Award No. 6054
Docket No. 5917
2-N&W-CM-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Don J. Harr when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

NORFOLK AND WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Agreement was violated and members of the regularly assigned wrecking crew damaged, when the Norfolk and Western Railway Company called, formed and/or used an auxiliary wrecking crew and outfit, for the performance of wrecking service in the rerailing of NKP Car, at a derailment in Princeton Yards, Princeton, West Virginia, on January 2, 1968.

2. That accordingly, the Norfolk and Western Railway Company be ordered to compensate Derrick Engineer D. B. Lilly, Car Repairer G. B. Dehart and Helper Car Repairer W. G. Wolfe, regularly assigned members of the Elmore Wrecking Crew, in the amount of a call of two (2) hours and forty (40) minutes each, at the rate of time and one-half, for January 2, 1968, because of said violation and resultant damage to Claimants.

EMPLOYES' STATEMENT OF FACTS: The Norfolk and Western Railway Company, hereinafter referred to as the carrier, maintains at Elmore, West Virginia, a point on carrier's line, on the New River Division, (formerly VGN) a wrecking outfit and regularly assigned wrecking crew, of which Carmen D. B. Lilly, G. B. Dehart and Helper Car Repairer W. G. Wolfe, hereinafter referred to as claimants, were regularly assigned members, this being the one and only wrecking crew so assigned on said New River Division.

On December 22, 1967, N&W Train Extra Tast with Engine No. 1129, reporting at 6:15 P. M., after traveling approximately thirty-five (35) miles experienced a derailment in Princeton Yards, at Princeton, West Virginia, a point also on said New River Division approximately 35 miles from Elmore, to which derailment the Elmore Wrecking Crew and Outfit were dispatched and after rerailing one or more cars, on December 23, 1967, one (1) car, which claimant member of the wrecking crew recorded and described as NKP 80036,

was placed in the clear of the main track, allegedly damaged. Ten (10) days later on January 2, 1968, an auxiliary wrecking crew was called and/or formed and utilizing a large Derrick Car No. 514861, manned and operated by employes from the maintenance of way department, was used to rerail said NKP Car, in said Princeton Yards.

Carrier has not refuted or denied, that said derailed NKP car was rerailed on said date, by such auxiliary wrecking crew as stated, only that they have no record of a car bearing the number of 80036 being involved in a derailment, on or near that date.

In conference with the Wreck Master White, he admitted to Local Chairman Lawrence, to placing said derailed car in clear of main track, but said he had no record of the car number. The general car foreman also admitted, that he did not know the number of the NKP car, that they had left just in the clear of the main track, on said date of December 23, 1967. The employes maintain claimants were damaged, as the result of said auxiliary wrecking crew being used to perform wrecking service, in the rerailment of said car in Princeton Yards January 2, 1968.

This dispute has been handled, up to and including, the highest officer of the carrier, designated to handle such disputes, all of whom have declined to make satisfactory settlement.

The Virginian Agreement, effective January 1, 1943, as subsequently amended, including the Merger Agreement of June 18, 1959, is controlling.

POSITION OF EMPLOYES: It is respectfully submitted, that under the provisions of Rule No. 114, of the carmen's special rules of the controlling Agreement reading as follows:

> "When wrecking crews are called for wrecks or derailments outside of yard limits, the regularly assigned crew will accompany the outfit. For wrecks or derailments within yard limits, sufficient carmen will be called to perform the work."

and Rule No. 30(a), of our current agreement reading:

> "None but mechanics or apprentices regularly employed as such shall do mechanics' work, except that helpers may assist mechanics and apprentices in performing their work, as per special rules of each craft."

that the carrier erred, and above quoted rules of agreement were violated when they called and/or used, other than the regularly assigned wrecking crew, to perform wrecking crew work. It is further submitted that the carrier further erred and, violated said rules of agreement when they used men and equipment, from the maintenance of way department, to perform such rerailment or wrecking service, within the yard limits at Princeton, West Virginia.

