Award No. 4853
Docket No. MW-4555

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Charles S. Connell, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

GALVESTON WHARVES

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated the agreement by not assigning to Hoist Operator M. L. Clark and Fireman A. C. Hansen the overtime work in connection with the handling of commodities at Pier 12 between the hours of 5 P.M. and 12:00 midnight on March 21, 1947;

(2) That the claimants M. L. Clark and A. C. Hansen be compensated for 7 hours pay at their respective rates provided for in Article 11, Rule 1, of the effective Agreement.

EMPLOYES' STATEMENT OF FACTS: On March 21, 1947 the Carrier had working on their property a crane owned by the Texas Gulf Construction Company. This crane was rented from this Construction Company in order to supplement the Carrier owned equipment working at this same point. However, on this referred to date the Carrier owned crane operated by Engineer M. L. Clark with Fireman A. C. Hansen was released at 5:00 p.m. and the claimants allowed to go home, while the crane belonging to the Texas Gulf Construction Company worked until midnight unloading revenue commodities. These revenue commodities referred to were in gondola cars.

The commodities were first picked up by crane working adjacent to the gondola cars. The commodities were then set on the ground nearby while the Clark fork trucks picked up these commodities and carried them across the street to storage sheds. These commodities remained in the storage sheds waiting shipment overseas. Such commodities were handled and controlled by the Galveston Wharves.

The Carrier's Crane No. 6, operated by Engineer M. L. Clark with Fireman A. C. Hansen, was available for this type of work at 5:00 p.m. There was a track along side the gondola cars which could be used for the operation of this Crane No. 6. Engineer Clark and Fireman A. C. Hansen performed no work for the Carrier between 5:00 p.m. and 12:00 midnight on March 21, 1947 and, therefore, received no compensation for such time.

The agreement in effect between the two parties dated August 1, 1944, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Article 1, Rule 1, Scope, states as follows:

"The rules contained herein shall govern the hours of service, working conditions and rates of pay of employes operating or firing

Exhibit No. 1, which is also attached, is a statement of the Laws of Texas, as enacted by the Legislature in December 1947.

CONCLUSION

Since the Organization is making claim for work not coming within the scope of their Agreement, work that is not railroad work and work that is in fact covered by an entirely different craft, the Board is respectfully requested to dismiss the claim presented in behalf of Hoist Operator M. L. Clark and Fireman A. C. Hansen.

(Exhiibts not reproduced.)

OPINION OF BOARD: Engineer M. L. Clark and Fireman A. C. Hansen are regularly assigned employes on Carrier Crane No. 6, and on March 21, 1947 they were released from work at 5:00 P.M. On the same date the Carrier worked a crawler type crane, operated by employes not covered by the Agreement, from 5:00 P.M. to midnight, unloading revenue commodities from gondola cars. These commodities were, after unloading, placed in storage sheds to await shipment, and were handled and controlled by Galveston Wharves. Carrier's Crane No. 6 operated by claimants was available during the time in question, and could have been used in unloading the gondola cars. The claimants contend that the Carrier violated the Agreement when it assigned to parties outside the Agreement work properly covered by the scope of the Agreement, when such work could have been performed by employes holding seniority under the Agreement.

The Agreement in effect between the parties dated August 1, 1944 contained the following Scope Rule:

"ARTICLE 1, SCOPE

> Rule 1. The rules contained herein shall govern the hours of service, working conditions and rates of pay of employes operating or firing locomotive hoists that are mounted on railway trucks and running on railway tracks when used for handling commodities handled or controlled by Galveston Wharves."

The Employes contend that the language of the Scope Rule quoted definitely placed the handling of commodities in question here, and controlled by the Carrier under the scope of its Agreement. The Carrier contends that since the work in question was performed by a crawler crane, then such work is outside the scope of the Agreement. The record clearly indicates that the claimants, as well as other employes similarly classed, have previously performed this type of work. The Carrier states that the reason Crane No. 6 was not used was that to move said crane to the place the work was done would have caused delay in unloading.

From the facts before us we are of the opinion that the work in question came under the Scope Rule of the Agreement, and that the Carrier violated the Agreement when it had the work done by other parties not covered by said Agreement. The work of unloading the commodities in question belonged to employes covered by the Agreement and the mere fact that the Carrier used a crawler type crane in the instant case, did not serve to remove the work from the scope of the Agreement. See Award No. 4546. The claim will be sustained.

The claimants request compensation for seven hour pay at the overtime rates provided for in Article 11, Rule 1 of the effective Agreement. In Award No. 4244, the Board said: "The right to perform work is not the equivalent of work performed insofar as the overtime rule is concerned. Whether the overtime rate be construed as a penalty against the employer, or as the rate to be paid an employe, who works in excess of eight hours on any day, the fact is that the condition which brings either into operation is that work must have been actually performed in excess of eight hours. One who claims compensation for having been deprived of work that he was entitled to perform, has

not done the thing that makes the higher rate applicable. One who has been deprived of work is not entitled to recover penalties accruing to the employe who actually performs the work where such penalties arise from the fact of his actually performing it. They are personal to such employe and are not a part of the loss sustained by the employe deprived of the work. The latter's loss is the rate the regularly assigned occupant of the position would have received if he had performed the work in the regular course of his employment." The work in question was performed outside claimant's regular hours, but the record is silent as to whether it was performed within the regular hours of other employes in the same class. The record is also silent as to whether extra or furlough employes were available to do the work. From the facts at our disposal, the claimants are entitled to seven hours at pro rata rate by reason of the Carrier's action.

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 Carrier violated the Agreement.

AWARD

Claim (1) sustained. Claim (2) sustained at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 1st day of May, 1950.