Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 7074
Docket No. 6901
2-B&O-CM-'76

The Second Division consisted of the regular members and in addition Referee Louis Norris when award was rendered.

Parties to Dispute: (System Federation No. 4, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(The Baltimore and Ohio Railroad Company

Dispute: Claim of Employes:

1. That the Carrier violated the provisions of the controlling Agreement by bringing in an outside concern to perform wrecking within the yard limits at Willard, Ohio.

2. That the Carrier be ordered to compensate Carmen V. Miller, John Polocheck, R. O. Morey, C. G. Coffman, John Bores, C. L. Biettner, C. D. Sage, Harold Gates, J. C. Henery, J. Andersac, and Assistant wreckmaster, H. C. Puckett for 13 hours and 20 minutes, time and one-half rate and wreckmaster R. E. Sage in the amount of 4 hours and 5 minutes at time and one-half rate.

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.

The basic facts involved in this dispute are not seriously in issue. On September 4, 1973, at approximately 12:40 p.m., a derailment occurred at the eastbound receiving yard at Carrier's facilities located at Willard, Ohio. This derailment involved ten cars and tore up 880 feet of track of the eastbound main, 300 feet of No. 1 yard track along with the yard lead, and about 100 feet of the No. 2 yard track.

The regularly assigned Willard wrecking outfit and crew were called to this derailment at 1:00 p.m. on September 4 and relieved of duty at 12:00 midnight on September 4. While the work was in progress it was determined that some of the derailed cars were not accessible to the wreck derrick and that off-track equipment would be needed. Accordingly, Carrier called the Hulcher Company, an outside organization, at 2:45 p.m. on September 4. The Hulcher Company's

equipment and 12-man crew arrived at the scene at 5:30 p.m., commenced work at 6:00 p.m., and continued the rerailing work, using their off-track equipment, until 4:05 a.m. on September 5, at which time the work was completed.

Petitioner contends that Carrier violated the controlling Agreement, particularly Rule 142, when it called in an outside concern (Hulcher Company) to perform wrecking and rerailing services within yard limits. Demand is made in the claim for compensation to specific Carmen who were available to perform the work here in dispute.

Rule 142 reads as follows:

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

It is not disputed that initially Rule 142 was complied with when the Willard wrecking outfit and regularly assigned wrecking crew were called to the derailment. Petitioner contends, however, that wrecking and rerailing work within yard limits belongs exclusively to Carmen by agreement and by "historical practice", and, accordingly, that the use of the Hulcher equipment and crew violated the Agreement. Moreover, that Carrier had ample time (5 hours) before arrival of the Hulcher crew to rebuild the torn out track so that the Willard wreck crew could have completed the work, but that Carrier made little effort to do so.

Carrier responds that the Willard crew did in fact rerail those cars within reach of the regular rail-operating outfit, but that off-track equipment, which Carrier did not possess, was necessary to complete the rerailing work. This necessitated calling in the Hulcher Company which did possess off-track equipment. Additionally, Carrier asserts that an emergency situation existed in that some 1280 feet of track was torn up, which included the eastbound main, the yard lead and No. 1 and No. 2 yard tracks; that an additional eight to ten hours work was necessary to clear up the derailment; that extensive delay would have caused blocking of the westbound main and disruption of other operations; and, accordingly, that it acted within its managerial prerogatives in deciding to clear the derailment as expeditiously as possible by calling in the Hulcher Company to complete the work.

Turning first to Petitioner's contention of exclusivity, although prior Awards are not in complete agreement, the clear weight of authority supports the principle that under Rule 142 (or similar Rules) Carmen do not have the exclusive right to do the work of rerailing cars unless a wrecking outfit and crew are called or required to do the work. <u>These findings have been made as to wrecks occurring within and outside of yard limits</u>.

See Awards 2343, 3257, 4337, 4901, 4931, 5306, 5621, 5860, 6030, 6454 and 6703.

Consequently, although both principals devote a goodly portion of their Submissions to discussion of whether the wreck occurred "within" or "outside of" yard limits, we do not consider this issue as paramount in this dispute in view of the above precedents and for reasons detailed hereafter.

Petitioner contends, further, that the disputed work belongs to Carmen exclusively on the basis of "historical practice". However, no factual evidence is offered to substantiate such assertion, which thus becomes merely conclusory in impact. This Board has held repeatedly that mere conclusory allegations are no substitute for factual evidence.

See, for example, Award 1760; Third Division Awards 8065 and 9609; and Fourth Division Award 1486, among others.