That the work of rerailing cars as involved in the instant dispute, is recognized as work rightfully belonging to the wrecking crew, is substantiated in Award 4571 of the Second Division reading in pertinent part:

> "Returning to the merits of the instant dispute, the mere fact that the disputed work was performed some two weeks after the initial wrecking service does not of itself take it out of the classification of

wrecking service. If it was the work of picking up scrap and debris in the maintenance of the right of way following the wreck, then we would deny the claim.

But something more was involved here. The work performed on December 20 involved a judgment concerning parts which might or might not be salvageable, and the handling of those parts in accordance with that judgment by mechanics skilled in the carmen's craft. It is true that three carmen were on the scene, but that did not make it any less wrecking service than it was on the date that the wreck occurred. The wrecking crew was entitled to be called back to complete the wrecking service, and in calling other men and equipment to perform the work here involved, the Carrier violated the controlling agreement."

Though claimant recorded the car number here involved, as being NKP 80036 and carrier denies any knowledge of a car bearing such number being derailed, the employes submit that the primary and important point at issue, is not whether or not the car number as stated is correct, or incorrect, but whether or not carrier's auxiliary wrecking crew did, on January 2, 1968, rerail the car in Princeton Yards, that had been placed in the clear of the main track, by the regularly assigned wrecking crew, ten days earlier, on December 23, 1967; this has not been refuted or denied by the carrier, therefore, in accordance with the accepted practice, since carrier has neither refuted or denied that such wrecking operation was performed as stated it must be accepted as factual.

We believe that the facts of record, when considered in connection with the rules involved, abundantly supports the employes' statement of claim, and the Honorable Members of your Board are respectfully requested to so find.

CARRIER'S STATEMENT OF FACTS: Carrier maintains a facility at Elmore, West Virginia which includes a transportation yard and repair track at which carmen are employed. A wrecking outfit and derrick are maintained at this point. Claimants in this dispute are employed at Elmore and are members of the regular wrecking crew at that point. Princeton, West Virginia, the point under consideration is located approximately thirty-five (35) miles southeast of Elmore.

The employes contend that on January 2, 1968, an auxiliary wrecking crew was formed and NKP 80036 rerailed in Princeton yards. The carrier searched its records and was unable to find that such an incident occurred. Under date of February 19, 1968, a letter was received from the local chairman in which claim was made in favor of Derrick Engineer D. B. Lilly, Carman G. B. Dehart and Carman Helper W. G. Wolfe for two (2) hours and forty (40) minutes at the overtime rate account of not being called for wrecking service in Princeton on January 2, 1968. The claim was declined under date of April 24, 1968, the car foreman denying any knowledge of such an incident. The claim was handled in the usual manner and appealed to the highest officer of the carrier designated to handle claims and grievances for the shop crafts under date of December 27, 1968. Conference was held February 6, 1969, and the claim denied under date of February 21, 1969.

Under date of November 18, 1969, carrier received a copy of a letter addressed to the Executive Secretary, Second Division, National Railroad

Adjustment Board in which Mr. James E. Yost, President, Railway Employes' Department indicated his intent to submit an ex parte submission in this dispute.

There is an agreement in effect between the Virginian Railway Company and System Federation No. 40 of the Railway Employes' Department, which includes the Brotherhood of Railway Carmen of the United States and Canada, bearing an effective date of January 1, 1943, and is on file with your Board, and by reference is made a part hereof.

POSITION OF CARRIER: Carrier asserts that the claim now before your board is not the same as that initiated by the local chairman and appealed to this office by the general chairman. It is revealed that the claim was handled on the property alleging an incident in Princeton yards involving a car designated as NKP 80036. All argument concerning this claim arose from the employes' contention that this specific car was involved in a derailment in Princeton yards. At no time on the property did the employes contend that any car other than NKP 80036 was involved at this time, nor did they supply sufficient facts to appraise the carrier of the claim against which it must defend itself. However, in appealing the claim to your board, it is noted in item 1 of the statement of claim that no specific car number is given. The only designation is that of "NKP Car." Slight though the omission of the car number may at first appear, it alters the entire complexion of the situation. Having initiated and progressed the claim on the property maintaining that a specific car was involved in a specific incident, the employes are not now at liberty to "hedge" or to alter their facts in such a manner that one of thousands of cars could have been involved and leave it to your board or the carrier to furnish sufficient facts to determine the merits of the claim. Under such circumstances, your board has without exception held that the petitioner must furnish the facts to support his claim — neither the carrier nor the board need "make" the organization's claim for it.

