Award No. 6286
Docket No. 6129
2-SLSW-CM-'72

# NATIONAL RAILROAD ADJUSTMENT BOARD

## SECOND DIVISION

**The Second Division consisted of the regular members and in addition Referee John J. McGovern when award was rendered.**

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## PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 45, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Carmen)**

**ST. LOUIS SOUTHWESTERN RAILWAY COMPANY**

**DISPUTE: CLAIM OF EMPLOYES:**

1. That Carrier willfully violated the rules of the Current Controlling Agreement on November 24, 25, 26, 28, 29, 30, and December 1, 2, 3, 1969, when an outside contractor with derrick assisted the Texarkana Wrecker Crew in clearing derailment at Mile Post 553, thereby damaging members of the Pine Bluff Wrecker Crew.

2. That the Carrier therefore be ordered to make whole the following members of the Pine Bluff Wrecker Crew in the amount of hours appearing after their name for said violation:

J. W. Carter, Engineer, 164.8 hours
H. J. Davis, Assistant Engineer, 164.8 hours
V. L. Ferguson, Groundman, 164.8 hours
M. R. Lovelace, Groundman, 164.8 hours
T. E. Ashcraft, Groundman, 164.8 hours
R. E. Lee, Groundman, 164.8 hours
J. H. Findley, Groundman, 164.8 hours
H. E. Gatlin, Groundman, 180 hours
P. C. Holtzclaw, Cook, 164.8 hours
L. Petty, Assistant Cook, 180 hours

EMPLOYES' STATEMENT OF FACTS: Sometime after midnight on November 19, 1969 a derailment involving thirty-six (36) freight cars occurred at Mile Post 553 south of Tyler, Texas, and the Texarkana Wrecker Crew was called at 2:00 A. M., November 19, 1969. They left Texarkana at 3:40 A. M. that date, and arrived at the north end of the derailment at 5:30 A. M., where they worked straight through until 8:30 P. M. on November 20. This Crew was called at 5:30 A. M., November 21, 1969, and worked the north end of derailment until 10:00 P. M., at which time the Main Line was clear and train service had been restored. 1. A Wrecking outfit and crew of the Southern Pacific Railway Company, which had been working the south end of the derailment was released. The Texarkana Crew returned to home point

and was released from service at 3:40 A. M., November 22, 1969. They were again called to return to Mile Post 553 at 11:00 P. M., November 23, 1969, and left Texarkana at 12:01 A. M., November 24, 1969. They arrived at the wreck site and picked up and retrucked SP 673357 and ? 40701 with the assistance of a derrick and employes of the Buddy Hardeman Company Inc., Justin, Texas, handling the south end of each car and tied up at 7:00 P. M., November 24, 1969. The Texarkana Wrecking Crew was called at 5:30 A. M., November 25, 1969 and worked at derailment site picking up and loading on to flat cars SP 511147, PFE 24340, PFE 542488, Southern 40701, and PFE 456439. They were assisted in the handling of each of these cars by the Buddy Hardeman Co. derrick and employes. The Wrecker Crew was tied up at 11:00 P. M.

