Award No. 6257
Docket No. 6098
2-IT-CM-'72

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Irving R. Shapiro when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 154, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

ILLINOIS TERMINAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier improperly used employes of a private company and their equipment to assist part of the wrecking crew in clearing up a wreck of four freight cars on November 11, 1969 instead of calling the full wrecking crew.

2. That accordingly, the Carrier be ordered to additionally compensate wrecking crew members Leonard Hernandez, G. L. Mansfield, A. D. Gaines, E. Quade and L. E. Crawford in the amount of eight (8) hours and thirty (30) minutes each at the time and one-half rate of pay.

EMPLOYES' STATEMENT OF FACTS: The Illinois Terminal Railroad, hereinafter referred to as the carrier, operates between St. Louis, Missouri, East St. Louis, Illinois and Springfield, East Peoria and Decatur, Illinois. It has a shop at Alton, Illinois known as Federal Shops where its only wrecking outfit is assigned. The outfit consists of one steam derrick capable of picking up any freight car or locomotive, one mobile crane which will run on rail or road which will pick one end of locomotive and swing 18 inches at one setting, and tool car, bunk car and dining car. However, subsequent to the dispute at hand arising, carrier posted notice of retiring its steam derrick and the wrecking cars. Copy of carrier's notice is quoted for your ready reference:

"Federal Illinois
March 6, 1970

To All Concerned:

Effective this date, Illinois Terminal Railroad Company Derrick and associated wrecking equipment has been retired and will not be available for service.

The theory argued by Petitioner in the instant case if 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 circumstance is:

> 'a sufficient number of the * * * crew will accompany the outfit.'

In this case no 'outfit' accompanied the wrecking crew."

Award 5768 requires that the instant claim be denied.

Carrier submits that the rules cited by the Union simply do not support the claim when such rules are viewed in the light of the cited Board Awards and carrier further submits that the record reflects that the Union has recognized the rules do not support their position and for this reason they have submitted to the carrier their Section 6 Notice of September 1, 1970, all of which requests a denial award in the instant dispute.

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 significant facts with reference to the incident which gave rise to the claim herein are not in dispute. At 2:15 P. M., on November 11, 1969, four cars of a freight train, operated by the Carrier were derailed on Carrier's rails at a location in the northern part of Granite City, Illinois. Carrier dispatched an XM52 wrecker truck with a crew of three carmen from its Federal Shops in Alton, Illinois, a distance of approximately twenty(20) miles, to the scene of the accident. It also assigned a Wreck Foreman, a Section Foreman and seven section laborers to assist in the rerailing work. It also hired from an outside company two bulldozers with employes to operate same to participate in the work. This outside company apparently is not in contractual relations with any railroad union and its employes are not represented by any of the unions with which Carrier has an agreement. In November of 1969, Carrier had stationed at its Federal Shops a steam derrick which was still in operating condition. (It was uncontroverted that said equipment was loaned to C.B.&Q. Railroad and used for wrecking service in February, 1970, approximately three months after the incident involved herein, and was not retired from service until March, 1970.) The claimants are five of the bulletined eight carmen regularly assigned to the wrecking crew, all of which should have been called out for the work on November 19, 1969, according to the Petitioner.

Essentially, the issue before us is whether the claim is sustainable under the provisions of the Agreement in force between the parties hereto, of which the pertinent Rules are:

"Rule 127 — Wrecking Crews —

Regularly assigned wrecking crews, including engineers and firemen, will be composed of carmen, and will be paid for such service under Rule 10 * * * When needed men of any class may be taken as additional members of wrecking crews to perform duties consistent with their classifications.

Rule 128. When wrecking crews are called for wrecks or derailment outside of yard limits, the regularly asigned crew will accompany the outfit * * *"

In our recent Award 6177 (Simons) dealing with comparable Rules, we stated:

"* * * the Awards listed below * * * in clear, unambiguous and definitive manner, repeatedly establish in decisive and controlling language * * * the following: 1. That derailment work outside a yard is not exclusively the work of Carmen. 2. That a wrecking crew need not be assigned to a derailment when no wrecking outfit is used."

The Awards cited are: 1719, 1757, 2049, 2050, 2208, 2343, 4190, 4362, 4415, 4821, 4848, 4931, 5306. Nothing in the record before us warrants our disturbing the basic concept underlying the above quoted and cited Awards, we from time to time endeavored to set forth guideposts to the parties, indicating the appropriate circumstances when this principle would be applicable to deny a claim of violation of Rules comparable to Rules 127 and 128 of the Agreement between the parties hereto.

In Award 1757 (Carter), quoted in part by the Carrier herein to support its position, we stated:

"* * * we think the applicable rules governing wrecks or derailments outside of yard limits mean as follows: (a) That crews assigned to wreckers or wreck trains, excluding engineers, will be composed of carmen. (b) **When a wrecker or wreck train is called for wrecks or derailments outside of yard limits, the regularly assigned crew of carmen are entitled to accompany the outfit.** (c) **If a derrick, crane or other wrecking equipment operated by employes of another craft is used in lieu of an available wrecker and crew, a violation of the agreement ordinarily exists.** (d) When a derailment occurs outside of yard limits and the services of a wrecker are not required, the wrecking crew do not have the exclusive right to perform the work. (e) If a wreck or derailment necessitates the doing of work within the carmen's scope rule, a carman is entitled to perform the work. (f) A train crew may properly rerail a locomotive or car, when the assistance of a wrecker is not required, without encroaching upon the rights of carmen. (g) The use of section foremen, section laborers or other employes to rerail a car or locomotive, when a wrecker is not needed, does not violate the carmen's agreement. (h) Others than carmen may properly rerail locomotives and cars, when a wrecker is not called or needed, by the use of jacks, frogs, rerailers,

blocks, and similar expedients, but this does not imply that such employes may invade the work of carmen specified in their Classification of Work Rules." (Emphasis ours.)