In essence, Rule 142 requires that "sufficient Carmen will be called to perform the work". Initially, this requisite was complied with. The question remains, however, whether Carrier was justified, under the facts and circumstances of this case, in calling in outside forces to complete the work. The answer to this question hinges upon two issues. Firstly, whether an emergency situation did in fact exist; and, secondly, whether Carrier acted reasonably and logically and did not abuse its managerial prerogatives.

On the second proposition, there is no evidence in this record that Carrier's determination to call in the Hulcher outfit and crew was in any sense unreasonable or illogical. Moreover, if an emergency situation did in fact exist, then Carrier acted properly and within its management responsibilities and prerogatives. This brings us to the paramount issue which confronts us here - the alleged emergency.

This Board has held that a minor delay and the fact that outside forces may expedite the work somewhat are not in themselves sufficient to constitute an emergency. Thus, in Award 5191, the saving of "three hours time" was held to be without merit; and in Award 4600 Carrier's desire to avoid delay to a single passenger train did not make "time of the essence" or constitute an emergency. Similarly, in Award 6703, Carrier failed to sustain its burden of proving that its equipment was unsuited to complete the rerailing operations. The factual situation in this case is directly to the contrary.

Obviously, the situation in each case is pregnant with its own peculiar facts and circumstances, and our determination of the applicability of the emergency concept must be based on particular facts. The facts in this case are that extensive track damage existed (1280 feet of track having been torn up) affecting the eastbound and westbound mains, the yard lead, and No. 1 and No. 2 yard tracks; that Carrier's equipment was inadequate to complete the rerailing and that off-track equipment was needed, which Carrier did not possess; that extensive delay and disruption of operations would result had Carrier attempted to use its own equipment and forces to complete the work, assuming that this could have been done..

In these circumstances, we are compelled to the conclusion that an emergency did in fact exist, and that Carrier acted reasonably and logically, and did not abuse its managerial prerogatives in calling in outside forces possessed with the required off-track equipment to complete the rerailing operations.

The following quote from Award 4581 is particularly applicable here:

> "Much of the submissions of the parties hereto is centered around the necessity of Carrier using private equipment. The record is sufficiently clear to convince us that Carrier was making full use of its own available equipment and its decision that an off-track crane such as it hired from the Higgins Company was also necessary to the proper handling of the derailment will not be disturbed by us under these circumstances."

Similarly, in Award 6490 we held that the emergency concept will be deemed applicable "primarily because the possibility of emergency is inherent in the factual statement". We stated further:

> "There is no doubt that main line blockage and urgent movement of trains are emergency situations but as in all emergencies judgment is required to accomplish the necessary result." (Emphasis added).

We conclude and find that "main line blockage and urgent movement of trains" were factors involved in this case, and that Carrier acted properly in exercising its judgment "to accomplish the necessary result". In short, that an emergency did exist, and that Carrier was warranted in attempting to clear the derailment as expeditiously as possible.

We point out, further, that the fact that the claim was sustained in Award 6490 is not contrary to our findings here. In that case the Hulcher crew and equipment arrived at the wreck site at 9:30 p.m. on the day of the wreck, but did not start operations until 5:00 a.m. the next morning, seven and one-half hours later - sufficient time for Carrier to have brought its own 75 ton derrick into play. This created a substantial doubt as to the validity of the claimed emergency.

In the case before us, the Hulcher crew and equipment arrived at the scene at 5:30 p.m. and started work one half hour later. Additionally, the necessity for use of off-track equipment was a further controlling factor. The two situations, therefore, are clearly distinguishable.

We quote, finally, from Award 6582:

> "In the case before us, there is evidence that an emergency existed, there is no evidence that the outside forces performed any work at the site after the emergency ceased to exist and there is no evidence that Carrier abused its managerial prerogatives under all the circumstances. In view of the foregoing, we find that there has been no violation of the Agreement."

We so find in this case. Accordingly, based on the entire record and controlling authority, we are compelled to deny the claim.

Finally, Carrier raises the issue "that Claimants Puckett and Sage are Supervisors represented by the Foremen and Supervisors Agreement and, as such, the Second Division does not have jurisdiction to handle their claims." Petitioner vigorously contests this issue, contending that these employees are dues paying members of the Carmen's Organization; that they are part of the original claim and should so remain; and, finally, that this issue constitutes inadmissible "new matter", not having been raised during the processing of this claim on the property.

In any event, in view of our findings and conclusions on the merits, we deem it unnecessary to resolve this issue and, accordingly, we make no determination thereof negatively or affirmatively.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this **22nd day of June, 1976.**