

The Second Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

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

STATEMENT OF CLAIM:

1. Carman R. L. Harrill was deprived of work and wages to which he was entitled when the Chicago and North Western Transportation Company failed to call him for a major derailment which occurred at Fremont, Nebraska on November 2, 1987, and instead utilized Carman R. L. Burns, who is not a regularly assigned member of the wrecking crew.

2. Carrier failed to timely respond to the Local Chairman's letter of December 4, 1988, and therefore is in violation of Rule 29 of the controlling agreement.

3. Accordingly, that Carman R. L. Harrill be compensated in the amount of four (4) hours pay at the time and one-half rate, \$79.26 plus .25 per hour incentive wrecking rate, amounting to \$89.26, due to Carrier's violation of Rules 29, 58 and 60 of the controlling agreement.

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.

On Monday, November 2, 1987, Carrier employed a contractor to re-rail freight Cars CR627607 and CR606846 which had been derailed at Fremont, Nebraska. Carrier assigned a Carman who was on duty at the time to assist in the rerailment work and he consumed four (4) hours of his regular assignment in rerailment work. In response to this assignment, the Organization later filed a time claim dated December 4, 1987, wherein it charged that Claimant

should have been assigned rather than the Carman to perform this work. Specifically, the gist of the Organization's petition is that Claimant as an assigned wrecking crew member was entitled to such work in accordance with Rules 21 and 60 of the current Agreement and available on November 2, 1987 for the assignment. It also asserts that Carrier's February 3, 1988, response to its December 4, 1987, claim letter was untimely. In other words, Carrier's response exceeded the Agreement's prescribed sixty (60) day limit.

Carrier disputes the Organization's timeliness assertion, arguing instead that it did not receive the time claim until December 7, 1987. It argues that the date received is the date the claim is filed and accordingly and consistent with Second Division precedent authority, the time limits toll from the date a claim is filed. (See Second Division Awards 7981, 8725, 8833.)

Furthermore, and as to the substantive issue, Carrier maintains that it was indeed proper to use the other Carman since he was assigned to wrecking service at Council Bluffs. It also contends that it was permissible to use this Carman, since a wrecking derrick was not used to perform the rerailing work. It points out that on November 2, 1978, Claimant was not available for work, since he was observing a rest day.

In considering this case, the Board finds no basis for supporting the Organization's timeliness assertion. In accordance with past decisions of this Board, the date a claim is filed initiates the tolling of the time limits and under the facts of this case, the claim was received (filed) on December 7, 1987 and denied on February 3, 1988. The Organization in its appeals correspondence has not shown a postmarked date on the envelope that would indicate an untimely mailing or even factually demonstrate when the denial letter was received.

Similarly, upon the facts developed in the on property appeals record, Carrier did not prove that the Carman called was assigned to wrecking service at Council Bluffs, and surprisingly it had the evidence in its possession. The Organization advanced proof that this Carman assigned job was oil Freight Car Repair and also submitted a confirming statement by this Carman. If Carrier had produced its Exhibit "A" on the property rather than with its Ex Parte Submission, it would have directly rebutted the Organization's contrary assertion.

On the other hand, while the Organization contends that Claimant was available for the November 2, 1987 rerailing work, there is no clear evidence, except a rebuttal presumption that he was in fact available. The Organization has not offered proof that he was available or adjudicative Second Division authority articulating the definitional dimensions of the word "available." There was also no showing of on property practice in similar situations. Consequently, in the absence of substantiating proof, the Board cannot conclude that Rules 21 and 60 were violated.

Form 1
Page 3

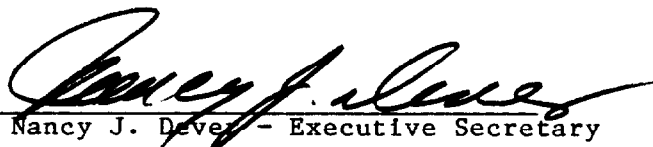
Award No. 11949
Docket No. 11735
90-2-89-2-5

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 28th day of November 1990.