Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 12394
SECOND DIVISION Docket No. 12111
92-2-90-2-233

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/ Division of TCU
(
(CSX Transportation, Inc. (formerly Chesapeake and Ohio
(Railway Company)

STATEMENT OF CLAIM:

1. That the Chesapeake & Ohio Railroad Company (CSX Transportation, Inc.) (hereinafter "carrier") violated the provisions of Rules 7 and 158 of the Shop Crafts Agreement between Transportation Communications International Union - Carmen's Division and the Chesapeake & Ohio Railroad Company (CSX Transportation, Inc.) (revised June 1, 1969) and the service rights of Carmen D. Grisson, W. Bowery, P. Curran, F. Lavenia, M. Davis and J. Lowery (hereinafter "claimants") when the carrier did not allow the claimants to accompany the wrecking outfit when returning from derailments.

2. That, accordingly, Carmen D. Grisson, W. Bowery, P. Curran, F. Lavenia and M. Davis are entitled to be compensated for six (6) hours each at the applicable rate of time and one-half. Further, that Carman F. Lavenia is entitled to be compensated for four (4) hours at the pro rata rate and six (6) hours at the time and one-half rate and Carman J. Lowery is entitled to be compensated for three (3) hours 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.

The facts herein are not in dispute. As a result of a derailment occurring at the Bremo Bluff Virginia Power Station, the Richmond Wrecking outfit and the Claimants were sent to the site on April 24, 1987 at 7:00 A.M. At approximately 11:30 P.M., the Claimants were returned to their home point

in Carrier trucks, although the wrecking outfit did not return until 5:30 A.M., April 25, 1987. As part of the Claim, the Organization seeks six hours' pay for the Claimants, under Rule 158 which reads as follows:

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

The issue here is whether the direction to have the crew "accompany the outfit" applies to the return from the wreck site. This is not a case of first impression, and Awards have variously sustained or denied such requirement, occasionally depending on the particular circumstances. Of the Awards presented for review by the parties, the Board here decides to follow the latest determination as found in Second Division Award 9708, which stated:

> "There are really two issues involved in this case. Does the wrecking crew have the right to accompany the wrecker on the return trip and . . . if they do, is the claim justified under the circumstances? In applying the divergent views reflected in the various cases cited to us, it is concluded first that generally speaking under the instant contract the employees at Birmingham have had a right to accompany the wrecker on the return trip. Further, if they do not accompany the wrecker they are entitled to be paid until the wrecker arrives.
>
> * * * * *
>
> [I]t is the judgment of the Board that the instant facts are close in nature for the purposes of realistic application of the relevant rules to the cases cited by the Organization. These cases appear to be the prevailing view among neutrals who have been faced with such difficult questions."

The Carrier cites Second Division Award 7664 on the property which denied pay under similar circumstances. However, that Award simply relied on failure of the Organization to show "established past practice", without further examination of the Rule, as was undertaken in Award 9708.

The remainder of the Claim concerns double time pay for service on a second rest day. The Carrier contends that the wrecking service constituted an "emergency", negating the entitlement for double time pay. The Board finds the Carrier's determination to be reasonable as applied to these circumstances. See Second Division Award 7246.

The Claim will be sustained solely to the extent of six hours at the pro rata rate of pay, since the Claimants were not required to perform work during the hours claimed.

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 15th day of July 1992.

CARRIER MEMBERS' CONCURRING AND DISSENTING OPINION
TO
AWARD 12394, DOCKET 12111
(Referee Marx)

The Majority concurred with the Carrier's determination that the involved wrecking service constituted an "emergency," thus negating entitlement to double time pay.

In addition, the Majority correctly pointed out that the issue was whether the language "accompany the outfit" applies to its return from the wreck site; and, moreover, that this was not a case of first impression. Unfortunately, however, they went on to selectively rely upon passages in Second Division Award 9708, an Award rendered on a different property and stated that they elected to follow that Award.