In Award 4190 (Anrod) we dealt with an aspect of the problem as follows:

"* * * who shall determine whether a wrecking crew is 'needed' within the contemplation of Section (a)? In the absence of a contractual limitation, * * * the determination of such need initially rests with the Carrier, subject, however, to challenge through the contractual grievance procedure * * * by an employe who believes that such determination was violative of the labor agreement * * * Since the determination of the need for a wrecking crew within the purview of Section (a) involves managerial discretion and judgment, we are of the opinion that the 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. Otherwise, we would substitute our judgment for the reasonable managerial discretion of the Carrier and thereby write a limitation into the labor agreement which it actually does not contain. Section 3, First (i) of the Railway Labor Act confers no authority upon us to do this * * *"

and further:

"* * * The record discloses * * * that the rerailing only required about 6 hours. Under these circumstances it cannot be said that the Carrier abused its managerial discretion * * * when it called a maintenance of way crane operator from Interior, a distance of about 72 miles, and three other maintenance of way employes, who were on hand at Rapid City, instead of the Claimants who were located at Sioux City, a distance of about 422 miles. * * *"

With the foregoing before us, we reviewed the facts presented in the record of this case.

There could be no question that claimants would have been entitled to have been called out on November 19, 1969, if the Carrier had dispatched the steam derrick stationed at Federal Shops to the derailment at Granite City. This wreck train was fully operable and available in November, 1969, as evidenced by the fact that it was used for wrecking service three months subsequent to the Granite City derailment and was not "mothballed" until March 6, 1970.

The Carrier submits that it relied on the advice of our Award 1757 to the effect that the invoked Rules "give Carmen the right to man wrecking crews. A wrecking crew within the meaning of these two rules refers to employes assigned to a "wrecktrain" but it ignored the further advice we gave in the same Award, namely; "If a derrick, crane or other wrecking equipment * * * is used in lieu of an available wrecker and crew, a violation of the agreement ordinarily exists."

The Carrier dispatched an XM52 wrecker truck with a Wreck Foreman and three carmen from the Reguarly Assigned Wrecking Crew to perform work at the accident scene. Two factors are raised by this. By Carrier's own description, the XM52 is a wrecker and wrecking equipment and use thereof in lieu of an available wrecker (which in 1954 was taken to mean a wreck

train) required, under Award 1757, a call out of the regularly assigned Wreck Crew. Further, all of our Awards relative to this type of dispute, as well summarized in Award 6177, clearly and definitively require utilization of the entire Regularly Assigned Wrecking Crew when a "wrecking outfit" is utilized in a derailment. Carrier, on page 2 of its Rebuttal Statement states:

"In the case at bar 'the outfit' dispatched to the scene was a piece of equipment designated as the XM52 wrecker truck." It then proceeds to reproduce for the first time an agreement between the parties thereto dated March 21, 1969, "covering use of XM52 wrecking truck." Although we generally do not give much weight to new matter introduced in Rebuttal, we consider it significant that the March 21, 1969 "Memorandum of Understanding" provides in part:

> "2. In the event of derailment or wrecks on Illinois Terminal Railroad Company property, XM52 wrecker truck will be dispatched from Federal, Illinois with two carmen assigned to XM52 plus not less than one member of wrecking crew, more if needed." (Emphasis ours.)

Three Carmen of the Regularly Assigned Wrecking Crew were assigned to go with the XM52 to rerail the derailed railroad cars. A Section Foreman and seven Section Laborers were also assigned. In addition, Carrier utilized workers who were not in its employ to work with hired equipment to perform the necessary work.

Carrier offers no explanation of what the parties intended by the words in the above quoted memorandum of understanding, paragraph 2., "more if needed." By introducing this for the first time in Rebuttal, it precluded the Petitioner from discussing this commitment and its impact, if any, upon Rules 127 and 128, and the Regularly Assigned Wrecking Crew.

In any event, the Carrier by its own words, labelled the XM52 Wrecker Truck as "an outfit" for derailment and wrecking service and therefore meets the standard we have established for proper invocation of the requirements of Rule 128.

Relying entirely on its own interpretation of its Management prerogatives as affording it unilateral rights to assign whom and what it wishes to derailments, the Carrier did not trouble to elucidate on its use of section laborers instead of members of the Regularly Assigned Wrecking Crew and completely ignored its obligation to justify use of non-employes to perform the work which its own employes claim they were ready, willing and able to do.

Our holding in Award 4190 declared that the determination as to the need for a wrecking crew was a matter of management discretion and judgment but cautions that this may be successfully challenged if the Carrier's action in this regard is "arbitrary, capricious, discriminatory or an abuse of managerial discretion." When claimants charge that Carrier's action was in derogation of a specific contractually provided benefit to which they believed they were 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. It's failure to do so brings it within the limitations upon its use of its discretion and judgment referred to hereinabove.

Based upon the above we must hold that Carrier violated Rules 127 and 128 of the Controlling Agreement and claimants are entitled to recover that which they lost thereby.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Secretary

Dated at Chicago, Illinois, this 13th day of March 1972.

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