Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8106
Docket No. 7935
2-WM-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. 4, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Western Maryland Railway Company

Dispute: Claim of Employes:

1. That under the controlling Agreement, the provisions of the December 4, 1975 Agreement and Rule 96 of the controlling Agreement was violated on March 22, 1977, when the Carrier failed to call the assigned wrecking crew at Port Covington, Baltimore, Maryland on the Western Maryland Railroad for a derailment at Greenmount, Maryland.

2. That accordingly the Carrier be ordered to compensate Carmen F. J. Lavicka, H. T. Wasmus, R. P. Jester, H. G. MacDonald, G. Jenning, and C. J. Leiberto for eight (8) hours' pay at time and one-half rate and eight (8) hours' pay at double time rate. Carmen F. J. Lavicka, H. T. Wasmus, R. P. Jester, H. G. MacDonald, G. W. Jenning, and C. J. Leiberto hereinafter referred to as the Claimants, were employed by the Western Maryland Railway Company, hereinafter referred to as the Carrier at Port Covington, Baltimore, Maryland.

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 March 22, 1977 a derailment involving 27 cars and 4 locomotives occurred at Greenmount, Maryland. Carrier called out the Hagerstown, (Md.) Wreck Train and regularly assigned crew as well as contractor and its crew. Claim was filed on behalf of the regularly assigned wreck members of Carrier's Port Covington, Baltimore, Md. wreck crew, who were not called. The Port Covington crew is located about 30 miles from the scene of the wreck.

Rule 96 reads, in pertinent part:

> "(4) When wrecking crews are called for wrecks or derailments outside of yard limits, 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 appears that only the first sentence of Rule 96 (4) has application to the facts of this dispute.

Article VII - "Wrecking Service" (National Agreement of December 4, 1975) reads:

> "1. When pursuant to rules or practices, a carrier utilizes the equipment of contractor (with or without forces) for the performance of wrecking service, a sufficient number of the carrier's assigned wrecking crew, if reasonably accessible to the wreck, will be called (with or without the carrier's wrecking equipment and its operators) to work with the contractor. The contractor's ground forces will not be used, however, unless all available and reasonably accessible members of the assigned wrecking crew are called. The number of employees assigned to the carrier's wrecking crew for purposes of this rule will be the number assigned as of the date of this Agreement.
>
> NOTE: In determining whether the carrier's assigned wrecking crew is reasonably accessible to the wreck, it will be assumed that the groundmen of the wrecking crew are called at approximately the same time as the contractor is instructed to proceed to the work."

Petitioner argues that the Port Covington crew was an assigned wrecking crew and was reasonably accessible to the derailment; that the wreck was sizeable; that the work was performed by both the Carrier's and the independent contractor's wrecking outfits on opposite ends of the derailment with no contact with each other; that point seniority does not restrict wrecking crews to any location on Carrier's property, notwithstanding Carrier's contention that the seniority of wrecking crews is confined to the point employed; and that the December 4, 1975 Agreement speaks of "assigned wrecking crew" and not regularly assigned wrecking crew.

Carrier asserts that Rule 27 confines seniority to the point employed, so that Claimants employed at Port Covington, Baltimore have no contractual right to work performed at Greenmount, unless called; that off track equipment was required, which was provided by the outside contractor; that the Hagerstown wreck train and crew were called as the "assigned wrecking crew" for the derailment at Greenmount; that Article VII of the December 4, 1975 Agreement does not require Carrier to use more than one regularly assigned wrecking crew; and that Petitioner's claim that each crew (Carrier's and contractor's) worked at separate ends of the derailment; i.e., as "separate entities" is irrelevant.

Carrier adds that under Rule 96, inasmuch as it did not utilize the Port Covington equipment or outfit, it was not obligated to use the Port Covington crew. Carrier cites prior Board Awards to the effect that wreck work accrues to a wreck crew only when the crew is called, and in the instant case, neither the Port Covington outfit nor crew were called.

Carrier also construes Article VII of the December 4, 1975 Agreement as authorizing it to use an independent contractor's equipment and employees after "all available and reasonably accessible members of the assigned wrecking crew are called" (Underlining added); and that the Hagerstown wreck crew constituted the assigned crew and that only one crew must be called in connection with work with an outside contractor. (Carrier in this connection calls attention to the use in Article VII of the singular: "... the carrier's assigned wrecking crew", rather than the plural term crews.) Carrier concludes that there is no requirement to call more than one Carrier wreck crew.

