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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6490
Docket No. 6285
2-GM&O-CM-'73

The Second Division consisted of the regular members and in addition Referee Irving T. Bergman when award was rendered.

Parties to Dispute: (System Federation No. 29, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(
(Gulf, Mobile and Ohio Railroad Company

Dispute: Claim of Employees:

1. That under the current agreement the Carrier improperly assigned other than Carmen to assist wrecking crew in performing wrecking service at Shubuta, Mississippi on June 19, 1971.
2. That accordingly, Carrier be ordered to additionally compensate the following Carmen in the amount of twenty-five (25) hours each at the applicable overtime rates:

M. T. Everett	C. C. DeVine	C. P. Williams
V. A. Tice	E. F. Burdett	W. B. Johnson
J. D. Risner	W. Powell, Jr.	D. W. Reynolds
J. N. Parnell	A. N. Tew	K. D. Bowden
J. L. Fellows	A. M. Poiroux	G. W. Singley
L. B. Colvin, Jr.	Leslie Powell	C. E. Bates
M. W. Smith	S. T. Hamilton	A. C. Lewis
H. C. Poiroux	F. E. Holland	
J. H. Presnall	L. E. Soutullo	

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 were given due notice of hearing thereon.

A derailment occurred at Shubuta, Mississippi at 10:45 AM on Friday, June 18, 1971. Thirty three cars were turned over or derailed. Shubuta is 39 rail miles south of Meridian where Carrier had a wrecking outfit and 96 miles north of Mobile, Alabama where Carrier maintained a 75 ton wrecking derrick. There is a siding track located at the scene of the wreck. Hulcher Emergency Railroad Service, an outside contractor was called to assist.

In Employes' rebuttal, the Organization has objected to items of the Carrier's submission on technical grounds. It objects to Carrier's Exhibit "B", referred to in Employe's Rebuttal p.8, as No. 2, because the exhibit was not attached to the copy of the submission received by it. It objects to Carrier's submission p.2, which states that Hulcher used fourteen men. Throughout the handling on the property the Organization stated that twenty-five employes of Hulcher aided at the wreck site. None of the Carrier's officers disputed this fact at any stage. Objection is made to Carrier's statement in its submission that the 75 ton wrecking derrick could not have served a usefull purpose at the wreck site. This is set forth for the first time and the issue was not raised in the handling on the property.

At the hearing, the Organization voiced objection to Carrier's Rebuttal wherein for the first time an undated letter from its General Superintendent describing the condition of the passing track is set forth and, for the first time, the contention is made that the passing track was blocked. Objection is made to the claim of Carrier for the first time, in its rebuttal, that at least eleven of the claimants were not available. Objection is made to Exhibits A and B of Carrier's submission as not submitted in the handling of this claim on the property. The same objection is raised as to Exhibits A and B of Carrier's rebuttal.

It is important that both parties to a dispute know each other's contentions and the issues to be resolved. This should start during the handling on the property. Hopefully, the parties may then resolve their differences voluntarily. In addition, this Board is concerned when material is presented for the first time by one party which the other party has not had the opportunity to answer. The importance of these principles which are fundamental to the function and purpose of the Board is expressed in National Railroad Adjustment Board Circular No. 1, issued October 19, 1934. It has been emphasized by this Division in Circular "A", dated June 1, 1936, reprinted October 1, 1953, and by Resolution of this Division adopted March 27, 1936, reprinted February 10, 1971. Second Division Award No. 5421, followed this doctrine in stating: "It is very apparent that the above lettered Exhibits were not submitted on the property and that this Board cannot consider such Exhibits in the determination of this dispute."

Accordingly, we shall not consider the letter from the Hulcher Company and its maps showing locations. We shall not consider Carrier's Exhibit B, nor the undated letter from its General Superintendent regarding the condition of the passing track. Neither shall we consider points raised for the first time regarding the availability of claimants, that the passing track was blocked, that the equipment from Mobile could not be used, or the number of men used by Hulcher at the wreck site. Although the Carrier uniformly denied the claim in each stage of the handling on the property solely because the claim was not supported by the rules of the agreement, we will consider the question of emergency. We accept this contention because it may be inferred from the letter, Employes' Exhibit A-15, but primarily because the possibility of emergency is inherent in the factual statement.

As to merits, the Organization claims that the Carrier violated Rule 509 and Rule 33 of the Agreement by failing to utilize the wrecking equipment at Mobile and by engaging an outside contractor whose employes performed carmen's work.

The Carrier has countered with the contention that this was a main line track which was blocked thereby constituting an emergency, and that in an emergency the Carrier has the right to do anything to clear the track and get trains moving. The Carrier also has argued that the scope rule for Carmen does not assign wrecking work to them exclusively; that this case should therefore, be dismissed on the authority of Award No. 261 of Special Board of Adjustment No. 570, in a comparable case, between the same parties.

Reading Award 261, we find that the Carrier called its wrecking equipment and crew which was not able to handle a condition involving the leaking of a highly flammable chemical from one of the cars. While the Carrier's wrecking crew stood by, Hulcher used its specialized personnel and equipment to take care of the problem after which the Carrier's crew continued its work. The claim was dismissed for lack of jurisdiction upon the authority of previous Awards of that Board, apparently because the Carmen's Classification of Work Rules does not include wrecking service or rerailling of cars. It is not clear that this was a decision on the merits.

