Special Board of Adjustment
No. 894

Case No. 1544
Award No. 1544

Carrier Docket No.: CRE-14108
BLE File No.: ABC-E-4-248-91

Parties to the Dispute:

Brotherhood of Locomotive Engineers
and
Consolidated Rail Corporation

Statement of the Claim:

Organization's Statement of Claim:

"Claim of Engineer T. D. Toth Dated August 25, 1990 for a Penalty Yard Day because of a Violation of BLE Articles F-s-1, Performance Of Service By Road Freight Engineers, G-m-7, Equipment on Engines, Arbitration Award No. 458, Article VIII, Section 3, Incidental Work and Article XVII, Section 2, Dispatchment of Locomotives."

Carrier's Statement of Claim:

"Whether the Claimant is entitled to a day's pay at the yard rate for allegedly servicing and supplying his locomotive consist at the Chicago and North Western Railroad Company, Proviso Yard, Chicago, IL."

Opinion of the Board:

The critical facts which are involved in this case are not in dispute.

On August 25, 1990, Claimant was assigned as Engineer operating in through freight service from Chicago, Illinois to Elkhart, Indiana, on Carrier's over-the-road interchange train PREL-5X with an on duty time of

10:30 AM with Units 6700 and 6745.[1] Claimant's home terminal was Elkhart. Claimant reported for duty at the hotel that day, and he was transported by Carrier to the Chicago and North Western Railroad Company's Proviso, Illinois Yard, a distance of approximately twenty (20) miles, for the receipt of his over-the-road interchange train.

Upon his arrival at the Proviso Yard, Claimant reported to Terminal Control as per usual procedure; he was advised that he was to use Units 6700 and 6745 for the trip; and he was further advised that said Units were on Track No. 2 in Yard No. 2.

Claimant was transported out to his Units in Yard No. 2; and upon inspecting them, he found that they had not been serviced. He reported this to Terminal Control. According to Claimant, at that point, he was directed by Terminal Control to make the appropriate servicing. Claimant complied; and Claimant alleges that this involved changing the ends of his two (2) unit consist by transferring the radio, head-end telemetry device and brake handle from the rear unit to the lead unit; washing the windows on the lead unit; and reporting fuel readings to Terminal Control. At that same time, however, according to Claimant, CNW Diesel Personnel were on duty in the Yard; and were, in fact, servicing CNW Unit 3070 just two (2) tracks away.

After the aforestated duties and other readying duties were completed, Claimant departed the Proviso Yard; he proceeded to Elkhart, Indiana without apparent incident; and subsequent to his arrival in the Elkhart Yard, he went off duty at 5:30 PM for a total time on duty of seven (7) hours.

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[1] The engine numbers have been alternatively reported in the record as either "6700 and 6745" , "6700 and 6741" and "6700 and 6747" (See: Org. Written Submission, pp. 2, 14 and 17; and Carrier Ex. #1 or Org. Ex. G). These discrepancies have not been addressed by the parties; and the Board must conclude, therefore, that said discrepancies are either undetected typographical errors, or are simply not significant in this matter.

Prior to going off duty that day, however, Claimant submitted a penalty time claim for one (1) day's pay at the yard rate. Said time claim stated as follows:

> "Order to change ends by T/C Scott. Change 6741 and 6700[2] on trk 2 on Yard 2. 11:30 A to 11:40 A wash windows & change radio, tele, handles. Engine hse. on duty 24 hrs. a day to do this. They were working on Engine 5070 just 2 trks. away at the time."

Said claim cited a violation of Article G-m-7 of the parties' current Agreement.

Carrier, for reasons which will be developed more fully hereinafter, denied the claim; and the matter was appealed unsuccessfully by Organization throughout all of the remaining steps of the parties' negotiated grievance procedure. Thereafter, the claim was appealed to arbitration by Organization; and pursuant to hearing, said claim is now properly before this Board for resolution.