This Board has laid down certain basic principles applicable to disputes involving wrecking service. One such is that rules such as Rule 96, by using the phrase "when wrecking crews are called ...", leave to management the determination of when a wrecking crew is needed. Another correlative principle is that when a wrecker outfit is not called, rerailing is not the exclusive work of carmen and the wrecking crew need not be assigned to a derailment.

Carrier's denial letter of August 29, 1977 stated that "... off track equipment was required". Petitioner's Rebuttal statement asserts that the "Western Maryland wrecking crews stood available, equipped with the proper equipment...", but does not controvert carrier's statement concerning the need to use off track equipment. Petitioner contends, however, that even if off track equipment were needed, the Port Covington crew should have been called to perform the work that was performed by the contractor's forces.

Article VII does not refer to an assigned wrecking crew at any given location where a wrecking crew may be established and/or designated. Article VII refers to "the Carrier's assigned wrecking crew" or "the assigned wrecking crew" or "the Carrier's wrecking crew". (Underlining added). Article VII is not transparently clear and free from doubt, particularly so in light of the last sentence which freezes the "number of employees assigned to the carrier's wrecking crew for purposes of this rule...". Does the "number" apply to the totality of wrecking crew members at all locations on Carrier's property, or to the consist of each wrecking crew, whenever established, at each location, the number of whose members may vary from location to location? Given that these alternative meanings can be read into the language of Article VII, it is not clear that each party understood a single, true meaning when they agreed upon Article VII.

We have carefully reviewed all of the Awards referred to us by the parties and by the Labor and Carrier Members, paying particular attention to recent Board decisions interpreting and/or applying Article VII. The factual situations and the Board's findings in these recent Awards involving Article VII are summarized below.

In Award 7670 (Valtin), the Carrier contracted with an outside contractor to perform rerailing work. The Carrier in that case also sent two Kansas City-based employees, not members of the wrecking crew, to assist the contractor. Members of the wrecking crew at Kansas City - about 90 miles from the scene of the wreck - filed a claim. The Board upheld the claim on the ground that in the absence of an emergency, the company should have used its own wrecking equipment at Kansas City. It found Article VII not applicable because that Article was not in effect at the time the disputed incident occurred. It did find, however, that Article VII "requires the Carrier under certain circumstances to call its own wrecking-crew employees when a contractor's wrecking-service equipment is utilized." The Award did not spell out the "certain circumstances".

In Award 7837 (Roukis), Carrier argued that the wrecking crew was not reasonably accessible as defined in the NOTE to Section 1 of Article VII, and, consequently, it did not use any of its employees in the rerailing work. The Board rejected the Company's contentions, stating:

> "Our review of this provision reveals that once Carrier calls an outside contractor to perform wrecking service work, it is contractually obligated to call a sufficient number of its assigned wrecking crew to work with the contractor.
>
> The second sentence of Article VII, which reads, 'The contractor's ground forces will not be used, however, unless all available and reasonably accessible members of the assigned wrecking crew are called.' We do not find that Carrier complied with the letter of this requirement. It was under an explicit obligation to call these carmen first. It did not do so. They were reasonably accessible and available."

In Award 7744 (Marx), the dispute involved two diesel locomotives which were derailed within the yard limits of ElDorado, Ark., where no wrecking equipment or wrecking crew is headquartered. Carmen based at El Dorado rerailed one unit. The other unit was rerailed by an outside contractor, using its drivers to assist in the rerailing work. The claim is that groundmen of the North Little Rock, Ark. wrecking crew should have been called to assist in the rerailing work. The Board found that members of the North Little Rock crew were "reasonably accessible" since the outside contractor's forces were called from a point only a relatively few miles closer than the location of the North Little Rock wrecking crew.

The Board ruled in Award 7744 that:

> "Article VII, Section 1, clearly permits the Carrier's use of an outside contractor, but in exchange requires the use of a 'sufficient number of the carrier's assigned wrecking crew'. Since the Carrier's wrecking equipment was not used, this would appear to mandate the use of the wrecking crew's groundmen in this instance. (Underlining in original).

> "This is the clear statement of Article VII, Section 1 -- with one proviso. This is the equally clear statement that the provision applies 'when pursuant to rules or practices'."

The Board then referred to Rule 120 which states:

> "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 and helpers will be called to perform the work, if available."

The Board denied the claim since the derailments were within yard limits, stating:

> "The Board finds no conflict between Article VII, Section 1, of the 1975 Mediation Agreement and Rule 120. The former memorialized the Carrier's right to use outside wrecking services while requiring the use of wrecking crew members as specified but 'pursuant to rules or practices'. Rule 120 is not superceded by Article VII, Section 1."