The Texarkana Wrecker Crew was called after midnight November 26, 1969 to go to a minor derailment in the train yard at Corsicana, Mile Post 621. The work train was turned back at Mile Post 607 and returned to the site of the derailment at Mile Post 553 arriving at 2:30 P. M. They picked up one Freight Car and loaded it on a Flat Car and were attempting to pick up another car when a Cable on the Private Contractor's derrick broke. The Texarkana Crew was returned to their home station and were released from Wrecking service at 8:00 P. M. This allowed the Wrecking Crew to spend the Thanksgiving Holiday, November 27, 1969, at home. They were called at 4:30 A. M., November 28, 1969 and were returned to the scene of the Wreck at Mile Post 553 where they picked up and loaded ? 13422, SSW 28101, UP 113007, and Soo Line 45836 on flat cars with the assistance of the Private Contractor's Derrick and Crew. On November 29, they were called at 6:00 A. M. and worked until tied up at 7:30 P. M., picking up and loading on flat cars NYC 78697 and SP 673471 with the assistance of the Hardeman Derrick and Crew. On November 30, 1969 they were called at 6:00 A. M. and worked until 7:00 P. M. picking up and retrucking SP 510557, SP 674325, SP 698484, SSW 27302, SP 698299, and SSW 25090, also picked up and loaded on Flat Car SP 215808 all with the assistance of the private Contractor's Derrick and Crew. On December 1, 1969 they were called at 6:00 A. M. ad worked until 7:30 P. M. picking up and retrucking SSW 85233 and PRR 96443 and picking up and loading on Flat Car SSW 85248 assisted by Hardeman Derrick and Crew. On December 1, 1969 they were called at 6:00 A. M. and worked until 7:00 P. M. picking up and retrucking SSW 27367 and SSW 25318 assisted by the Hardeman Derrick and Crew. On December 3, 1969 they were called at 6:00 A. M. and worked until 7:00 P. M. and during this time the Hardeman Derrick and Crew were used to load Freight Car Parts into L & N 170278, B & O 361051 and L & N 170278. The Texarkana Wrecker Crew and outfit were returned to their home point relieved from Wrecker service December 4, 1969 at 8:30 P. M.

The St. Louis Southwestern Railway Company maintains Wrecking Derrick with outfit and regular assigned Crew at Texarkana, Texas and Pine Bluff, Arkansas.

Carmen J. W. Carter, H. J. Davis, V. L. Fergusson, M. R. Lovelace, T. E. Ashcraft, R. E. Lee, J. H. Findley, H. E. Gatlin, P. C. Holtzclaw and Leon Petty, hereinafter referred to as Claimants, were regularly assigned Members of the Pine Bluff Wrecker outfit at the time.

This claim has been handled with the highest designated officer of the Carrier, who has declined to settle the matter. The agreement effective November 1, 1953, as subsequently amended is controlling.

POSITION OF EMPLOYES: It is submitted that Carrier damaged Claimants when they employed the services of The Buddy Hardeman Derrick and Employes to perform work which was contracted to them under the Agreement of November 1, 1953, as amended, particularly the following rules and contract provisions:

The Contract Agreement reading:

"This agreement governs the rates of pay, rules and working conditions of machinists, boilermakers, blacksmiths, sheet metal workers, electrical workers, carmen, their helpers and apprentices who perform the work specified in this agreement in the Motive Power and Car Departments of the St. Louis Southwestern Railway Company, St. Louis Southwestern Railway Company of Texas, and who are represented by System Federation No. 45, Railway Employes' Department, American Federation of Labor, Mechanical section thereof."

The Preamble to the Agreement reading:

"The obligation that rests upon the Carrier to provide and the Employes to render honest, courteous and efficient service is recognized. (Emphasis ours.)

A spirit of co-operation between the Employes and the Carrier is essential to safe and efficient maintenance and operations, and both parties agree to so conduct themselves. The responsibility for success rests equally with the Employes and the Carrier."

That part of Rule 34-1, reading in pertinent part:

"None but mechanics or apprentices regularly employed as such shall do mechanic's work as per special rules of each craft, * * *." That part of Rule 87, reading in pertinent part:

"* * * wrecking derrick engineers, * * *." and all other work generally recognized as Carmen's work on this Carrier. * * *."

The Carmen's Special rules also contains the following:

Rule 90, "Wrecking Crews," reading in pertinent part:

'Wrecking crews (except cook) including engineers shall be composed of regularly assigned carmen, when available, and will be paid for such service as per general rules from time called until return to their home station. * * * When wrecking crews are called for wrecks or derailments outside of yard limits, the regularly assigned crew will accompany outfit. * * *'

It is submitted that on the basis of the facts as presented herein and the above quoted rules, Claimants held contractual right to the services in dispute, particularly that part of the Preamble obligating the Carrier "to provide" service under the agreement dated November 1, 1953, and that part of Rule 34-1 specifying that none but mechanics regularly employed as such shall do mechanic's work as per the special rules of each craft for all service developing on the St. Louis Southwestern Railway Company Lines.