CSX had appropriately relied on Second Division Award 7664 which was rendered on the involved property (Chesapeake and Ohio Railway Company) and interpreted the same Rules with the same Organization. The Majority cavalierly rejected Award 7664 because, in the Majority's stated view, the Organization had failed in Award 7664 to show "established past practice."

Examination of the foregoing logic employed by the Majority in Award 12394 reveals it to be patently faulty, because in relying on only part of Award 9708 the Majority ignored the very foundation upon which that decision was based. In Award 12394 the Majority quoted from the same paragraph right up to, but not including, the following pivotal reasoning that underpins Award 9708:

> "The Organization has claimed that this is the manner in which the Agreement has always been applied at Birmingham. There is no response in the record by the Carrier on this point. Thus, in this respect, the

> instant case is distinguished from at least Second Division Award 7664." (Emphasis added)

Here we see a Majority intent upon relying on Award 9708, but ignoring the fact that the Carrier involved therein made no response to the Organization's claim of past practice and ignoring, as well, that such lack of response distinguished that case from Award 7664. If the Majority were inclined to rely on Award 9708, they should have relied on the entire Award and not merely self-serving passages. Had they done so, it is apparent Award 12394 would have reached the same conclusion as Award 7664.

Award 7664 adhered to the settled principle that if the Rule is silent or not clear, the Organization has the burden to establish by proof or competent evidence that past practice supports its claim, concluding:

> "Insofar as the return trip to Saginaw is concerned, the Rule does not offer the same clear interpretation. It is thus incumbent upon the Organization to show that established past practice has been that the Crew so accompany the equipment; this has not been accomplished on the record."

Thus, the claim for not being permitted to accompany the wrecker outfit on its return trip from the wreck site was denied by Award 7664 for failure of the Organization to show that "established past practice" supported the claim.

The on-property record in Award 12394 demonstrates that the Organization again failed to support its claim. The same Organization, which could not prove that past practice on the

Chesapeake and Ohio Railway Company supported its claim in Award 7664, could not do so in Award 12394.

At no time on the property did the Organization even allege, much less prove, that the Carrier had ever permitted a wreck crew to accompany the wrecker outfit on its return trip from the wreck site or had ever paid a wreck crew for not being permitted to do so. At page 7 of its Submission, the Organization asserts, for the first time in the history of this dispute, that:

> "It is the Employees' position that the historical past practice and recognized application of this Rule and proper interpretation thereof, has always recognized the right of the Carmen to accompany the outfit during derailments and the language as contained within the provisions of Rule 158 are clear and unambiguous with regard to that matter." (Emphasis added)

No rational basis exists for concluding that the above quoted portion of the Organization's Submission constitutes proof of past practice. Ironically, in the very next paragraph of its Submission the Organization actually relied upon Award 7664 which had previously denied its 1976 claim that employees should be permitted to accompany the wrecker outfit on its return trip.

The foregoing demonstrates that in Award 12394, no proof of past practice was shown by the Organization which would support the decision reached by the Majority. The Majority clearly recognized the failure of the Organization to show "established past practice" in Award 7664 and should also have recognized that failure in Award 12394. The Majority, in its poor attempt to distinguish Award

7664, actually signaled the basis why Award 7664 should have been followed.

Third Division Award 10911 sets forth the fundamental rule applicable in situations such as this:

> "When the Division has previously considered and disposed of a dispute involving the same parties, the same rule and similar facts presenting the same issue as is now before the Division the prior decisions should control. Any other standard would lead to chaos." (Emphasis added)

However, in disregard for precedent on the property and settled labor relations, the Majority issued an Award that no one should follow.

Michael C. Lesnik
M. C. Lesnik

M. W. Fingerhut
M. W. Fingerhut

Robert L. Hicks
R. L. Hicks

P. V. Varga
P. V. Varga

James E. Yost
J. E. Yost