Award No. 24
Docket No. 24

PUBLIC LAW BOARD NO. 76

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

VS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

Roy R. Ray, Referee

STATEMENT OF CLAIM:

1. The Carrier violated the effective Agreement on August 10 and 11, 1968 by failing to call regularly assigned Crane Operator, B. O. McNutt for overtime work with his crane X-1030 on his Rest Days.

2. Crane Operator, B. O. McNutt be now reimbursed for the amount of time worked by others in the operation of Crane X-1030, during the period here involved.

OPINION OF BOARD:

On August 10, 1968 a derailment of several cars occurred on Carrier's main line track near Fayetteville, Texas (Mile Post 998). Some hours later and in rapid succession two other derailments occurred on the same track near Plum (Mile Post 982) and Kirtley (Mile Post 974). These derailments were only a few miles apart. When the first derailment occurred Carrier's Trainmaster Turner went to the cars assigned to the System Pile Driving Gang then headquartered at Smithville, Texas (Mile Post 969) some 29 miles from the scene of the first derailment to recruit personnel to clear the track. When he arrived there he learned that Claimant McNutt, regularly assigned Operator of Pile Driving Machine X-1030, had gone to his home in Atoka, Oklahoma, some 400 miles away and approximately 7 hours of highway travel time from the scene of the derailment, for his rest days on Saturday and Sunday, August 10 and 11. Turner ordered Machine X-1030 moved dead-in-train with other machinery and equipment from Smithville to the derailment site. He recruited C. H. Hilcher, who lived at Smithville and Glen Pfluger who resided at La Grange (near the derailment) to operate the machine. Hilcher was junior to McNutt as Crane Operator and Pfluger was a machine

operator with no seniority as a Crane Operator. Turner made no further effort to contact McNutt. He estimated that it would take from 7 to 10 hours to clear the derailment at Fayetteville. The time of the occurrence of the two other derailments is not apparent from the record, but when Turner made the above assignments to Hilcher and Pfluger he had no reason to anticipate the subsequent derailments. Machine X-1030 was not used at the derailment to drive piles but rather as a crane to assist in picking up and moving the derailed cars. The Pile Driving Gang was not needed and not used at the derailment. Before the first derailment had been cleared up the two other derailments occurred and Hilcher and Pfluger operated the machine as a crew to clear up these derailments.

When B. O. McNutt learned that Hilcher and Pfluger had been used for the above work on August 10 and 11 he filed the present claim for pay for the hours Machine X-1030 had been operated by the two men. The Organization asserts that Hilcher operated the machine 17 hours and Pfluger operated it 18 hours. The Company says that the machine was operated for a total of 18 hours on the two days.

The Organization contends that since McNutt was the senior employe assigned to operate the X-1030 crane in question and had been regularly assigned as operator of it since November 1960 he held the exclusive right to be offered the work of operating the machine on the day in question. It relies upon Article 3, Section 2 which reads in part:

> Seniority rights of district machine operators are restricted to their seniority districts and they are not privileged to exercise their rights as machine operators on the Steel B & B Gang, Pile Driver Gangs, and Steam Shovel Gangs when such gangs are working on the districts of District Machine Operator.

The Organization also says that Article 11, Section 2(f) supports its position that McNutt should have been called. This section reads:

> Where work is required by the Carrier to be performed on a day

which is not a part of any assignment, it may be performed by an available unassigned employe who will otherwise not have worked 40 hours of work that week; in all other cases by the regular employe.

The Organization does not deny that an emergency was created by the first derailment, and does not contend that the Carrier should have stood by and awaited the arrival of McNutt before beginning the work of clearing the track. But it does assert that the Company was obligated to contact McNutt and offer him whatever portion of the overtime work that remained upon his arrival at the scene. It says that Carrier's failure to do so was a violation of the above cited provisions of the Agreement.

Carrier contends that before Article 11, Section 2, Rule (f) applies it must be shown that the Scope Rule gives an exclusive right to the work performed. It says that no such right has been established here; that the machine was actually used to rerail and move cars, and that this work has never been customarily or exclusively performed by Pile Drivers or any other class of employes.

Carrier further takes the position that an emergency existed making it necessary for Carrier to use personnel immediately available to clear the main line track; and that there was no way for Carrier to anticipate the two subsequent derailments which were also emergencies. It relies upon Awards of this Board as well as those of the Third Division as establishing the principle that in the event of an emergency Carrier is entitled to use personnel immediately available. Thus Carrier contends that the two rules relied upon by the Organization are not applicable and controlling here.

The first question to be resolved is whether Claimant had any contractual right to the work in question. We have previously held that under the Scope Rule of the present Agreement between the parties the Organization can establish such a right

to particular work only by showing that the disputed work has been customarily performed exclusively by the class of employes making the claim. Award No. 2, PL Board No. 76. Here the Organization has made no such proof. There is no evidence that the Machine involved was customarily used exclusively to perform the work in question. In fact it was normally used as a pile driver. But it can be converted to a crane and used to remove and rerail cars. Here is was used for this purpose. The Carrier asserts and the Organization does not deny that this work is performed by various classifications of employes.

The Organization has relied specifically upon Article 11, Section 2, Rule (f). In interpreting an identical rule the Third Division has held that such a rule is not mandatory unless it covers work exclusive to the occupant of the position under the Scope Rule of the Agreement. Award 14875 (Ritter). Here there is no such proof.

The Organization insists that since McNutt was regularly assigned to this machine and had operated it since 1960 he had an exclusive right to overtime work to be performed by the machine. We find nothing in the Agreement to support this position. Even if it could be said that McNutt had the right, by virtue of his assignment as the regular operator, to operate it whenever it was used for pile driving purposes it does not follow that he has the exclusive right to operate it when used as it was in this case for rerailing cars.

However, even if we assume that Claimant is entitled to operate the machine under all normal circumstances where overtime is scheduled the present claim still cannot be upheld. We have ruled in prior awards of this Board that where an emergency exists and prompt action is required to restore a track to service Carrier may use personnel immediately available. Awards 13 and 14. Awards of the Third Division to like effect are: 12299 (Wolf); 14372 (Zumas); 13858 (Mesigh). Undoubtedly an

emergency situation was created here with the first derailment and Carrier was entitled to proceed to clear the track with personnel then available. This much is admitted by the Organization. See Uptergrove's letter of January 7, 1969. But the Organization argues that despite the emergency Carrier should have contacted McNutt and advised him that he could come ahead and would be given whatever work remained unfinished when he arrived. We cannot agree. In view of the estimate of the Trainmaster that it would take from 7 to 10 hours to clear the track we believe it would have been utterly impractical to call McNutt for work likely to be finished before he could arrive. (In fact the work at Fayetteville did take only 7 hours, and was completed before McNutt could have arrived). Neither of the subsequent derailments were reasonably to be anticipated. If, as we hold, Carrier was entitled to use personnel immediately available to clear up the first derailment we cannot consistently say that when a second emergency arose Carrier was now required to call McNutt. We have examined the cases cited by the Organization holding that Carrier was derelict in not calling Claimant for particular work in an emergency. All of them are distinguishable on the facts, rule and issues involved, and we do not regard them as persuasive here. We hold that no violation of the Agreement has been established.

AWARD

The Claim is denied.

Public Law Board No. 76

Roy R. Ray
Neutral Member and Chairman

A. J. Cunningham
Employe Member

Fred R. Carroll
Carrier Member

Dallas, Texas
October 31, 1969