It cannot be disputed that employes of the Buddy Hardeman Company were certainly not "regularly employed" by Carrier nor covered under any of the rules of the above quoted agreement, and were therefore not entitled to any service devolping under that agreement.

It is further submitted that the facts clearly substantiate that no emergency existed within the time of the present claim. The wrecked equipment had been moved so as to clear the Main Track, Train service had been restored, and the wrecker crew relieved and returned to home station prior to the commencing date of this claim. The facts substantiate an elapse of fifty-six (56) hours between the time the main line was cleared and train service restored and the work of picking up the damaged equipment begin.

Prior Awards of this Division sustain our position.

In Award No. 1124 this Division said:

> "* * * as was said in Docket 1026, Award 1123, Wrecking work, with certain well recognized exceptions, belongs to Carmen and of course to Carmen covered by the Controlling Agreement. This case comes within one of the exceptions to this rule. This was an emergency in which the Carrier was justified in borrowing the wrecking outfit and crew from another Railroad. * * *"

In Award No. 1327 this Division said:

> "* * * no emergency was involved. * * *"

The Employes position is further substantiated by the fact that Carrier obviously recognized this service properly belonged to employes covered under their agreement, evidenced by the fact that they called and used the Texarkana Crew and outfit throughout the claim period of November 24, 1969, through December 3, 1969. There are many decisions rendered by this Division which sustains our position.

In Award No. 4964 this Division said:

> "Under these and comparable circumstances this Division has properly held that Wrecking service belongs to the Wrecking Crew when a Derrick or similar equipment is used, unless the use of a substitute for the Crew's derrick is necessitated by an emergency."

Therefore under the basis of the facts as submitted and the above quoted rules, it becomes abundantly clear that Carrier's assertion that the use of an outside Contractor to assist in picking up some of the Cars did not infringe on rights of Claimants is without justification, when the facts reveal the Contractor assisted in picking up twenty-six (26) wrecked cars. The Honorable Members of this Division are requested to correct this inequity by sustaining the Employes' Statement of Claim in its entirety.

CARRIER'S STATEMENT OF FACTS: On November 19, 1969, at about 1:15 A. M., 36 cars in train ABSM-18 derailed at Mile Post 553 south of Tyler, Texas, blocking the main track. This train consisted of a three-unit diesel locomotive and 118 cars. 21 cars located 20th through 40th cars from the engine derailed and 15 cars located 54th through 68th cars from the engine derailed. It was necessary to reroute trains until the main track could be cleared.

The relief crane with crew from Texarkana was called to go to the scene of the derailment. Also a Southern Pacific - Texas and Louisiana Lines relief crane with crew from Houston, Texas, was used to assist in clearing the derailment.

In addition two bulldozers and a side-boom bulldozer furnished by Buddy Hardeman and Co., Inc., were used to assist in clearing the main track and restoring the right of way.

The main track was cleared and ready for passage of trains at 4:00 A. M., November 20, 1969. The two relief Cranes and the bulldozers continued working until the evening of November 21 the SP-TIL Lines relief crane returned to Houston and the Texarkana relief crane returned to Texarkana.

On November 22 and 23 lading from the derailed cars was transferred under the supervision of the Freight Claim Dept.

On November 24 the Texarkana relief crane with crew was returned to the derailment scene and began work of picking up the derailed cars. They worked on the dates indicated below:

November 24, 1969—12:01 A. M. to 6:00 A. M. Travel from Texarkana to derailment; 6:00 A. M. to 7:00 P. M. work at derailment.

November 25, 1969—5:30 A. M. to 12:00 MN work at derailment.

November 26, 1969—12:00 MN to 5:30 P. M. at derailment; 5:30 P. M. to 8:00 P. M. return to Texarkana.

November 28, 1969—4:30 A. M. to 6:40 A. M. Travel from Texarkana to derailment; 6:40 A. M. to 7:00 P. M. work at derailment.

November 29, 1969—6:00 A. M. to 7:30 P. M. work at derailment.