In the case decided in Award 7926 (Larney) Carrier used a foreman and four carmen assigned to the repair track at Washington, Ind., who performed all ground service in rerailing a tank car derailed at Hayden, Ind., together with an off-track crane provided by an independent contractor. The claim, filed in behalf of two other carmen "members of a regularly assigned wrecking crew" at Washington, Ind., alleged a violation of Article VII. The Carrier asserted that the wreck outfit had been removed from the Washington, Ind., location in 1972; and since there was no wreck outfit at that location, there was no regularly assigned wrecking crew. Carrier also referred to a prior settlement of a claim at another location on the property allegedly made on the basis of recognizing that the term "assigned wrecking crew" as used in Article VII of the December 4, 1975 Agreement refers to the assigned wrecking crew at a location where a wrecking outfit is assigned. The Board found that a wreck crew continued to exist at Washington, Ind., since the wreck crew assignments were never aboished in accordance with applicable rules.

To summarize, in all four Awards the Company used an independent contractor, in three instances outside yard limits and in the fourth, within yard limits. In Awards 7670 and 7926, the Company also used employees not members of the wrecking crew but who were employed at the same location as members of the wreck crew; in Award 7837, the independent contractor's employees were used exclusively; in Award 7744, which involved a within-yard situation, carmen who were not wreck crew members rerailed one diesel unit and an independent contractor rerailed a second diesel unit. (It is not clear from the Award whether Company employees assisted in the rerailing of the second diesel unit).

Thus, none of these Awards reflects the circumstances involved herein; namely, Carrier's use of an independent contractor and the wrecking outfit and wrecking crew from one location on Carrier's property without also calling the wrecking crew from another location on Carrier's property for ground work.

Award 7744 (Marx), previously referred to, laid down the principle that Article VII, Section 1 must be read with due regard to the introductory phrase of that section, "When pursuant to rules or practices, ...". In the instant case, this requires us to look at the relation between Rule 96 and Article VII. Under Rule 96, for wrecks or derailments outside yard limits -- the situation involved in this dispute -- when wrecking crews are called. "The regularly assigned crew will accompany the outfit."

Article VII sets down several conditions for the use of a Carrier's wreck crew when the carrier uses a contractor's equipment: 1) "a sufficient number of the Carrier's assigned wrecking crew, if reasonably accessible to the wreck will be called ... to work with the contractor"; 2) The Carrier's assigned wrecking crew will be called "with or without the Carrier's wrecking equipment and its operators"; and 3) "The contractor's ground forces will not be used, however, unless all available and reasonably accessible members of the assigned wrecking crew are called."

Applying these three conditions and Rule 96 to the instant case we find that Carrier called out the Hagerstown Wreck Train and regularly assigned crew. This met the requirement of Rule 96. It also met conditions 1 and 2 of Article VII; that is, Carrier called out the Hagerstown "assigned wrecking crew" with its own "wrecking equipment and its operators".

The critical issue remaining, however, is whether, by not calling the members of the Port Covington crew, Carrier failed to comply with the third condition set forth in Article VII; namely, "the Contractor's ground forces will not be used, however, unless all available and reasonably accessible members of the assigned wrecking crew are called".

We hold that Carrier did comply with the terms of Rule 96 and Article VII. The Hagerstown "assigned wrecking crew", in its entirety, was called to work with the Contractor's equipment and crew. In essence, therefore, we interpret the references in Article VII to "the Carrier's assigned wrecking crew", "the assigned wrecking crew", and "the Carrier's wrecking crew" as a crew in the singular and not in the plural; i.e., a crew at a specific location on Carrier's property and not to all wrecking crews at all locations on Carrier's property where wrecking crews have been established and/or designated. This construction is borne out by the language of the NOTE to Article VII which also refers to wrecking crew in the singular.

The Port Covington "outfit", referred to in Rule 96 was not called to the derailment and this Board has clearly sustained the principle that a wrecking crew need not be assigned to a derailment when no wrecking outfit is used.

Carrier was within its rights to use the independent contractor because the contractor could provide the off track equipment not available to the Carrier. Although Carrier used the contractor's forces as well as equipment, it met the requirements of Article VII by using the Hagerstown assigned wrecking crew, who were called about one hour prior to the time that Carrier called the independent contractor.

Accordingly, we find that Carrier did not violate the Agreement and the claim is denied.

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 27th day of September, 1979.