Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 7071
Docket No. 6871-T
2-BN-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. 7, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Burlington Northern Inc.

Dispute: Claim of Employes:

1. That the Burlington-Northern, Incorporated, violated Rules 7-82-83 and 86 of the Controlling Agreement. In effect, on the Burlington-Northern, Inc., when they dispatched other than the regularly assigned Superior wrecking derrick and the regularly assigned wrecking crew to complete the task of rerailing derailed cars, load salvageable parts and trucks at a derailment site October 8 and 9, 1973.

2. That, accordingly, the Burlington-Northern, Inc., be ordered to compensate wrecking Engineer, J. Karling, Carmen J. Monberg and C. Jablonski in the amounts of ten and one-half ($10\frac{1}{2}$) hours each at the time and one-half ($1\frac{1}{2}$) rate for October 8, 1973, and ten (10) hours each at the time and one-half ($1\frac{1}{2}$) rate for October 9, 1973.

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.

On December 17, 1972, a derailment occurred outside the yard limits of Carrier's facilities at Superior, Wisconsin. The Superior wrecker derrick and the regularly assigned wrecking crew were dispatched on that day to perform the necessary wrecking and rerailment services. Such work was performed continuously on December 17, 18, 19, 20 and 21, 1972, and on January 15, 16, 24, 25, 26, 31 and on February 1 and 2, 1973. These services were paid for at the contract wrecking rate and, as of February 2, 1973, the main line had been cleared, the emergency was over, and all rerailing had been completed. The latter points are conceded by both principals to this dispute.

On October 8 and 9, 1973, some eight months later, three Superior Carmen were dispatched to the derailment site for the purpose of assisting in the loading of salvage wheels and trucks into gondola cars. The regular wrecker derrick was not used, instead a Maintenance of Way Crane was utilized. No rerailment of cars was done on these days.

Petitioner contends that Carrier violated Rules 7, 82, 83 and 86 of the controlling Agreement when it dispatched "other than the regularly assigned Superior wrecking derrick and the regularly assigned wrecking crew to complete the task of rerailing derailed cars, load salvagable parts and trucks" at the derailment site on October 8 and 9, 1973. Demand is made for compensation to specific wrecking crew members as detailed in the claim.

In point of fact, the record does not indicate that any rerailing was involved; the specific work being the loading of salvage wheels and trucks into gondola cars. Moreover, there is no proof in the record (other than conclusory assertions by Petitioner) that any decisions were required by the Carmen engaged in the loading operation as to the selection of parts to be salvaged, as was the case in Awards 4571 and 4572, cited by Petitioner. Carrier asserts that such decisions were reached earlier by Carrier Supervisors.

Petitioner's basic contention is that the disputed work belongs exclusively to the regularly assigned wrecking crew since a "wrecker derrick" was used "consisting of a Maintenance of Way Crane". To buttress its position, Petitioner refers us to the dictionary definition of "derrick", which we have compared with the dictionary definition of "crane".

We would point out, firstly, that although in particular situations derricks and cranes can perform similar tasks, the wrecker derrick is a much larger piece of equipment designed for exceedingly heavy work, whereas the crane is smaller and designed for lesser tasks.

Secondly, and more to the point, the dictionary definitions are irrelevant in the context of this dispute. What is relevant is that the derrick to which the Rules refer is the specific regular wrecking derrick of this Carrier at Superior. And it is precisely this derrick which, when called out, requires under Rule 86 that "the regularly assigned crew will accompany the outfit". Obviously, then, the Maintenance of Way Crane is not synonymous with the regular wrecking derrick. The issue, therefore, precisely stated, is whether Carrier was justified in using the crane instead of the derrick.

This Division has held repeatedly that it is within Carrier's management prerogatives to decide on its own judgment whether or not the regular derrick is required in particular situations. And that the burden of proof rests on Petitioner to establish by affirmative evidence that Carrier's exercise of such judgment was arbitrary, capricious or unreasonable.

See, for example, Awards 4898, 5545 and 6322, among others.

Such "affirmative evidence" is absent in this record and, accordingly, we find that Carrier acted reasonably and within its managerial authority in deciding not to utilize the regular derrick in this case. Additionally, we point out that the disputed work occurred some ten months after the derailment, that all wrecking and rerailment work had long since been completed, and that the sole function remaining was to "load salvage wheels and trucks into gondola cars". Clearly, in these circumstances, Carrier was fully justified in using the smaller equipment (Maintenance of Way Crane) and in deciding not to call out the wrecker derrick. This being so, Carrier was under no obligation under the controlling Agreement to call out the regular wrecking crew. We are unable to conclude, therefore, that Carrier acted in violation of the Agreement.

Practically the identical issues, on this property and involving the same principals, have been reaffirmed in a host of prior Awards of this Division, in each of which similar conclusions and findings were arrived at contrary to Petitioner's position in this dispute.

See, for example, Awards 4821, 4898, 5637, 6177, 6322 and 6838, among many others. In Award 6177, some thirteen confirming Awards are cited on the same issue running from 1953 through 1967.