November 30, 1969—6:00 A. M. to 7:00 P. M. work at derailment.

December 1, 1969—6:00 A. M. to 7:30 P. M. work at derailment.

December 2, 1969—6:00 A. M. to 7:00 P. M. work at derailment.

December 3, 1969—6:00 A. M. to 7:30 P. M. work at derailment.

During the period November 24 - December 3, 1969, the two bulldozers and the side-boom bulldozer furnished by the contractor worked at the derailment site. The two bulldozers were used to help clear the site and restore the dump and embankment. The side-boom bulldozer was used to assist pulling some of the cars, which had been shoved aside earlier to clear the main track, to point where they could be picked up by the relief crane. The two bulldozers worked 10 hours each on claim dates November 24, 25, 26, 28, 29 and 30, and the side-boom dozer worked 10 hours on claim dates November 24, 25, 26, 28, 29, 30, December 1, 2 and 3, 1969.

All work at the derailment site was completed on December 3, 1969 and the Texarkana relief crane and crew returned to Texarkana on December 4.

The Employes filed claim alleging that the work performed by the contractor at the derailment with a "derrick" assisting the Texarkana relief crew

was violative of the rules of the current agreement, that the Pine Bluff relief crane and crew should have been used to assist the Texarkana relief crane, and that 8 carmen assigned to the Pine Bluff relief crane should be paid 164 hours and 45 minutes, 1 carman 174 hours and 1 carman 180 hours during the period November 24 through December 3, 1969. The claim appealed to this Board was changed to show 7 carmen should be paid 164.8 hours, 1 carman 180 hours, 1 cook 164.8 hours and 1 assistant cook 180 hours.

The claim was denied.

The applicable schedule agreement is that with System Federation No. 45, Railway Employes' Department, A. F. of L., Mechanical Section thereof, effective November 1, 1953.

POSITION OF CARRIER: The rules do not state the conditions under which wrecking crews will be called for wrecks or derailments. The agreement provides that when wrecking crews are called for wreck or derailment outside of yard limits, the regularly assigned crew will accompany the outfit. This is shown by Rule 90 reading:

> "Wrecking crews (except cook), including engineers, shall be composed of regularly assigned carmen, when available, and will be paid for such service as per general rules from time called until return to their home station. Meals and lodging will be provided by the Carrier while crews are on duty in wrecking service. When wrecking crews are called for wrecks or derailments outside of yard limits, the the regularly assigned crew will accompany outfit. For wrecks or derailments within yard limits sufficient carmen will be called to perform the work."

Likewise Rule 87 captioned "Classification of Work" does not make specific reference to wrecking service other than to mention wrecking derrick engineers. Rule 87 reads:

> "Carmen's work shall consist of building, maintaining, dismantling, painting, upholstering, and inspecting all passenger and freight cars, both wood and steel, planing mill, cabinet and bench carpenter work, pattern and flask making, and all other carpenter work in shops and yards, except work generally recognized or now assigned to other departments, building, repairing, and removing and applying wooden locomotive cabs, pilots, pilot beams, running boards, foot and headlight bards, tender frames and trucks; pipe and inspection work in connection with air brake equipment on freight cars; applying patented metal roofing, work done with hand forges and heating torches in connection with carman's work; painting with brushes, varnishing, surfacing, lettering, decorating, cutting stencils, and removing paint on passenger cars (not including use of sand blast machine, removal

their home station. Meals and lodging will be provided by the Carrier while crews are on duty in wrecking service. For wrecks or derailments outside of yard limits, the regularly assigned crew will be called to perform the work. For wrecks or derailments within yard limits sufficient carmen will be called to perform the work.

NOTE: It is understood and agreed that this rule is not in conflict with Rule 46." (Emphasis ours.)

The change proposed is underlined in the proposed rule quoted above. Carrier denied the change requested.