Organization contends that Claimant was required to service his outbound locomotives on the day in question in violation of Article G-m-7, Equipment on Engines, which reads, in pertinent part:

> "(a) Engines shall be supplied with fuel, water, sand, and equipment necessary for the service to be performed and shall be equipped to comply with statutory requirements relating to the health and comfort of the engineer.
>
> (b) Engineers shall be responsible for knowing that their engines are properly equipped and serviced. Engineers shall report any defects that come to their attention.
>
> (c) When engines are dispatched from an engine facility where enginehouse forces are employed and on duty at the time of dispatchment, engines shall be supplied and cleaned by enginehouse forces. At locations where engine house forces are not employed, engines shall be supplied by other than engineers."

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2 See Footnote #1.

In addition to the above, Organization also contends that the readying work which was required of Claimant on the day in question did not fit within the exceptions which are contained in Article VIII, Section 3, Incidental Work Rule of Arbitration Award No. 458, which states:

"Section 3 - Incidental Work

Road and yard employees in engine service and qualified ground service employees may perform the following items of work in connection with their own assignments without additional compensation:

(a) Handle switches

(b) Move, turn, spot and fuel locomotives

(c) Supply locomotives except for heavy equipment and supplies generally placed on locomotives by employees of other crafts

(d) Inspect locomotives

(e) Start or shutdown locomotives

(f) Make head-end air tests

(g) Prepare reports while under pay

(h) Use communication devices; copy and handle train orders, clearances and/or other messages

(i) Any duties formerly performed by fireman."

Still yet further, Organization also believes that the May 19, 1986 side agreement letters #7 and #8, which were agreed to by the National Railway Labor Conference and Organization and which apply to the aforestated Article VIII, Section 3 - Incidental Work Rule, are applicable in the instant case. Said letters respectively, in pertinent part, provide as follows:

"Letter #7:

It is further understood that paragraphs (a) and (c) of Section 3 do not contemplate that the engineer will perform such incidental work when other members of the crew are present and available."

"Letter #8:

It was understood that the reference to moving, turning, spotting and fueling locomotives contained in Section 3(b) includes the assembling of locomotive power, such as rearranging, increasing or decreasing the locomotive consist. It is not contemplated that an engineer will be required to place fuel oil or other supplies on a locomotive if another qualified employee is available for that purpose."

Given the preceding provisions, Organization contends that since the Chicago and North Western Railroad Company maintains a complement of employees who were capable of servicing Claimant's locomotives on the claim date, then any such servicing work which was performed by Claimant on that same date was in violation of the applicable contractual provisions; and, therefore, Claimant is entitled to one (1) day's penalty pay at the yard rate.

In counter point to Organization's contentions, Carrier proffers two (2) arguments -- one procedural, and the other based upon the merits of the case.

Procedurally, Carrier maintains that the pending claim, as originally submitted by Claimant, was impermissibly altered by the Local Chairman, and later yet by the General Chairman as well. Such alteration(s), Carrier maintains, constituted an abandonment of the original claim, and a substitution of a new claim(s) instead which is a violation of Article G-m-8 - Time Limit on Claims, which, in pertinent part, states:

"G-m-8 - Time Limit on Claims

* * *

(c) To file a claim, a claimant or his duly accredited representative shall be required to furnish sufficient information on the time slip to identify the basis of the claim, such as :

(1) Name, Occupation, Employee Number, Division.

(2) Train symbol or job number and engine number(s).

(3) On and off duty time.

(4) Date and time of day work performed.

(5) Location and details of work performed for which claim is filed.

(6) Upon whose orders work was performed.

(7) Description of instructions issued to have such work performed.

(8) Claim being made, rule if known, and reason supporting claim."

Carrier contends that, under these circumstances, the pending claim is procedurally defective, and cannot be entertained or allowed since this Board has no jurisdiction to resolve new claim(s) which were not originally presented. In addition to the language of Article G-m-8-c, Carrier further predicates its procedural argument on various arbitration awards which, Carrier asserts, establish that claims can only be progressed on the property as stated in the initial filing; and that any claim which is subsequently altered becomes null and void (Special Board of Adjustment No. 894, Award No. 1342; and Special Board of Adjustment No. 894, Award No. 815).

