

NATIONAL RAILROAD ADJUSTMENT BOARD**THIRD DIVISION****(Supplemental)**

Claude S. Woody, Referee

PARTIES TO DISPUTE:**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY**

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

(1) The Carrier violated the Agreement when, on or about June 28, 1962, it assigned or otherwise permitted other than a Garage Serviceman to service Bulldozer No. 470 at Gary, Indiana.
[Carrier's file WM-19-62.]

(2) The senior garage serviceman assigned to the 7:30 A. M. to 4:00 P. M. shift at Gary, Indiana now be allowed compensation in the amount he would have received had he been called and used to perform the work referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The claimant was regularly assigned to the position of Garage Serviceman at Gary, Indiana, with a work week extending from Monday through Friday (rest days were Saturday and Sunday). His assigned hours were from 7:30 A. M. to 4:00 P. M., including a thirty (30) minute meal period.

Motor Car Repairman Ruge, who performed the work here involved during the assigned hours of his position, was regularly assigned as such to a night shift at Gary, Indiana.

Within his letter of claim declination, the Carrier's highest appellate officer admitted that Motor Car Repairman Ruge performed the subject Garage Serviceman's work when he stated:

"The facts of this case are as follows: On June 27, 28 and 29, 1962 Motor Car Repairman Ruge, in accordance with our preventative maintenance program, was assigned to completely check over Bulldozer No. 470 and to make all necessary repairs. In total, this job consumed twenty-four (24) hours or three (3) days of work. In the process, incidental and as an integral part of the project, Mr. Ruge on June 28th greased this bulldozer and on June 29th he changed the crank case oil. . . ."

are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the 9 months' period herein referred to.

2. With respect to all claims or grievances which arose or arise out of occurrences prior to the effective date of this rule, and which have not been filed by that date, such claims or grievances must be filed in writing within 60 days after the effective date of this rule in the manner provided for in paragraph (a) of Section 1 hereof, and shall be handled in accordance with the requirements of said paragraphs (a), (b) and (c) of Section 1 hereof. With respect to claims or grievances filed prior to the effective date of this rule the claims or grievances must be ruled on or appealed, as the case may be, within 60 days after the effective date of this rule and if not thereafter handled pursuant to paragraphs (b) and (c) of Section 1 of this rule the claims or grievances shall be barred or allowed as presented, as the case may be, except that in the case of all claims or grievances on which the highest designated officer of the Carrier has ruled prior to the effective date of this rule, a period of 12 months will be allowed after the effective date of this rule for an appeal to be taken to the appropriate board of adjustment as provided in paragraph (c) of Section 1 hereof before the claim or grievance is barred.

3. A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof. With respect to claims and grievances involving an employe held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

4. This rule recognizes the right of representatives of the Organizations, parties hereto, to file and prosecute claims and grievances for and on behalf of the employes they represent.

5. This agreement is not intended to deny the right of the employes to use any other lawful action for the settlement of claims or grievances provided such action is instituted within 9 months of the date of the decision of the highest designated officer of the Carrier.

6. This rule shall not apply to request for leniency."

(Exhibits not reproduced.)

OPINION OF BOARD: The facts involved in the instant case are not in controversy, i.e., the parties concede that a Motor Car Repairman performed work on Bulldozer No. 470 as stated in the claim.

The Organization contends Rule 56 III (e) (as amended by agreement) reserves the work in question exclusively to Claimant. The rule specifies the duties of Garage Servicemen as follows:

" . . . (2) checking and providing motor cars, motor vehicles and various pieces of equipment serviced and maintained in the Maintenance of Way Department with proper fuel, lubricants, tire repairs, air and water. . . ."

This contention is well founded on a previous award involving the identical parties. In Award 14137 (Rohman) this Board held that Garage Servicemen have an exclusive right to perform the duties outlined by the rule. There is no question that the work performed in this case was within those specifications.

The Carrier argues that the claim must be denied because the Organization has not proved "availability" of the Claimant for the work performed. And, further, that unless "availability" be proved, there could be no "actual pecuniary loss," a condition precedent to recovery which is expressed in Rule 62 of the Agreement, as follows:

" . . . Time claims shall be confined to the actual pecuniary loss resulting from the alleged violation."

In Award 13741 (Dorsey) we held:

" . . . It is the intent of the Act that issues in a dispute, before this Board, shall have been framed by the parties in conference on the property."

Rule 62, which was raised on the property, obviates the necessity of compensating an employee, regardless of Carrier's violation, if the employee was otherwise gainfully employed when the work in question was actually performed. See Award 12328 (Dolnick). However, this rule does not encompass the issue of "availability." The record does not indicate that "availability" was an issue raised on the property and, therefore, the Carrier's argument is not tenable.

The record contains sufficient evidence that the on-duty Garage Servicemen were not available at the time Bulldozer No. 470 was serviced. At page 20 of the record Carrier submits the following statement:

" . . . During the aforementioned 24-hour period Mr. Ruge lubricated and changed the crank case oil, without giving it a thought. When he did so the Garage Servicemen were all preoccupied."

At page 54 of the record, on the property Carrier stated in writing:

"On the two nights in question there were two night shift Garage Servicemen working and on duty at Gary who had a full day's work of their own each date. The latter is apparently admitted as there is no claim or alleged damage sought on behalf of either of the two."

The Claimant was entitled to be called for the work in question. No effort was made to contact him. If called, Rule 29 (a) requires that such employee " . . . be allowed a minimum of two (2) hours and forty (40) minutes at time

and one-half rate for two (2) hours and forty (40) minutes of work or less. . . .” The work in question was not performed during Claimant's regular work period, the record reflects no evidence of his being otherwise gainfully employed when the call would have been made, and, therefore, Claimant did suffer an “actual pecuniary loss” as a result of the violation.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 was violated and the Claim should be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of February 1967.