This Division, as well as other Divisions of the NRAB, have upheld the principle that the Board does not have the authority to expand or enlarge the terms of the controlling agreement nor to grant provisions in a rule by interpretation that were rejected by the Carrier at the bargaining table. For example, the Findings in Award 758 (Referee Mitchell) included:

"This record shows that the present working arrangement has been in force and effect since 1926. That when the 1934 agreement was negotiated, the employes suggested a change in the rule. The change was not agreed to. At the time the agreement dated July 1, 1936 was entered into, the employes again requested a change in the rule. This change was not agreed to and was withdrawn. This Award is based solely on the fact that under this record the employes have waived the right to a different interpretation of the rule involved."

Awards 15719, 14594, 14405, 12192 and others of the Third Division upheld this same principle.

Not only have the Employes recognized that carmen do not have the exclusive right to work at derailments, they are also aware that it has been the practice for many years to use contractors and other than carrier forces to assist at derailments. Following is list of some derailments on this carrier during a three-year period prior to the claim date which shows use made of contractors and other than carrier forces at such derailments:

February 22, 1967, derailment of 16 cars at Mile Post E-556 near Gresham, Texas. Used SSW relief crane from Texarkana, Sotuhern Pacific-T&L Lines relief crane from Houston and bulldozers furnished by contractor.

February 26, 1967, derailment of 3 cars at Mile Post I-50 near Dexter, Mo. Used Missouri Pacific relief crane from Poplar Bluff. Mo.

March 24, 1967, derailment of 2 cars at Big Sandy, Texas. Used SSW Mechanical Department Wheel truck and bulldozer furnished by contractor.

April 26, 1967, derailment of 3 cars at Mesler, Mo. Used Missouri Pacific relief crane from Poplar Bluff, Mo. and bulldozers furnished by contractor.

May 27, 1967, derailment of 58 cars at Mile Post 176 near Fair Oaks, Ark. Used SSW relief crane from Pine Bluff, SSW relief crane from Texarkana, Missouri Pacific relief crane from Little Rock and bulldozers furnished by contractors.

July 31, 1967, derailment of 3 cars at Commerce, Texas. Used SSW relief crane from Texarkana and winch truck furnished by contractor.

August 8, 1967, derailment of 4 cars at Commerce, Texas. Used SSW relief crane from Texarkana and bullozers and portable crane furnished by contractor.

January 13, 1968, derailment of engine and 7 cars at Mile Post E-581. Used SSW relief crane from Texarkana, SP-T&L Lines relief crane from Houston and bulldozers furnished by contratcor.

January 31, 1968, derailment of 7 cars at Corsicana, Texas. Used SSW relief crane from Texarkana and bulldozers furnished by contractor.

March 16, 1968, derailment of 24 cars near Roe, Arkansas. Used SSW relief crane from Pine Bluff, SSW relief crane from Texarkana and bulldozers furnished by contractor.

May 10, 1968, derailment of 2 units of diesel locomotive and 26 cars near Dauphin, Texas. Used SSW relief crane from Texarkana and bulldozers furnished by contractor.

May 13, 1968, derailment of 2 cars at Corsicana, Texas. Used bulldoders furnished by contractor.

May 14, 1968, derailment of 3 unit diesel locomotive and 41 cars at Stephens, Arkansas. Used SSW relief crane from Texarkana, SSW relief crane from Pine Bluff, bulldozers and mobile crane furnished by contratcor.

October 14, 1968, derailment of 23 cars near Malakoff, Texas. Used SSW relief crane from Texarkana, T&P relief crane and bulldozers furnished by contractor.

November 2, 1968, derailment of 23 cars at Mile Post 254 near Altheimer, Arkansas. Used SSW relief crane from Pine Bluff and bulldozers furnished by contractor.

November 26, 1968, derailment of 7 cars near Hunter, Arkansas. Used SSW relief crane from Pine Bluff and bulldozers furnished by contractor.

March 10, 1969, derailment of 4 cars at Mile Post K-416 near Plain Dealing, La. Used SSW relief crane from Texarkana and bulldozers furnished by contractor.

April 10, 1969, derailment of 12 cars at Brinkley, Arkansas. Used SSW relief crane from Pine Bluff and bulldozers frunished by contratcor.

