Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7523
SECOND DIVISION Docket No. 7403
2-CR-CM-'78

The Second Division consisted of the regular members and in addition Referee Walter C. Wallace when award was rendered.

Parties to Dispute: (System Federation No. 100, Railway Employes' Department, A. F of L. - C. I. O. (Carmen)
(Consolidated Rail Corporation

Dispute: Claim of Employes:

That within the meaning of the controlling agreement, particularly Rules 11, 121, 124 and 125, the Carrier improperly used employees of a private company, and their equipment, in performing wrecking service on September 6, 1975 at Hendlers, Pa.

That accordingly the Carrier compensate Arnold Cochi, Joseph E. Geffert, John Stromick, Orlando J. Alexander, Leo Bentley, John Sparduti, Clement Altieri, Robert Alexander and Doug Depew, members of the Sayre wreck crew, eight (8) hours each at the time and one half rate of pay plus the number of hours travel time to and from Hendlers.

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 facts are not in dispute. Carrier sustained a mainline derailment on Wednesday, September 3, 1975. The regular assigned Sayre, Pennsylvania Wreck Crew along with additional carmen from Coxton, Pennsylvania were called out and they cleared the mainline on that date. They were then relieved and ordered to return to their home stations leaving six cars for rerailment which were not blocking the mainline. Thereafter, on Saturday, September 6, 1975, carrier arranged for Hulcher Emergency Service, an outside contractor along with carmen from Coxton to rerail the six cars and clean up the derailment scene. The claim alleges violations of Rules 11, 121, 124 and 125 of the applicable agreement and seeks eight (8) hours pay, at time and one half rate each, for nine designated members of the aforesaid wrecking crew plus travel time to and from Hendlers, the wreck site.

Rule 11 provides the method of payment for wrecking crews. Rule 121 describes the work classified to carmen and makes no reference to wrecking crew. Our attention is directed primarily to Rules 124 and 125 with particular reference to the latter rule which provides in full:

> "Rule 125
>
> When wrecking crews are called for wrecks or derailments, a sufficient number of the regularly assigned crew will accompany the outfit.
>
> This shall not be construed to prevent train crews from rerailing cars or locomotives, when wrecker is not required."

The opinions of this Board have held that this rule and those like it do not establish exclusive jurisdiction in the carmen requiring the carrier to call them out when a wreck occurs. In effect, the carrier is vested with the managerial prerogative to call such crews or not. See Award 7157 (Marx). That is not the issue here however. The Carrier did call out the Sayre Wrecking Crew and utilized them for the duration of the emergency, that is, to perform the work necessary to clear the mainline and then relieved them utilizing an outside contractor and carmen from Coxton to complete the work of rerailing and cleanup which was not of an emergency nature three days later.

The cases cited by the Carrier that emphasize the non-exclusive rights to handle work at wreck sites are not relevant here. The decision to call them out had been made in connection with the wreck and they performed work on it. The question is whether or not carrier was justified in restricting their work to the actual emergency then relieve them and complete the work with an outside contractor. There is no explanation given by the carrier to justify the relieving of the Sayre Wrecking Crew. For instance, a claim that such crew was needed to handle another emergency situation could go far to establish the reasonableness of the Carrier's actions here. Based upon this record the Carrier, in effect, asserts a right to determine as a matter of management prerogative the duration and scope of the work of the wrecking crew after it is called.

The Carrier's own statement by its Director, Labor Relations and Personnel, letter dated March 5, 1976, while the matter was on the property, stated in part:

> "... the rules only provide that when a wrecking crew is used does the element of exclusive rights accrue to members of the wrecking crew who are Carmen and are used to clear up a wreck or derailment."

The Carrier's argument to this Board confirms this:

> "WHEN a wreck crew is called - then the work accrues to Carmen." (emphasis theirs).

The only way we believe Carrier's position can be rationalized here would be to suggest there were two separate jobs: that on September 3 and that on September 6, 1975. But the facts are clear there was only one wreck. Granted, the work on September 3rd involved the clearing of the mainline and it was in the nature of an emergency. The work performed on September 6th was not of an emergency nature. Then the mainline was cleared and only rerailing cars and clean-up was required. Only if we so divide this work and adopt Carrier's view that it can so make one job into two, or even three or four can we reach this conclusion. We cannot do that and we rely upon the reasoning advanced in Award 6845 (Twomey) in reaching this conclusion.

