Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8284
Docket No. 8015
2-B&O-CM-'80

The Second Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

Parties to Dispute: (System Federation No. 4, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Baltimore and Ohio Railroad Company

Dispute: Claim of Employes:

1. That under the controlling Agreement, the provisions were violated on May 10 and 11 of 1977 when the Carrier used the Hulcher Wrecking Service, an outside contractor and twelve (12) of their ground crew members, to perform a rerailing service at Big Curve, Maryland.

2. That accordingly, the Carrier be ordered to compensate the assigned crew on the Cumberland Wreck Outfit being Claimants A. T. Rice, Jr., J. E. Price, R. G. Hovatter, G. R. Shafferman, L. B. Mathias, W. D. Rawnsley, P. H. Sibley, L. D. Saville, J. E. Bierman, A. F. Hinkle, E. F. Ellis and W. C. Shaffer, Cumberland, Maryland for twenty (20) hours pay at time and one half rate and eight (8) hours pay at double time rate each account alleged violation of Article VII of the December 4, 1975 Agreement when not used at a derailment at Big Curve, Maryland on May 10 and 11, 1977.

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 factual circumstances surrounding the instant case are not in dispute. On May 10, 1977, at approximately 10:40 AM, Cumberland train 96 with engine 1830 pulling 73 cars derailed twenty-eight (28) cars at a location west of Keyser, West Virginia and approximately two (2) miles east of Big Curve, Maryland. To clear the derailment, Carrier on this same date, at about 12:50 PM, contacted the Hulcher Emergency Service, an independent contractor and arranged for Hulcher to provide off-track equipment necessary to perform the job. Ten (10) minutes later, at 1:00 PM*, according to the Carrier, it called out the assigned wrecking crew based

*Carrier in its correspondence stated the Grafton wrecking crew was called at 1:00 PM, while the Organization places the time at 12:00 PM.

at its facility in Grafton, West Virginia. Grafton is situated approximately 66.4 miles from the site of where the derailment occurred and it took the assigned wrecking crew of six (6) members along with their tool cars a total of seven (7) hours and forty (40) minutes to arrive at the scene. The Hulcher Company along with their crew and equipment which included, twelve (12) groundmen, two (2) sidewinders, one (1) dizer, and a foreman arrived at the derailment site at about 7:15 PM on May 10, 1977. The Carrier's Granton wrecking crew arrived at the derailment site at approximately 7:40 PM, May 10, 1977, commenced work immediately and worked continuously until relieved at 7:00 PM the following evening, May 11, 1977.

The Organization alleges, among other charges, that the Carrier violated Article VII of the December 4, 1975 National Agreement, when on date of the derailment, May 10, 1977, Carrier chose to call out the assigned wrecking crew of six (6) members based at Grafton, West Virginia rather than the assigned wrecking crew of twelve (12) members based at Cumberland, Maryland, which was situated much closer to the derailment site, Cumberland being located approximately 32.8 miles away.

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

> "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."

The Organization contends the Carrier manipulated the provisions of the December 4, 1975 Agreement, specifically that of Article VII in the instant case by calling a wreck outfit from a further distance (Grafton, West Virginia as opposed to Cumberland, Maryland), with a much smaller crew size (six member crew at Grafton as opposed to a twelve member crew at Cumberland), thereby ostensibly complying with the fulfilling the obligations set forth in the Agreement. Furthermore, the Organization believes that the language of Article VII preserves the rights of an assigned wrecking crew to be called before the contractor's ground forces can be used. In the instant case, the Organization asserts that in not calling the assigned wrecking crew at Cumberland to join with the assigned wrecking crew from Grafton, the Carrier failed to meet its obligation under Article VII by not dispatching a sufficient number of assigned wrecking crew members reasonably accessible to the derailment site. By not meeting this obligation, the Organization accuses

the Carrier of farming out the livelihood of the employees of the Carmen craft and class who hold regularly assigned wrecking crew positions.

In reviewing this case, we note the high degree of similarity between the surrounding circumstances and facts here with those which prevailed in our Award No. 8106, with Referee Weiss presiding. We feel that our Award 8106 is dispositive of the several major arguments made here by the Organization with but one exception. Briefly, we continue to affirm the following findings advanced in Award 8106:

(1) It falls within management's prerogative to utilize the services of an independent contractor especially in those situations requiring the use of off-track equipment not otherwise available to the Carrier.