April 19, 1969, derailment of 10 cars at Mt. Pleastant, Texas. Used SSW relief crane from Taxarkana and bulldozers furnished by contractor.

July 31, 1969, derailment of 10 cars at Tyler, Texas. Used SSW relief crane from Texarkana and bulldozers furnished by contractor.

This list shows that it is not unusual and is in fact a common occurrence for equipment of other railroads as well as equipment furnished by contractors to be used to assist Carrier's forces at derailments. In none of the above instances where contractors worked with one of Carrier's relief cranes at a derailment did the carmen allege the other relief crane and crew should have been used.

Carrier submits that the use of a contractor's equipment to assist at this derailment was not violative of any rule of the agreement and was in accordance with established practice.

Attention is directed to the following awards of this Division which support Carrier's position in this case:

Award 4393 (Referee Williams) denied claim with Findings including:

> "We find no language in these rules which require the Carrier to send the wrecking crew to all wrecks or derailments, nor is there any language which prevents the Carrier from determining, unilaterally, when the wrecking crews are to be called."

Award 5005 (Referee Weston) denied claim of carmen when wrecking crane and crew of another railroad were used to clear a derailment with Findings including:

> "In this setting, it is appropriate to consider past practice. Carrier has presented some evidence that it has used Northern Pacific wrecking crews in the eastern area of its property for many years. Petitioner challenges the timeliness of that evidence, but that point is academic. The burden of establishing all essential elements of the claim rests on Petitioner and here it has submitted no facts to show how Rule 67 was interpreted in actual practice on the property.
>
> Since no clear basis is perceived in the agreement or in past practice for finding that Carrier is contractually committed to use its own wrecking crews to rerail cars outside yard limits in the Snake River area, the claim must be denied."

Award 5391 (Referee Ritter) denied claim of carman when carrier used a contractor's truck and boom to assist in rerailing two cars. Findings included:

> "The record discloses that Claimant did not have the exclusive right to the work involved in this instance. (Award 3859 - Award 2049.) In the absence of evidence that Carrier acted in an arbitrary, capricious and discriminatory manner, it is well established that Carrier may exercise its prerogative of management. (Award 4898). The evidence has not been established, in this case, that it was necessary to use the heavy 100 ton wrecking crane located at McGehee for this small job. There is no contention by the Organization that the small crane ordered from the construction company was comparable to the heavy wrecking crane located at McGehee. (Award 1909 and Award 4682). There was also no evidence in the record disclosing that Claimant was familiar with the construction company's crane or that he would have been permitted to operate the same if he had been present. (Award 4686).
>
> Therefore, it is concluded that in this instance, Carrier had the prerogative to use or not use Carrier's equip-

ment had been used, Claimant's claim would have been valid. It is further concluded that Carmen do not have exclusive right to the work involved herein and that in this instance, the small crane owned by the construction company was needed and not the heavy equipment owned by the Carrier. In the absence of any showing that Claimant could have operated the small crane, there is no question but that this claim should be denied."

Award 5621 (Referee Murphy) denied claims of carmen when others than carmen were used to augment the wrecking crew at a derailment. Findings included:

"Rules 149, 152 and 153, relied upon by petitioner do not convey monopolistic rights to the carmen's craft to perform wrecking service such as the rerailing of cars to the exclusion of all others. In fact, the language of these rules, particularly Rule 153, make it clear that carmen do not possess such rights to service under all circumstances."

Award 5768 (Referee Dorsey) denied claim of carmen when employes of another craft performed work at a derailment alleging that carmen were entitled to all the work at the derailment site. Findings included:

"Rule 88(a) and (c) does not mandate that a wrecking crew shall consist of sufficient Carmen to perform all the work involved as a result of a wreck — the interpretation which Petitioner seeks. It does not expressly reserve to a wrecking crew, which the Carrier finds 'needed,' the exclusive right to all the work in the wrecking service. The words 'when needed' can note 'to the extent needed.'

We find no contractual bar to the operation of the crane by a Maintenance of Way employe in light of the facts of record; provisions of Carmen's Agreement; and, the estabilised principle that wrecking service is not reserved, exclusively, to Carmen in the absence of expressed contractual obligation. We will deny the Claim."