Second Division Award No. 5509 held:

> "Petitioner has the burden of furnishing competent evidence to support the essential elements of this claim. Mere assertions do not constitute proof."

Obviously, by appealing this claim to the board alleging that an "NKP Car" was involved rather than NKP 80036, which was alleged on the property, the employes not only are admitting that no such incident occurred but also are changing the claim from one dealing with specifics to one dealing with generalities. The carrier, having successfully defended itself on the property, is at a loss to know what course the employes will now take.

The carrier avers that altering this claim in this manner on appeal to the board removes the claim from the jurisdiction of that body and must be dismissed.

Without prejudice to carrier's position that the board has no jurisdiction in this case, it will be shown that had the incident involving NKP 80036 or any other car actually occurred, and it apparently did not, there is no basis for the claim and it has no merit.

Claimants in this case, Messrs. Lilly, Dehart and Wolfe, are members of the regular wrecking crew and are employed and have point seniority at Elmore, West Virginia. The incident allegedly occurred in Princeton yards, approximately thirty-five (35) miles from Elmore and a point at which approximately one hundred (100) car department employes were working. There is no rule or agreement which vests to the claimants any right to work at Princeton unless and until the wrecking outfit is called. The Elmore wrecking outfit definitely was not called on January 2, 1968; therefore claimants have no claim for work performed in Princeton on that date.

This claim was initiated by the local chairman maintaining that Rule 114 had been violated, particularly that portion stating:

> "For wrecks or derailments within yard limits, sufficient carmen will be called to perform the work."

Rule 114 in its entirety provides:

> "When wrecking crews are called for wrecks or derailments outside of yard limits, the regularly assigned crew will accompany the outfit. For wrecks or derailments within yard limits, sufficient carmen will be called to perform the work."

In reading letters initiating and progressing this claim, particular attention should be given the fact that only the second sentence of this rule is alleged to have been violated. There is nothing in this portion of the rule which gives wrecking in yards exclusively to carmen, more especially to carmen who are members of the wrecking crew.

The carrier steadfastly denies that the referred to incident occurred; however, in alleging that NKP 80036 was rerailed on January 2, 1968, the employes admit that such work was performed within Princeton yard limits. Assuming this to be true, the second sentence of Rule 114 quoted by the local chairman does not give carmen from Elmore, wreck crew members or otherwise, any right to perform work at Princeton, which is outside of their seniority district.

Second Division Award No. 4770, Referee H. A. Johnson, is similar to this case except that there the carrier admitted that the incident occurred. Your board held in that Award:

> "The Claimants are Wrecking Engineer Melin and three other regularly assigned carmen at Superior, who are also assigned for wrecking service as required.
>
> If the derailment had been outside yard limits the Superior wrecking crew should under Rule 88 have been called. But since it was within yard limits and the wrecker was not used, 'sufficient carmen' with seniority at the point should have been called.
>
> The work of clearing the derailed cars from the tracks was wrecking service, and the use of maintenance of way employes in lieu of carmen was improper. Claim 1 must therefore be sustained.

But the claimants were not entitled to be called, since carmen with Allouez seniority are entitled to carmen's work in their seniority district."

The second paragraph of Rule 88 referred to in this award is identical to Rule 114 in the Virginian Agreement.

