Award No. 2448
Docket No. MW-2371

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Messrs. George W. Emery, Robert M. Whitesides, Warren Y. Cantrell and Carl A. Johnson, B. & B. Department employes, be paid three (3) hours under the provisions of Rule 31 for work performed not continuous with the regular work period on October 30, 1939.

EMPLOYES' STATEMENT OF FACTS: Messrs. Emery, Whitesides, Cantrell and Johnson are employes of Bridge and Building Gang No. 4, working under the supervision of Foreman Lee Moore. They are assigned to outfit cars, which are their home station. On October 30, 1939, outfit cars were located near Palm Springs, California. The regular established working hours were 7:00 A. M. to 11:00 A. M.—12 Noon to 4:00 P. M.

About 6:00 A. M. October 30, 1939, employes were called by Foreman Lee Moore to assist in removing wreckage of an automobile which obstructed the Carrier's main line as a result of colliding with the wig-wag protection signal at the railroad highway crossing near Palm Springs. Employes secured bars and other equipment from the tool car, following which they proceeded to the scene of the accident about one-half mile distant. Upon completion of the work the employes returned to the outfit cars, put tools away and were released about 6:30 A. M. Employes then ate breakfast and reported for work on their regular assignment at the starting time of the work period, 7:00 A. M.

Foreman Moore made no time allowance to employes for the performance of this work.

By letter dated February 28, 1940 (Employes' Exhibit "A"), the Division Chairman presented to Carrier's Division Superintendent, request that claimants be paid three (3) hours under the provisions of Rule 31 for work performed October 30, 1939.

By letter dated March 9, 1940 (Employes' Exhibit "B"), Carrier's Division Superintendent advised the Division Chairman that the work performed by the claimants was not railroad work and claim was declined.

By letter dated March 14, 1940 (Employes' Exhibit "C"), Division Chairman requested the Carrier's Division Superintendent to give further consideration to the claim.

By letter dated May 11, 1940 (Employes' Exhibit "D"), Carrier's Division Superintendent advised that a review of the case did not warrant any other conclusion than that expressed in his letter of March 9, 1940.

At the time the members of the gang received information of the accident, the foreman did not assume to issue instructions or orders to them to perform service or work for the carrier at the scene of the accident. He may have suggested to members of the gang that they render assistance to the owner of the automobile, but such suggestion—if it was made—was not in his capacity as the carrier's foreman, and so cannot be construed to be a notification or call to perform work for the carrier. Rule 31 of the current agreement clearly contemplates compensation only when employes are notified or called to perform work for the carrier.

The carrier submits that the claimants, not being notified, called, instructed or ordered to perform work for the carrier, were not entitled, under Rule 31 or any other rule of the current agreement, to compensation for the assistance rendered at the scene of the accident.

Had the foreman called the claimants to perform service for the carrier at 6:00 A. M., October 30, 1939, he would not have released them from service prior to their regular starting time but would have required the claimants to continue to work, and they would have been compensated on a continuous time basis under Rule 28 of the current agreement, which is as follows:

> "Except as otherwise provided in these rules, employes will be allowed time and one-half on minute basis for service performed continuous with and in advance of regular work period."

However, as previously established, since the claimants were not notified or called to perform service for the carrier prior to their regular starting time on October 30, 1939, neither Rule 28 nor Rule 31 were applicable, and therefore the carrier submits that the claimants were properly compensated for October 30, 1939, when they were compensated on the basis of their regular assignments.

CONCLUSION

The carrier submits that it has conclusively established that the alleged claim in this docket is entirely without merit and therefore respectfully submits that it is incumbent upon the Board to deny it.

OPINION OF BOARD: The claim is for three hours' minimum pay under Rule 31 for work not continuous with the regular work period. The work was performed on October 30, 1939, and consisted of procuring bars and other equipment from a tool car, proceeding to a crossing one-half mile away, removing a wrecked automobile which after colliding with a crossing protection signal had lodged between the signal and the track so as to foul the main line, and returning the tools to the tool car. This was all done between 6:00 and 6:30 A. M., after which the claimants had their breakfast and reported for their regular work period at 7:00 A. M.

The Carrier contends that, since the claim has been allowed to remain dormant for some two and one-half years, it should now be denied regardless of its merits and cites Awards 116, 1680, 1811, 2126, 2137 and 2146 as authority for that contention. But there is no limitations provision, either in the law or the applicable agreement, so providing; and in this claim there is no element of estoppel as in Award 2146, nor any continuing or cumulative claim as in the other awards cited; only the one incident is involved. The contention must therefore be denied, there being nothing either in the nature of the claim or in the record to indicate that the Carrier was prejudiced by the delay.

Rule 31 provides:

> "Except as otherwise provided in these rules, employes notified or called to perform work not continuous with the regular work period, will be allowed a minimum of three (3) hours for two (2) hours work or less."

The Carrier contends that the foreman did not "call" or "notify" the claimants to do the work but merely "suggested" that the assistance be given the owner of the wrecked auto in removing it. There would seem little practical difference whether the foreman called, notified or suggested to the Claimants that they do the work. Admittedly the initiative was supplied by the foreman who was in a position of authority, and the employes were hardly in a position to consider the difference between a notification and a suggestion, or the possible consequences to them of not doing what he desired done.

The Carrier states: "The Foreman did not assume to issue instructions or orders to them to perform service or work for the Carrier at the scene of the accident. He may have suggested to members of the gang that they render assistance to the owner of the automobile, but such suggestion—if it was made—was not in his capacity as the Carrier's foreman, and so could not be construed to be a notification or call to perform work for the Carrier." But it was his job to notify or call them for work in connection with the Carrier's facilities, and unless in his "suggestion" he expressly stated otherwise, the employes were entitled to consider it as in his usual scope of duty and therefore as within their duty to comply. The foreman's words are not given in the record, and the contention that they constituted a mere suggestion which did not amount to a notification or call cannot be sustained.

The Carrier further argues that "the removal of the auto from the crossing signal was not the obligation of the Carrier, but was the obligation of the owner of the auto," and that the Claimants' services were, therefore, performed for the owner and not for the Carrier. But they performed those services at the initiative of the foreman who, like the Claimants, was working for the Carrier and not for the automobile owner. Under the circumstances it would not seem material whether the obligation to remove the automobile from the Carrier's right-of-way was in the first instance the obligation of the owner or of the Carrier. Certainly the Carrier was obligated to keep its facilities clear of wreckage and in repair, which it could not do without removing the automobile. It may be the obligation of the owner to repay the Carrier for the expense incurred, but that is a matter which does not concern us here. The Carrier does not dispute the statement that the wrecked automobile "became lodged between the track and the crossing signal, fouling the main line." Certainly it was the duty of the Carrier to remove the obstruction, both to clear the line and to permit the prompt repair of the crossing signal, the maintenance of which was necessary for the public's protection.

The Carrier argues further that, "Had the foreman called the claimants to perform for the carrier at 6:00 A. M. * * * he would not have released them from service prior to their regular starting time but would have required the claimants to continue work, and they would have been compensated for overtime work continuous with the regular shift on a minute basis under Rule 28, rather than on a non-continuous basis, calling for a minimum of three hours' pay under Rule 31. But that is a matter for argument rather than of fact. While the foreman could have minimized the claim if he had followed the course suggested, his failure to do so cannot change the facts nor prove that he did not cause the work to be done or that it was not done for the Carrier.

It is clear that the claim is proper and must be sustained.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the agreement has been violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 2nd day of February, 1944.