Carrier relies upon Award 6286 (McGovern) for its position. We do not believe the facts are apposite and the rule relied upon is inapplicable. There the wrecking crew was not used and the concept of "need" is used in a different context as follows:

> "Since the termination of the need for a wrecking crew within the purview of Section (a) involves managerial discretion and justment, we are of the opinion that carrier's decision can successfully be challenged before this Board only on the ground that it was arbitrary, capricious, discriminatory or an abuse of managerial discretion."

The managerial prerogative that Carrier seeks to assert here is far too broad. When the Sayre crew was worked at the wreck site their rights attached in accordance with Rule 125. If the Carrier could then assert rights of managerial prerogative to restrict or limit such rights or any basis it sees fit, such as, restricting those rights to an emergency, the wrecking crews' rights would be tenuous, indeed. We find no such authority in the rule. It does not refer to emergencies and, in fact, it is broadly worded to cover "wrecks or derailments". Clearly, the work performed by the outside contractor resulted from the wreck and derailment and it would be difficult to argue the Sayre crew had no rights to such work. We are not disposed to define the precise nature of the work the Sayre crew could claim. We take note, however, that clean-up work in connection with a wreck is not excluded by the rule.

We do not suggest that the Carrier under no circumstances could exercise such managerial prerogative to restrict the Sayre crews work at this wreck site. We have already suggested one possible circumstance. We do not rule out others. By analogy the "contracting out" cases are relevant. See Award 2377. The point we make is that Carrier must justify its actions in situations as this. And such justification must be evaluated as to its

reasonableness in determining whether or not Carrier acted arbitrarily, capriciously or discriminatorily. Absent such justification we have no basis to deny the rights asserted by the Sayre Wrecking Crew as to the work performed by the outside contractor. The record indicates the Sayre crew was available to perform the disputed work.

We are persuaded that the awards cited by the Organization are pertinent here although none involve fact situations closely related to this case. Awards 4581 (McDonald); 4964 (Johnson); 6030 (Zumas); 6257 (Shapiro); 6490 (Bergman); 6847 (Twomey; and 7181 (Marx). In a somewhat different context, and not an emergency, Referee Shapiro in Award 6257 made a statement which reflects our reasoning here:

> "When claimants charge that carrier's action was in derogation of a specific contractually provided benefit to which they believe they are entitled, it becomes incumbent upon the carrier to offer a reasonable explanation for its need to utilize other employes and most particularly total strangers to the Railroad in place of them. Its failure to do so brings it within the limitations upon its use of its discretion and judgment referred to hereinabove."

We are not aware of any award of this Board, with one exception, that follows a contrary position on facts such as those involved here. Award 5608 (Dorsey) involved distinguishable facts, in that it involved a different carrier and different rules. However, that opinion appears to follow a contrary view and in deference to the referee's distinguished record we quote two paragraphs from that award:

> "The theory argued by Petitioner in the instant case is that when the Carrier has made a determination that a wrecking crew is 'needed' all the work involved then becomes exclusively reserved to Carmen and Carrier is obligated to assign a sufficient number of Carmen to the wrecking crew to perform all the work. We find no support of the premise in Rule 88(a) and (c). The only qualification of carrier's inherent management prerogative to determine the number of employes assigned to a wrecking crew under any circumstances is:
>
> > 'a sufficient number of the ... crew will accompany the outfit.'
>
> 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' connote 'to the extent needed'."

Referee Dorsey cites no authority for this view. This Board has uniformly held that it may not amend or add to rules. We rely upon the numerous cases cited by the Carrier in this case to that effect. The Supreme Court of the United States in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 404 (1936) said:

"The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation."

It is sufficient to point out that the word "needed" does not appear in Rule 125. The use of this phrase in Rule 124, however, is in a different context, one not relevant here. The interpretation advanced in Award 5608, above, may be appropriate for that agreement but we do not believe it can be extended to this. On this basis we believe such an interpretation here would be outside the contemplation of the parties when they made this agreement and we are not inclined to follow it. The view we follow is consonant with the plain wording of the rule.

In our view of this case, we find no reason to consider the organization's argument related to the matter of contract interpretation. As we see it, the contractual requirements are clear under the applicable circumstances.

The record is not sufficiently clear on the damage question and we are not authorized to award a penalty under this agreement. However, the carrier has not raised an objection on that basis and insofar as the work in question was performed three days later on a Saturday, at a time when there was no emergency, we must assume the individual claimants who were deprived of the work were entitled to be made whole by awarding them compensatory damages in accordance with the claim, including travel pay. Therefore, we find the contract was violated.

A W A R D

Claim sustained.

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 25th day of April, 1978.