Should the employes expand the claim to include Rule 114 in its entirety, carrier avers that there is no provision in this rule for calling the wrecking outfit and crew to any and all derailments. Your board has often ruled that "when" in rules **identical** to Rule 114 is a conditional word. Second Division Award No. 1322, Referee J. G. Donaldson, is a classic example:

"The word 'when' in the sentence from Rule 131 providing:

'When wrecking crews are called for wrecks or derailments outside of yard limits, the regularly assigned crew will accompany the outfit.'

is a conditional word, indicating that the parties contemplated that in some circumstances wrecking crews would not be called to the scene of wrecks and derailments."

This interpretation was reaffirmed with finality in Second Division Award 4190.

That the employes recognize it is not always necessary to call the wrecking outfit and crew is amply demonstrated by events on January 2, 1968, the day in question. On this date two of the claimants, Messrs. Dehart and Wolfe worked and were compensated for seventeen and one-half (17½) hours for wrecking and incidental service performed at Summerlee, Wyco and King, West Virginia. The remaining claimant, Derrick Engineer D. B. Lilly, remained at Elmore and was compensated eight (8) hours for service performed. If the employes were not in agreement that Rule 114 did not provide that the wrecking crew and outfit must be used for all derailments, claim would certainly have been made for an additional nine and one-half (9½) hours in favor of Mr. Lilly because the outfit and engineer were not used.

An additional reason this claim has no merit is that, as related above, claimants would not have been monetarily damaged had the incident occurred as alleged. Under these circumstances, your board has held that a money claim has no merit. In Award No. 5564 of this division, Referee F. B. Murphy, it is stated:

"In regard to damages the record is clear that claimant did not lose any time from work and thus suffered no pecuniary loss as a result of carrier's action. This Board is not empowered to use sanctions or penalties not authorized or permitted by the controlling agreement; therefore, inasmuch as claimant did not suffer any pecuniary loss we must deny the claim in regard to damages."

Carrier still denies that a car bearing the identification NKP 80036 was rerailed in Princeton yards on or about January 2, 1968. The carrier also contends that it was given no reasonable indication of what incident could have given rise to this claim. It has also shown that the employes on appealing the

claim to your Board have also abandoned their position that this car was retracked at this time and place, thus altering the claim and removing it from the jurisdiction of your board. It has further been shown that if the incident had occurred as alleged, claimants would have no right to perform work in another carman's seniority district. Also that claimants were not monetarily damaged; therefore are not entitled to pecuniary damages.

The carrier respectfully requests that the claim be dismissed or denied in its entirety.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

By letter dated February 19, 1968, the Employes' Local Chairman instituted a Claim reading in part:

> "This will serve as formal claim, for damages sustained by regularly assigned Elmore Wrecking Crew, on date of January 2, 1968, due to non-compliance with current Agreement, by Management, in the calling and/or formation and utilization of auxiliary wrecking crew and outfit, for the performance of wrecking service at Princeton, West Va., a point on the N&W Railway, (formerly VGN) approximately 35 miles from the home terminal of said regularly wrecking outfit, in the rerailment of NKP Car No. 80036, with all duties performed by said auxiliary crew, thus depriving the one and only wrecking crew, assigned to New River Division, and having serviced such Division and territory, for many, many, years, of work to which they were contractually entitled."

The Carrier contends that the Claim was amended upon appeal to the Board since no specific car number was given.

From a careful review of the record we find that at all times, during the handling on the property, the Employes contended that car NKP-80036 was involved.

The Vice President–Personnel denied the Claim by letter dated February 21, 1969, as follows:

> "We have no record of a car bearing the identification and number NKP 80036 being derailed in Princeton or elsewhere on or near January 2, 1968. Under the circumstances it must be assumed that you have been misinformed in this instance.
>
> Your attention is called to the many awards by all divisions of the National Railroad Adjustment Board, wherein it has been definitely,

positively, established that the burden of establishing facts sufficiently that require or permit the allowance of a claim is upon him who makes the claim."

We do not believe that the failure to name a specific car upon appeal would be a fatal amendment of the Claim.

We must, however, find that the employes have failed to meet their burden of proof. We find no probative evidence to support the Claim. This Board has held on many occasion that the burden of proving the claim is on the claimant.

We will dismiss the Claim.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 18th day of November, 1970.

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