intermodal worker who spends 3 1/2 hours each work day of his assignment in other than intermodal service is an intermodal worker since, "more than half the work day" is in intermodal service. However, an individual who

spends the same amount of time on non-intermodal work but only on Monday and Tuesday of the work week is not an intermodal worker on two days of his work week. The same time, effort and work is expended, yet there are two different results. Such is not what the Parties intended and such action certainly does not provide a stable means to compete against the other modes of transportation.

Secondly, on the assumption that these nine claims represent the actual incidence of intermodal workers performing non-intermodal work at this location, we have a total of 51 dates consuming 587 hours, 40 minutes in just over 48 weeks (December 12, 1988 - November 14, 1989 - 240 work days). If just one Carman worked 3 1/2 hours each work day during these same 48 weeks in non-intermodal work he would have expended 840 hours in non-intermodal work for which he would be compensated only at the intermodal rate. It just does not make any rational sense that an individual could work 43% more than the total represented in these nine claims on non-intermodal work and be within the guidelines of these Awards. Yet, these multiple Claimants working far less hours in non-intermodal work are found here to be entitled to the other than intermodal rate.

In Award 12122, involving the largest number of Claimants (13), the largest number of dates claimed (18) and the most time (290 hours) over a six week period (December 12, 1988 - January 20, 1989) we find that the 290 hours claimed is less that 16% of the time worked by these Claimants (13 Claimants x 8 hours x 18 dates = 1872 hours). If we look at the time worked by these same 13

Claimants over the six week claim period (13 Claimants x 8 hours x 5 days/week x 6 weeks = 3120 hours) the total claimed is less than 10% of the time worked. By any calculation, other than on a daily basis, it is self-evident that Claimants were "preponderantly engaged" in intermodal work and were so engaged not just the majority of the time but the vast majority of time employed. Had the Parties desired to require that the determination of the status of the position being intermodal or not to be made on a daily basis it would have been a simple matter to have so stipulated. However, as the Majority has properly noted, there is no Agreement provision that supports such a conclusion.

Third, the Majority itself has noted the lack of contractual basis for making daily determinations when it acknowledges the need to provide an exception:

> "The Board recognizes that there may be circumstances, due to factors such as traffic patterns, when it is appropriate to measure the work over a somewhat longer period of time, e.g., a work week."

Obviously, the recognition, "that there may be circumstances" in which a daily determination would not apply, upholds and confirms the fact that there is no contractual provision to support the conclusion reached in these Awards. Furthermore, what are the traffic patterns that would entitle the Carrier to, "measure the work over a somewhat longer period of time..."? What other circumstances might be "appropriate"? To acknowledge the need for exceptions warrants the conclusion that an evaluation on a daily basis was not the intent of the Parties in negotiating Article IV.

The result made in this matter is a disposition made on perceived equity and not on any contractual support.

In Award 16 of PLB 4170, involving the application of the intermodal rate, we find the following:

> "If Claimants' positions are not primarily in intermodal service, they are not subject to Article IV. In resolving this dispute, we can consider only the evidence presented to us. The Carrier has furnished a computer generated report for the fourth quarter of 1988 which shows the number of man hours charged to various functions for each intermodal employee at Inman Yard. According to this report, Claimant Bailey worked 479.7 hours in intermodal equipment repair and 28.3 hours in shop maintenance. Claimant Tatum worked 388.7 hours in intermodal equipment repair and 8.8 hours in ship maintenance....The Organization, on the other hand, has submitted bulletins describing the jobs in question. Because maintaining pig cranes is only one of three duties listed on the bulletin, the Organization concludes this work constitutes only one-third of the job. In light of the Carrier's more precise time records, we cannot accept the Organizations's conclusion. Based upon the Carrier's records, it is evident that Claimants' jobs are primarily in intermodal service." (Emphasis added)

Here, the review was over a thirteen week period; not daily.

Again, there is no support either in Article IV of the November 19, 1986 Agreement or in Letter No. 3 for the conclusion that bulletined and assigned Intermodal positions are to be reevaluated and reclassified on a daily basis.

The Majority, in support of its conclusion has noted that this Board historically, "...has examined the nature of an employee's work on a daily basis" and that there is nothing in the 1986 Agreement that would change that view. However, such a conclusion can only be reached if the basic purpose of the Intermodal provisions are ignored. No railroad can compete with other less

costly transportation modes when its ability to compete is restricted by an artificially imposed barrier.

The Majority also relies on rules 20 and 38 to support its position of daily review. However, Rule 20 applies to the rate of pay for the filling of vacancies and there is no dispute that these cases DO NOT INVOLVE THE FILLING OF A VACANCY. It is a fact of record that the Claimants were assigned at the time to intermodal positions by bulletin and assignment. There was no issue raised concerning the filling of vacancies. And certainly there is no dispute that Claimants properly could be required to perform non-intermodal work so long as they were "preponderantly engaged" in intermodal work. Thus, there were no other positions nor were there any vacancies to be filled. Concerning Rule 38, it was NEVER raised on the property but was first raised by the Organization in their Submission to this Board. Even though such argument should have been excluded as being in violation of this Board's Circular No. 1, the fact is that the parties by agreement in that rule did make a specific contract provision, detailing when and how there would be a change in the rate paid for welding. The Majority has noted the fact here that there is NO SUCH RULE PROVISION in Article IV.

Finally, it was the Organization that asserted a violation of Article IV on the property. Thus, it was the Organization's burden to prove with substantial evidence that the National Agreement adopted on November 19, 1986, DID PROVIDE for the application of the intermodal rate to be made on a daily basis. The Majority has

correctly concluded that the National Agreement DOES NOT contain such a provision and in fact, the Agreement provides NO GUIDANCE in this regard. The Organization's claims should have been denied on their failure to support their claims with evidence. Whatever the Parties meant by the term "preponderantly engaged" it is clear on these records that Claimants, at all times relevant, were "preponderantly engaged" in intermodal service and it was contractually proper to compensate them at the intermodal rate.

We dissent.

P. V. VARGA

M. W. FINGERHUT

R. L. HICKS

M. C. LESNIK

J. E. YOST