Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7670
SECOND DIVISION Docket No. 7584
2-MP-CM-'78

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

Parties to Dispute: (System Federation No. 2, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Missouri Pacific Railroad Company

Dispute: Claim of Employes:

1. The Missouri Pacific Railroad Company violated Rule 120 of the controlling agreement and Article V of Agreement of January 12, 1976 when they contracted to Neosho Railroad Service the work of rerailing fifteen (15) freight cars of Train 610 at Barryton, Kansas, March 13, 1976, derailment occurred March 12, 1976.

2. That, accordingly, the Missouri Pacific Railroad Company be ordered to compensate the Kansas City, Missouri Wrecking Crew, namely Crew Members R. Howard, R. F. Robbins, C. J. Clear, R. D. Kissinger, J. E. Loucks, A. J. Savage, M. E. White, and R. F. Lappett in the amount of nine and one-half (9½) hours at the punative rate and one and one-half (1½) hours travel time, and one (1) hour preparatory time.

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 facts in this case are not in dispute and may be summarized as follows:

- On the evening of March 12, 1976, Train 610 -- composed of two engines and thirteen freight cars -- derailed on a branch line, outside of yard limits, at Berryton, Kansas. Berryton is near Topeka (about 10 miles).

- Neosho Railroad Service is a Topeka-based company. The Carrier contracted with Neosho to rerail the train. Neosho's equipment, including the derrick which was used for the rerailing, is on truck wheels.

- Neosho commenced the rerailing work at 7:30 AM on March 13 and completed it at 5:00 PM on the same day. The Carrier sent a wheel-change truck from Kansas City to assist Neosho. The Driver and Groundman with the truck were Carrier employes but not members of the Carrier's wrecking crew.

- The Carrier maintains a wrecker and wrecking crew at Kansas City. The wrecking equipment is on track wheels. The members of the wrecking crew are Carmen (claimants in this case). The distance between Kansas City and Berryton is about 90 miles.

- The Kansas City wrecking equipment and wrecking crew protect the Carrier's trackage as far west as Pueblo, Colorado -- a distance of about 600 miles -- and shorter distances to the north, east and south. The Carrier chose not to activate the Kansas City wrecker and wrecking crew for the instant rerailing because: 1) the rerailing was of relatively small magnitude; 2) Neosho was nearby and available; 3) avoidance of the use of the Kansas City wrecker and wrecking crew would mean the continued protection of the rest of the Carrier's trackage.

For the reasons momentarily to be given, we have decided that we must uphold the Organization in this case (though not the punitive remedy which the Organization is urging). We want first to indicate what we are <u>not</u> holding.

We are in agreement with the Carrier that it is not obligated to engage its wrecking equipment and wrecking crew for any and all of its rerailing work. There unquestionably are underlying circumstances which render the Carrier free to accomplish rerailing by other means. We also accept that the Carrier was not up to anything arbitrary or capricious and, instead, made a decision based on commonplace good-business considerations. The question in the case is whether the Carrier acted reasonably, and whether the contracting-out action, in the facts and circumstances here presented, was barred by the Agreement, as interpreted by several of our previous decisions.

Next, we will consider the Organization's reliance on Rule 120. This Rule reads as follows:

> "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, a sufficient number of carmen and helpers on duty will be used to perform the work. If a sufficient number of

"carmen and helpers are not on duty, a sufficient number of the wrecking crew will be called, if available.

NOTE: This does not change the practice of using train, engine or yard crews to rerail equipment being operated by them at time of derailment, provided this does not require the use of the wrecker outfit or tools other than frogs or blocks."

The Organization invokes the Rule's first sentence. We do not read the sentence as imposing the obligation which the Organization is asserting. We believe that "wrecking crews" in the sentence must be read as referring to the Carrier's equipment and personnel - for this is the only way to yield consistency with "are called" and "will accompany the outfit". So read, the sentence goes to an event -- i.e., "when wrecking crews are called for wrecks or derailments outside of yard limits" -- which did not here happen. Stated otherwise, the sentence obligates the Carrier to the presence of adequate manpower when its wrecking equipment and wrecking crew are activated. This is not the same thing as an obligation to activate that equipment and crew for each and every wreck or derailment. And it is precisely such reading of the sentence which the Organization is urging.