Specifically, in Award 6322, three cars were derailed at Helena, Montana. Carrier called three carmen from the overtime list and sent them from Great Falls to Helena with a highway truck the following morning. The cars were rerailed with the aid of a small maintenance of way crane. The Claimants in that dispute were members of the wrecking crew located at Great Falls. The employes contended that rules and precedent required that the wrecking derrick and crew be sent to Helena to rerail the cars.

The Board then stated:

> "This same question has been before this Board many times. Awards have consistently held that it is the prerogative of management to decide whether to call wrecking derricks and crews and wrecking crews do not have the exclusive right to all rerailing work."

Finally, we quote the following from Award 6322, which conclusively disposed of the issues in that case and which should similarly and equally conclusively dispose of the issues in this case:

> "Three Awards of this Board between the same parties should dispose of the instant dispute.

Second Division N.R.A.B. Award 4898 (McMahon) states:

'Carrier in exercising its prerogative of management, did not use the wrecking equipment from Minot, but used other employes to rerail the car with the use of other Carmen and Sectionmen and the use of a catepillar tractor.

There is no evidence in the record here that Claimants had an exclusive right to work involved here. Nor is there evidence that Carrier acted in arbitrary, capricious or discriminatory manner, in exercising its judgment to determine whether or not the use of the Wrecking Crew and its equipment were necessary to perform the work required here as alleged. The principles set out in Award No. 4190, this Division, are similar to the facts and circumstances here before us.'

"Second Division N.R.A.B. Award 5545 (Ritter) states:

'This Board is of the opinion that this claim is without merit. This Board has decided many times that the rerailing of locomotives and cars is not the exclusive work of carmen when a wrecker is not called or needed. See Awards 1482 (Carter), 1757 (Carter), and 4821 (Johnson). The last named Award, 4821, arose on this property and involved these parties. Awards 2722 (Ferguson), 4903 (Harwood), and 4393 (Williams) hold that the actual wrecking crew must be called only when the outfit, or wrecker, is called and that the need for calling the wrecker is a matter to be determined by the Carrier. Awards 4682 (Daly), 5032 (Weston) have determined that a winch truck does not constitute a wrecker or "wrecking outfit". Since this derailment occurred outside yard limits and for other reasons hereinabove set out, this claim will be denied.' (Emphasis added).

"Second Division N.R.A.B. Award 6177 (Simons) states:

'This Board is dismayed that it is compelled to consider a dispute over issues which have been adjudicated innumerable times over two decades. The Board, though sorely tempted, will not, in the interests of brevity, cite the pertinent portions of the awards listed below, all of which in clear, unambiguous and definitive manner, repeatedly establish in decisive and controlling language,

among other matters, the following:

1. That derailment work outside a yard is not exclusively the work of Carmen.

2. That a wrecking crew need not be assigned to a derailment when no wrecking outfit is used.'

"We hope that this Award and the Awards quoted above (will) once and forever put this question to rest."

Accordingly, based on the record facts and our findings and conclusions detailed above, particularly as repeatedly confirmed by most recent Awards of this Division, we have no alternative but to deny this claim.

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.

LABOR MEMBER'S DISSENT TO

AWARD NO. 7071, DOCKET NO. 6871-T

In reaching an indefensable conclusion in Award No. 7071, the majority uses the following language.

> "In point of fact, the record does not indicate that any rerailing was involved; the specific work being the loading of salvage wheels and trucks into gandola cars...."

For reasons unknown the majority fails to recognize that Rule 86 covers wrecking service and not merely rerailing.

Award 4770 dealt with a dispute between the Employes and The Great Northern Railroad which is now a part of Burlington-Northern (Carrier). Rule 88 of the Agreement was selected and placed in The Burlington Northern Agreement as Rule 86. In Award 4770 the majority held:

> "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.

Again under Great Northern Rule 88 which is now Burlington Northern Rule 86 the majority in Award No. 4571 sustained a Claim identical in nature and pertinent facts as existed in the dispute covered in Award 7071.

The majority in the former held:

> "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."

In Award 4572 (again Great Northern Rule 88) the majority held that cutting off salvagable parts and cutting derailed cars into small section for loading into gandola cars was wrecking service.

The majority chose to ignore those long established principles of what constitutes wrecking service and issues its own misguided definition.

The majority then uses the cover of one Award (6838) the conclusion of which was improperly determined, and Awards 4821, 4898, 5637, 6177, and 6322 which deal with disputes wholly unlike that covered in Award No. 7071 for justification.

The majority here recognized that no emergency existed and that the wrecking outfit was called. As stated in Award 4571 the wrecking crew was entitled to be called back to complete the wrecking service.

See also Award 6030 where the majority held in pertinent part.

> "Where, however, a wrecking crew had been called and wrecking equipment had been used, that work belongs to the Carmen."

The majority's misconception of the principles governing wrecking service laid out by this Board as particularly pertains to the parties involved in Award 7071 demands our dissent.

C. E. Wheeler, Labor Member