Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7833
SECOND DIVISION Docket No. 7707
2-CRI&P-CM-'79

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

Parties to Dispute: (System Federation No. 6, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Chicago, Rock Island and Pacific Railroad Company

Dispute: Claim of Employes:

(1) That under the current Agreement the Carrier improperly used the Hulcher Company to perform Carmens work at Rushville, Missouri on February 20, 1976.

(2) That accordingly the Carrier be ordered to compensate Carmen B. G. Hollenbeck, M. M. Wardwell, C. C. Harris and W. D. Boyle sixteen (16) hours pay each at the 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.

Six cars of an Atchison, Topeka and Santa Fe train hereinafter referred to as Santa Fe, derailed on Carrier's main line at Rushville, Missouri on February 20, 1976. A contractor, Hulcher Wrecking Service, was employed with machinery and ground forces to perform the rerailing work. Four Hulcher employees were used to hook chains, cables and perform the ground work normally performed by Carmen.

Claim was subsequently filed on behalf of the Claimants, employees of Carrier, for the ground work performed by the four Hulcher employees.

Petitioner relies heavily on an agreement between the parties dated May 27, 1971 which provides in part, that "the carrier has the unrestricted perogative to lease, rent or otherwise secure equipment or machinery to assist in the work resulting from derailments," and that the Carrier may "use other than employees represented by the Carmen's Organization to serve as

'groundmen' in the performance of work which is normally performed by carmen but only until such time as they can be relieved by carmen who will be called simultaneously with the 'groundmen' to be relieved." Such "groundmen" are to be relieved within 30 minutes after the carmen arrive at the scene of derailment.

Carrier alleges that the May 27, 1971 agreement is not applicable because the derailed train was a Santa Fe train operating over Carrier's lines by trackage agreement in effect since 1898 (as amended) and that said agreement makes Santa Fe responsible for all emergencies in connection with the operation of Santa Fe's trains, including setting out disabled cars, repair and subsequent picking up of such cars. Carrier cites Section 2 of the 1968 amendment to said joint trackage agreement as assigning such responsibility to Santa Fe. Carrier concludes, in view of the above, that since it had no control over the work of rerailing, the May 27, 1971 agreement with the Carmen's Organization is not applicable.

The Organization, in its submission, emphasizes that Carrier has failed to meet its burden of affirmative defense by not submitting a copy of the trackage agreement with the Santa Fe. The record, however, contains no denial nor refutation by the Organization of Carrier's statement that Santa Fe had the responsibility under the joint trackage agreement for clearing its own wrecked or derailed trains or cars. Thus, it was Santa Fe, and not Carrier, who contracted with the Hulcher Co. to rerail the derailed cars.

This Board has often held that work performed must be within the Carrier's control to assign to its employees before it is subject to the applicable collective bargaining agreement. See Third Division Awards 20280 (Lieberman), 20529 (Lieberman), 20644 (Eischen), 21283 (Eischen); Second Division Awards 4807 (Robertson), 6742 (Bergman), 7236 (Roadley). The Second Division has also held that work on cars of a carrier using joint tracks under agreement does not necessarily belong to the carrier who owns the track. See Award 4169 (Harwood).

In the instant case, the rerailing of the six cars was the responsibility of the Santa Fe and not this Carrier. Because the Santa Fe was responsible and had control, it, and not the Carrier called the Hulcher Co. to do the rerailing. Carrier was without authority to assign the rerailing work to Claimants. Santa Fe retained responsibility and authority to determine how and by whom the re-railing work was to be done. Neither Carrier nor its Carmen could direct otherwise.

Our attention has been called to a recent Second Division Award, No. 7543 (Eischen) involving this Carrier and Organization. In the case covered by that Award, the Board sustained a claim by Carrier's Carmen because the Carrier failed to call Carmen in its employ to relieve an outside contractor's employees being used as groundmen at a derailment, under the terms of the May 27, 1971 agreement cited above.

But that case refers to a different fact situation. In the case covered by Award 7543, the situation involved the rerailing of Carrier's own cars on its own tracks. In the case before us, however, the issue revolves around the right of another Carrier (Santa Fe) operating on Carrier's tracks under a long-standing trackage agreement and Santa Fe's responsibility and authority to rerail its own cars which had been derailed outside Carrier's yard limits. As previously noted, it was not controverted that Santa Fe had the responsibility, under the trackage agreement, to perform the rerailing work in dispute. Consequently, such work was not within Carrier's jurisdiction and control and, therefore, not within its authority to assign to claimants covered by the applicable collective bargaining agreement.

Our attention has also been called to other pending cases involving the same parties, where Carrier submitted portions of a trackage rights agreement made by Carrier with another railroad to operate over Carrier's tracks. The argument is made that a reading of such submissions leads to the conclusion that Carrier does not permit another railroad any control of its main line tracks when it is tied up by a derailment extensive enough to require equipment to rerail wrecked or derailed cars. While such conclusion, arguendo, may follow from the language of the trackage agreement cited in these pending cases, that conclusion does not necessarily apply to the trackage agreement between Carrier and the Santa Fe which, according to Carrier's uncontradicted statements in the record before us, make the Santa Fe responsible for such work. Consistent with prior Board rulings, we must accept Carrier's statements as to Santa Fe's responsibility as established fact, given that such assertion was undisputed and not contradicted by Petitioner.

Petitioner also points to Rules 110 (Carmen-Classification of Work) and 114 (Wrecking Crews) of the current Collective Bargaining Agreement to support the instant claim. However, as the Carrier has shown, Rule 110 does not include wrecking or rerailing work at issue herein and Rule 114 provides only that "when wrecking crews are called...." No wrecking crew was called in this case.

In view of the foregoing findings, we cannot sustain the 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 7th day of February, 1979.