(2) Carrier is not obligated by the language of Article VII of the December 4, 1975 Agreement to call more than one assigned wrecking crew in situations appropriate to their utilization.

However, with regard to this point, we note there is nothing in the Agreement either which would bar the Carrier from calling more than one assigned wrecking crew to be used simultaneously in the same situation if Carrier so decided.

(3) The references in Article VII to "the Carrier's assigned wrecking crew", "the assigned wrecking crew", and "the Carrier's wrecking crew", is interpreted to mean a crew in the singular referring to a crew at a specific location on the 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.

The exception we believe concerns that portion of Article VII which makes reference to "a sufficient number of the carrier's assigned wrecking crew, if reasonably accessible to the wreck, will be called ... to work with the contractor". We agree with Petitioner's observation that one of the purposes of the December 4, 1975 Agreement was to express assurance to the employees of the Carmen craft and class who hold regularly assigned wrecking crew positions that they will be entitled to perform wrecking service work under certain specified conditions and prevailing circumstances. We so identified these several conditions in Award 8106 by stating that:

> "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."

In the case at bar, the Carrier had a choice of at least two (2) assigned wrecking crews that we know of which were considered to qualify as being reasonably accessible to the wreck. Carrier exercised its prerogative and chose the smaller crew and the one based the furthest distance away from the derailment site. We might not have cast any objections to Carrier's choice of wrecking crews here no matter how dubious such choice may appear to be to us on the surface, had it not been for the fact that the crew arranged for by Carrier and provided by Hulcher, the independent contractor, outnumbered Carrier's crew by slightly more than two (2) to one (1). Although we realize that wrecking crews vary in size as to the number of employees holding regular assignments, that number to some extent being fixed by the 1975 Agreement itself, it occurs to us that the Carrier's choice of the smaller crew at Grafton over the larger crew at Cumberland, did not comply with the spirit and intent of Article VII with regard to providing a sufficient number of the carrier's assigned wrecking crew. Carrier apparently was cognizant that the smaller crew at Grafton was not of sufficient size to meet the work demands of the derailment in question since at the time, they made arrangements with the Hulcher Company not only for the off-track equipment but also for Hulcher to bring a sizable crew of twelve (12) groundmen and a foreman.

Based on the facts presented in the record it is our opinion that, in fact, the Grafton wrecking crew of six (6) members was not sufficient to accomplish the magnitude of work created by the May 10, 1977 derailment and that Carrier was well aware of this fact at the time. Otherwise, why would Carrier have arranged with the Hulcher Company to provide such a sizable ground force? Given our previous findings in Award 8106 that a carrier is not obligated under Article VII of the December 4, 1975 Agreement to call more than one (1) assigned wrecking crew, we now additionally add that where more than one assigned wrecking crew is determined to be reasonably accessible to the wreck, all other things being equal (ceteris paribus), Carrier is obligated under Article VII to call the crew whose consist contains a number of wrecking crew members sufficient to perform the wrecking service work.

In so finding, we are of the belief that the determination as to which of the reasonably accessible assigned wrecking crews is of sufficient size (in those situations where more than one wrecking crew is reasonably accessible to the wreck, with all other things being equal), should be based, among other considerations, on the size of the independent contractor's crew arranged for by carrier relative to the comparative differences in crew size among the eligible wrecking crews. These determinations should be made on a case by case basis.

Accordingly, we find the Carrier in the instant case did violate Article VII of the December 4, 1975 Agreement when it chose to use the smaller wrecking crew at Grafton over the larger wrecking crew at Cumberland. To hold otherwise would be to circumscribe the spirit and intent of Article VII as it applies to employees of the Carmen craft and class holding regularly assigned wrecking crew positions.

A W A R D

Claim sustained. Carrier is directed to compensate the Claimants named herein the amount of wages they would have earned had they been assigned to perform the wrecking service work associated with the derailment on May 10 and May 11, 1977.

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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 26th day of March, 1980.