We do not believe that this case resolved for all time all claims based on the use of outside contractors. On the contrary, Awards on this subject have been submitted by the Carrier, each decided on its own facts. Essentially, the result revolves around whether or not an emergency existed, whether or not the Carrier's equipment and crews could have done the work, if they were readily available and, depending on the circumstances, was the use of outside wrecking equipment and crew required or advisable. This does not contradict or do violence to the "General Purposes" of the Railway Labor Act. The legal positions of stare decisis and res adjudicata urged by carrier are obviously debatable, depending upon the facts of a case. Although interposed as a defense in countless lawsuits, these defenses are sometimes sufficient, and sometimes insufficient. Carrier's contention that Award No. 261, must be followed in this case is not conclusive as to the result to be reached.

Carrier has submitted a number of prior Awards to justify its action in engaging the Hulcher Company. One Award held that in a main line blockage "anybody can do anything to clear the Main Line within a reasonable length of time", p. 8 of Carrier's submission. (If an emergency exists, why limit action to a "reasonable length of time?"). Main Line interruption may not be the only time an emergency develops. The existence of flammable material, saving lives, escaping poisonous fumes may justify emergency action even if not on a main line. In Second Division Award No. 4862, an emergency existed within yards because livestock was involved, with a legal limit on time they could not be confined in cars. The carrier was justified in renting a local truck crane and operators because the carrier's derrick was 100 miles away. It was determined that the carrier's derrick was not suitable, necessary nor reasonably available.

In Second Division Award No. 4268, the use of outside equipment and help was found to be justified because a loaded freight car was in a precarious position, kept from tipping over by coupling to the engine. A main line was not blocked but switching operations to the main line were disrupted and Carrier's wrecking equipment was 91 miles away.

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. Second Division Award No. 1068, held that where mail trains were being tied up, use of outside help 30 miles away was justified because Carrier's equipment was 155 miles away. In Award No. 1065, Carrier was justified in getting help 15 miles away when claimants were 155 miles away because Army troop trains moving in both directions were being held up. In Award No. 1559, the emergency was created by main line being blocked. It was a bad wreck with 351 feet of track torn up, 41 cars derailed, 23 cars beyond repair, 2 bodies were buried in ore cars. Outside help was necessary to clear the tracks. When the main line was clear, the emergency ceased to exist. Although clearing the remains of the wreck was still to be accomplished as soon as possible, carrier was obliged to use its own forces for this purpose.

In essence, the Organization does not disagree with the policy adopted by the carrier. It has been urged in its submission, in effect, that carriers are abusing the management prerogative reserved for emergency situations. In doing so, it is contended, carriers are using outside help when emergencies do not exist, or continuing to use outside help after the emergency has been overcome, or in using other than carmen to do carmen's work at wrecks when carmen are available. The Organization has also submitted Award 1559, to illustrate the use of outside men beyond the period of emergency, and to do work normally performed by carmen. The same point is made in Second Division Award No. 4581, in which the facts show that carrier was using all of its available equipment. It was justified in engaging outside help but violated the agreement by using outside personnel to do work which falls within carmen's classification.

In the present case, the Organization has challenged the use of management prerogative and discretion. Second Division Award No. 6257, last paragraph of the Findings, states that a successful challenge requires a finding of arbitrary, capricious or discriminatory action by the carrier, or abuse of managerial discretion, Award 4190. Also it becomes incumbent upon the Carrier to offer a reasonable explanation for its use of strangers to the railroad in place of its own employees. Second Division Award 3629, indicates that the carrier claimed that its wrecking derrick was not needed, assigned part of a wrecking crew and called in outside help to right a tank car that had spilled acid. The Finding was that the carrier's right to decide when to call out the wrecking outfit and crew is not absolute; that the carrier should have called out the wreck derrick and crew. Whether or not the claimants are seeking to substitute their judgment for that of carrier or to protect rights granted by the controlling agreement depends upon the facts, Award No. 4186. In Award No. 4222, the carrier claimed an emergency and the need (not explained) to rent outside equipment, where no siding was available. This Division found that carrier could have used its own available outfit for the work performed by the rented equipment.

The facts of the present case must be submitted to the test of what was reasonable and logical under the circumstances.

It is a fact that the Hulcher equipment arrived at the wreck scene at 9:30 PM on the day of the wreck but did not commence operations until 5:00 AM the next morning. This creates a doubt as to the validity of the argument that it was an emergency situation.

Carrier's 75 ton wrecking derrick at Mobile could have arrived at the wreck with all necessary employes by late afternoon on the day of the wreck and commenced work immediately at the wreck site of an emergency existed.

The acceptable record offers no demonstrable proof that the passing track could not be used or that the derrick from Mobile could not have done the work.

Conceding that the carrier had the prerogative to exercise managerial discretion, subject to challenge, there has been no reasonable explanation submitted by the carrier to explain why it was more desirable to wait until 9:30 PM for an outside outfit to arrive; and then to wait seven and one half hours to start operations. Emergency work to clear main lines can be done at night.

Petitioner has the burden to prove its case. Relying on prior Awards, we think that sufficient facts exist in favor of the Organization. The carrier has not demonstrated that this was a compelling emergency, that the Mobile equipment and crew could not have done the work, that it had not suitable outfit and crew available, that the outside company was either necessary or that it was more reasonable to call in the Hulcher Company.

We find that the carrier violated Rule 509 of the Agreement by failing to call the outfit and crew of carmen from Mobile. We find that only carmen assigned to the regular wrecking crew at Mobile are entitled to pro rata pay for work not performed during their recognized straight time hours and overtime compensation according to paragraph 10, of the General Rules, as set forth in the Agreement.

The claim is presented only for carmen. We are not making a finding as to any other classes of employes.

A W A R D

Claim disposed of according to the findings set forth, and the ascertainment of the names and number of carmen who would be entitled to payment and the amounts payable to each is remanded to the property.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:

E. A. Killen

Executive Secretary

Dated at Chicago, Illinois, this 2nd day of May, 1973.