Turning next to its merits argument, Carrier contends that on the date of the triggering occurrence, Claimant was merely required to move operating handles and necessary radio equipment a short distance from one unit to another; and that said work was work which was incidental to Claimant's operating of the locomotive in accordance with Arbitration Award No. 458, Article VIII - Road, Yard and Incidental Work, Section 3 - Incidental Work (c) which states that employees in engine service may "... (S)upply locomotives except for heavy equipment and supplies generally placed on locomotives by

employees of other crafts." Carrier maintains that the disputed work did not involve "heavy equipment" as contemplated by Article VIII, Section 3 of Arbitration Award No. 458; nor has Organization proved that the disputed work was generally performed by members of other crafts at the CNW Proviso Yard . Accordingly, Carrier concludes that the service complained of in the instant case may be required of Claimant because it was incident to the operation of his assigned locomotive; it is not service which is otherwise reserved exclusively to any class or craft of employee; and, under such circumstances, the service may be required of Claimant without payment of any additional compensation.

As support for the aforestated contention, Carrier cites Public Law Board No. 237, Award 64 and its progeny which hold(s) that the minor servicing of outgoing locomotives (such as moving operating levers and transferring radios) is incidental work to the operating of the locomotive; and, therefore, does not require the payment of penalty pay.

Carrier's final significant area of argumentation regarding the merits portion of this case is that said assignment of work was permissible since no Conrail mechanical department forces were available in the Chicago and North Western Railroad Company's Proviso Yard to perform the disputed work on the date in question; and Carrier had no control over CNW forces at Proviso; (Special Board of Adjustment No. 894, Award No. 720).

In response to Carrier's procedural argument discussed hereinabove, Organization counters that the original claim submitted by Claimant in this matter on August 25, 1990, sufficiently placed Carrier on notice as to the pertinent facts of the triggering contractual violation so that Carrier could evaluate the appropriateness of the claim. Therefore, Organization asserts, even if Claimant's original contentions/arguments were enhanced by a Union

officer(s) during any of the subsequent appeals steps, the basic facts of the claim did not change so as to constitute a violation of Article G-m-8 of the parties' Agreement. In further support of this particular contention, Organization cites Special Board of Adjustment No. 894, Award No. 595, involving these same parties, wherein the Board concluded:

> "We are not impressed by Carrier's procedural objection that the claim was not presented in proper detail. Petitioner would be well advised to make certain that the details mentioned in Article G-m-8 are included in claims. In this instance, the claim was sufficiently clear to apprise Carrier of its nature and scope and there is no indication that Carrier was prejudiced in any material respect."

The Board has carefully read, studied and considered the complete record which has been presented in this case, and we find that Claimant is entitled to one (1) day's pay at the yard rate for servicing his outbound locomotives on August 25, 1990, in volition of applicable contractual provisions and controlling railroad arbitral precedent involving these same parties. We make this determination after dismissing Carrier's procedural argument alleging that the pending claim, as presented, was materially changed by Organization in its handling on the property; thereby constituting a new claim which is outside of the controlling appeals procedure.

In support of the aforestated procedural determination, while Claimant's originally presented claim may not have been artfully drawn, it was, nonetheless, sufficiently articulated so as to place Carrier on notice of the nature of his complaint, and the alleged contractual violation. Moreover, any subsequent enhancement(s) of the claim by his Local Chairman and/or General Chairman during the progressing of the claim on the property, did not change said claim either materially or substantively to warrant its dismissal based upon Carrier's procedural objection. Still yet further, we are

also persuaded that there is no probative evidence -- as was cited as a critical element of the Board's rationale in Special Board of Adjustment No. 894, Award No. 595 -- to indicate that Carrier was otherwise prejudiced by the pending claim's alleged enhancement.

Turning next to the merits portion of this case, the Board is of the opinion that Claimant's/Organization's position herein is supported by the applicable contractual provisions. Accordingly, it is evident from reading said language in its totality that the obvious meaning thereof and the intent of the parties in the negotiation of said language was to contractually relieve engineers from the task of preparing/readying their outgoing locomotives when other personnel are available in the yard to perform this servicing function. As indicated by the applicable facts, the Chicago and North Western Railroad Company maintains engine service personnel around the clock at the Proviso Yard who could have prepared Claimant's outgoing locomotives on the day in question. Furthermore, we do not believe that the disputed tasks of transferring equipment from one locomotive to another, cleaning of the windshields on the locomotives, and providing fuel readings to Terminal Control is incidental work as contemplated by Article VIII, Section 3 of Arbitration Award No. 458. That particular Section enumerates specific tasks which are considered to be incidental to engine operations; however, none of the servicing tasks which are involved in the instant dispute are included in Section 3.

