Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11044
SECOND DIVISION Docket No. 10829
2-BN-CM-'86

The Second Division consisted of the regular members and in addition Referee Elloitt H. Goldstein when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
(
(Burlington Northern Railroad Company

Dispute: Claim of Dispute:

1. That the Burlington Northern Railroad Company violated the provisions of the current controlling agreement and in particular Rules #118 and #119 (Former Frisco Agreement) and Article VII of the December 4, 1975 Agreement, when they failed to call the regular assigned wrecking crew for normal wrecking service.

2. That the following named carmen (wrecking crew members) be compensated for the actual time lost at their respective hourly rates as shown.

"Borroni, L.P. - 9.5 hrs time & one-half rate of
$13.00 per hr--$185.25
Miller, P.E., Jr. - 9.5 hrs. time & one-half rate of
$13.00 per hr--$185.25
Ray, D.L. - 9.5 hrs time & one-half rate of
$12.93 per hr - $184.21
Myers, W. R. - 9.5 hrs time & one-half rate of
$12.93 per hr - $184.21
Williamson, H. - 9.5 hrs time & one-half rate of
$13.06 per hr - $186.11."

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 employes 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.

Claimants are Carmen and members of the wrecking crew at the Carrier's Tennessee Yards outside of Memphis, Tennessee. On July 7, 1983, at approximately 6:30 P.M., four cars of an Illinois Central Gulf Railroad transfer derailed on the main line at President's Island. President's Island is an Industrial area at Memphis, Tennessee served by three different railroads who alternate in switching the Industries within the confines of the Island. The point where the derailment occurred was on property owned and maintained by the Carrier. An ICG wrecking crew and equipment rather than the Carrier's, was utilized to clear the derailment. The ICG wrecker and crew were called on July 7, 1983, at 8:00 P.M. and eventually completed the work on July 8, 1983, at 5:30 A.M.

The Organization argues that Rules 118 and 119 of the Controlling Agreement have been violated. Further, the Organization asserts that the ICG wrecking crew came on to the Carrier's property and therefore constitutes an "outside contractor" within the meaning of Article VII, Paragraph 1, of the December 4, 1975, Agreement thereby requiring a sufficient number of the Carrier's assigned wrecking Crew to work with the contractor.

The Carrier relies upon the provisions of Item 4 of the February 1, 1957, Agreement between the Carriers (which the Organization contends is irrelevant since it was not a party to that Agreement) concerning responsibilities at President's Island, providing:

> "(4) If any line incurs a derailment in connection with delivering its cars to or pulling its cars from the exchange tracks, it will be the responsibility of that line to clear up the derailment, perform any necessary work train service in connection with the derailment regardless of which line may be performing the Island switching."

The Carrier further asserts that Rules 118 and 119 are not applicable to this case since the Carrier's wrecking crew was not called. With respect to the contention that Article VII applies, the Carrier argues that no Contractor was used since the ICG used its wrecker to clear its own cars and hence, no Article VII violation existed.

Rule 118 provides:

> "Regularly assigned wrecking crews, including wrecking derrick operators, will be composed of carmen and will be paid for such service under Rule 10."

Rule 119 provides:

> "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 where wrecking outfit is used."

Article VII of the December 4, 1975 Agreement provides in part:

> "When pursuant to rules or practices, a carrier utilizes the equipment of a 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 it 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."

The entire argument of the Organization is premised upon the assumption that because the property on which the derailment occurred was owned and maintained by the Carrier, the wrecking work had to be assigned to the Carrier's wrecking crew. However, ownership and maintenance responsibility is not enough. There must also be control of the work. See Second Division Award No. 7833:

> "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, 20529, 20644, 21283; Second Division Awards 4807, 6742, 7236. 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. See also, Second Division Award No. 8053."

Indeed, we note that Award No. 7833 involved a fact situation similar to the instant matter in that the derailed train therein was not the Carrier's (Rock Island) but was another Carrier's (Santa Fe) that was operating on the Rock Island's track by virtue of a Joint Trackage Agreement which assigned the disputed work to the Santa Fe. The reasoning of this Award is therefore dispositive of the principles involved in the current case.

It is undisputed in this record that there was an Agreement concerning derailments at President's Island that assigned the responsibility for derailments of ICG trains to the ICG. Thus, the Carrier did not have control of the disputed work for assignment purposes. The fact that the Organization was not a party to that Agreement, under the circumstances of this case, does not require a different result, since the threshold question is whether the Carrier had control. The Awards cited by the Organization in its submission

(Second Division Awards Nos. 9063, 8090, 5696, and 4838), while standing for the propositions that wrecking work ordinarily must be performed by a Carrier's wrecking crew, do not have the added factor contained herein, i.e., the existence of an Agreement for specifically delineated derailment responsibilities where trackage is shared. They are thus clearly distinguishable.

Since the Carrier did not have control concerning the wrecking work, it follows that Rule 118 and 119 and Article VII have not been violated. No Carrier wrecking crew was called (or should have been called); therefore there was no requirement that the regularly assigned crew be composed of Carmen to accompany the outfit. Further, since there was no control of the work in question, an outside Contractor was not utilized by the Carrier within the meaning of Article VII.

The Organization has also asserted the existence of a contrary practice. However, beyond the assertion, the record is devoid of any showing that such a practice existed to a sufficient degree to require a different result or to prove the practice.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 15th day of October 1986.