Without prejudice to its position that this claim is not supported by the rules as outlined above, there is no basis for the claim for the number of hours listed for each of the claimants. In the handling on the property the Employes did not separate the number of hours claimed for each of the carmen as to the specific times they should have worked on each date. Instead they merely claimed each of the carmen should be made whole the total amount of hours listed for each. At no time during the handling of the claim did they indicate on what basis they arrived at such total amount of hours for each carman.

Inasmuch as the Employes allege that the carmen named should have performed work that was performed by the contractor's machine, even if the claim had merit (which it does not), clearly the claim could be for no more than the time worked by the contractor's machine on each of the days listed in the claim, less any time the claimants were not available for work and less any time for which they have already been compensated on such dates.

Also without prejudice to its position that the claim is not supported by the rules as outlined above, Carrier submits that the claimants were not available on some of the claim dates.

Although the Employes allege the Pine Bluff relief outfit was available during the period November 24 - December 3, 1969, it was pointed out in conference on the property that the Pine Bluff relief crane and crew were used at a derailment at Stamps, Arkansas on November 30 and December 1, 1969, and obviously were not available to have been used at Mile Post 553 on those two dates. Therefore, any claim for the carmen in the instant case on those two dates could not be valid.

It was also pointed out that Carman T. E. Ashcraft was on vacation December 1 - 3, 1969, and Carman H. E. Gatlin was on vacation December 2 - 3, 1969, and they were not available for service on such days.

Carrier also submits that there could be no valid claim for P. C. Holtzclaw, Cook, and L. Petty, Assistant Cook, as Rule 90 specifically excepts cooks.

In conclusion Carrier submits that there was no violation of the agreement and respectfully requests that the claim be denied.

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 tht 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.

On November 19, 1969, at approximately 1:15 A. M., a derailment occurred on Carrier's line blocking the main track. The latter was cleared and ready for passage of trains at 4:00 A. M., November 20, 1969. Additional work was required in and around the scene of the derailment requiring the use of the two relief cranes and bulldozers until the evening of November 21, 1969. From November 24 to December 3, 1969, bulldozers were used to clear the area, etc.

The work was performed by Carrier's Texarkana relief crane equipment and crew assisted by two bulldozers and one side-boom bulldozer furnished by an outside contractor.

The instant claim has been submitted by the Pine Bluff Wrecking crew on the grounds that they should have been afforded the opportunity to perform the work in preference to the outside contractor. They rely principally Rules 34-1, 87 and 90, all of which in pertinent parts read as follows:

Rule 34-1

"None but mechanics or apprentices regularly employed as such shall do mechanic's work as per special rules of each craft," * * *

Rule 87

"* * * Wrecking derrick engineers * * *" and all other work generally recognized as Carmen's work on this Carrier. * * *"

Rule 90

"Wrecking crews (except Cook) including engineers shall be composed of regularly assigned carmen, when available, and will be paid for such service as per general rules from time called until return to their home station. * * * When wrecking crews are called for wrecks or derailments outside of yard limits, the regularly assigned crew will accompany outfit. * * *" (Emphasis ours.)

The Classification of Work Rule (87), specifies "and all other work generally recognized as Car-Men's work." Although this rule does not include "wrecking service" as such, the Organization arguendo avers that such work is generally recognized as their work. Further, Rule 34-1 provides that one must be "regularly employed" by Carrier to perform the work, and since the employes of the outside contractor are not so "regularly employed," Carrier has ignored their basic rights to work.

We take cognizance of the arguments propounded by the Organiaztion but do not find them to be persuasive. There is no showing in this record that claimants had an exclusive right to the work. There is no evidence, burden of which is on the Petitioner, to prove that by engaging the services of an outside contractor. Carrier ipso facto has violated the agreement. The use of the word "when" is highly indicative of the non-exclusive nature of the work performed. We find no contractual prohibition against the employment of an outside contractor. We will deny the claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 28th day of March 1972.

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