Additionally, we further note that the aforestated Section 3 was negotiated by the parties in 1986, which was after the rendering of Public Law Board No. 237, Award No. 64 on April 30, 1970, which, in essence, created the parties' Incidental Work Rule. In that Award, which forms the basis of Carrier's claimed arbitral precedent in the instant case, the Board

invited the parties, if they disputed the Board's creation of an incidental work rule, to negotiate a better rule. Given that the national Incidental Work Rule was negotiated between Organization and the National Railway Labor Conference in 1986, then we must conclude that the parties' subsequent refinement of the Incidental Work Rule, based upon that Agreement, must be accorded greater weight than Public Law Board No. 237, Award No. 64.

As a final point of consideration in this analysis, this Board is also not persuaded by Carrier's argument that "... no Conrail mechanical department forces were available in the Chicago and North Western Railroad Company's Proviso Yard to perform the service in question"; and that, as such, Carrier had no control over CNW forces at Proviso. In this regard, suffice it to say that none of the applicable agreement provisions articulate such an exception to the subject rule that engineers will not perform locomotive servicing work when other personnel are available who can prepare/ready outgoing power; and, furthermore, said language creates no distinction between the availability of Carrier's own forces, and the availability of other employees from other railroads who are available in the Yard and capable of performing such engine servicing work.

Given the aforestated analysis and rationale, we must sustain this claim as presented; and we will direct the payment of the requested remedy.

Award:

Claim sustained in accordance with the above.

John J. Mikrut, Jr.
Chairman and Neutral Member

A.E. Briggs
Carrier Member

J. A. Cassidy, Jr.
Organization Member

Adopted at Philadelphia, Pennsylvania on 7-24-95.

SPECIAL BOARD OF ADJUSTMENT NO. 894

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

AS THE REPRESENTATIVE OF

T. D. TOTH

VS

CONSOLIDATED RAIL CORPORATION

DOCKET NO. CR-E-14108

CARRIER'S DISSENT

The Incidental Work Rule, Article VIII, Section 3 of Arbitration Award 458, does not enumerate each and every task included in incidental work. Rather, the Rule describes the type of ancillary service an Engineer may perform as part of his or her primary duty of operating a freight train in a safe and efficient manner. The work complained of in the instant claim has been established as "incidental" in previous arbitration awards which were cited in the Carrier's brief. The majority's opinion that changing ends of a locomotive consist is not work incidental to an Engineer's duties ignores established practice and previous arbitral precedents.

The organization never attempted to assert that other members of the crew were present and available to perform the incidental work. Therefore, Letter No. 7 was not violated with respect to Section 3(c). Furthermore, Letter No. 8 does not call for a sustaining award because no other qualified employee was shown to be available and the incidental work in question is not only contemplated in Section 3(c), but is part of the work described in Section 3(b). Pursuant to Letter No. 8, changing handles and radio equipment are task elements inherent in adding or separating or rearranging units. They are incidental work tasks in those instances and they are incidental work in the instant case.

In addition to the misconstruction of the incidental work rule, the majority failed to apply the proper standard to the phrase "available forces." The Claimant obtained his engines on the property of a foreign railroad where there were no Conrail mechanical forces available to service the engines assigned to the Claimant. The mechanical forces employed at this location were under the jurisdiction of a foreign carrier. The management of that railroad determined that none of the mechanical forces employed at Proviso Yard were available to service the Claimant's power. The employment of mechanical forces at a location does not make them available. There are limits to the amount of work a mechanical service team can perform at any one time. A railroad would be hard-pressed to operate in a timely fashion if it were prevented from making good faith determinations that on-duty mechanical forces were occupied and not available to perform additional service. Moreover, the organization readily admits in their submission that mechanical forces were not available because they were otherwise occupied on another track at the time the Claimant's train was scheduled to depart.

Finally, the rules cited in the organization's brief do not provide payment of a penalty day for servicing locomotives. Therefore, payment of eight hours for the complained of service is awarded without any basis in the Collective Bargaining Agreement. For all of the above reasons, the instant award cannot be considered precedential in any other case. I respectfully dissent.

P. C. Poirier