Last by way of what we are not holding, our determination places no reliance on Article VII of the Agreement. This Article is titled "Wrecking Service" and requires the Carrier under certain circumstances to call its own wrecking-crew employes when a contractor's wrecking-service equipment is utilized. The real point here to be made, however, flows from the Carrier's assertion with respect to the time at which Article VII was to go into effect. By its own terms, Article VII was to go into effect "75 days after the effective date of this Agreement". What the Carrier asserts is that, though the Agreement is known as the National Agreement of December 4, 1975, its effective date was January 12, 1976. 75 days from this date brings one to March 28, 1976 -- which is beyond both the date on which the instant derailment occurred and the date on which the instant rerailment work was done. The Organization has entered no refutation of the Carrier's submission with respect to the 75-day delay.

We now turn to the affirmative basis of our decision. The organization has argued that, in light of the facts and circumstances of this case, Carrier's action of subcontracting was barred by Article V of the December 4, 1975 National Agreement, which amended the provisions of Article II of the September 25, 1964 Agreement to read as follows:

"The work set forth in the classification of work rules of the crafts parties to the Agreement or, in the scope rule if there is no classification of work rules, and all other work historically performed and generally recognized as work of the crafts pursuant to such classification of work rules or scope rules where

"applicable, will not be contracted except in accordance with the provisions of Sections 1 through 4 of this Article.... In determining whether work falls within a scope rule or is historically performed and generally recognized within the meaning of this Article, the practices at the facility involved will govern."

Section 1 contains this:

"Subcontracting of work, including unit exchange, will be done only when genuinely unavoidable because (1) managerial skills are not available on the property but this criterion is not intended to permit subcontracting on the ground that there are not available a sufficient number of supervisory personnel possessing the skills normally held by such personnel; or (2) skilled manpower is not available on the property from active or furloughed employees; or (3) essential equipment is not available on the property; or (4) the required time of completion of the work cannot be met with the skills, personnel or equipment available on the property; or (5) such work cannot be performed by the carrier except at a significantly greater cost..."

It may very well be that the work performed in this case fell within the category of "... all other work historically and generally recognized as work of the crafts..." within the meaning of amended Article II. However, this Board has no jurisdiction to consider disputes arising from Articles I and II of the September 25, 1964 Agreement, as amended. By virtue of that Agreement, the parties signatory thereto established a Special Board of Adjustment (now known as Special Board of Adjustment 570) to have exclusive jurisdiction over such disputes (see Second Division Awards 5938, 5941, 6081 and 6534, among others). In this vein, prior to the amendment of Article II discussed, supra, this Board decided that it was the National Railroad Adjustment Board, and not Special Board of Adjustment 570, which had jurisdiction over wrecking service cases on the basis that the work was not set forth or covered in the Carmen's classification of work rule (Award 232, SBA 570 and Second Division Awards 6582 and 6703).

Accordingly, we must consider this dispute in light of the fact that Article VII of the December 4, 1975 National Agreement was not in effect at the time the disputed incident occurred and in light of the fact that we have no jurisdiction to consider matters exclusively referrable to Special Board of Adjustment 570.

In the facts of this case, no emergency existed and Carrier did not argue in that vein. The incident occurred on a lightly used branch line and the blockage of this line did not, even arguably, delay traffic or trains. Accordingly, we conclude that the case is squarely on point with previous decisions on this same property and between these same parties. In recent Award 7436, we held:

> "The Hulcher equipment used were two bulldozers with side booms, one front-end loader and one heavy D-8 Catepillar tractor all equiped with winches. The Organization contends, and it is not denied, that Hulcher's equipment replaced the Carrier's Wrecker crane in performing the rest of the work of clearing the derailment. In Award No. 4835, between these same parties to this agreement, we held that two draglines used in lieu of the wrecking derrick outside yard limits was a contract violation. We find in the instant case that Carrier violated Rule 119(a) and Rule 120 when it utilized the equipment and personnel of an outside contractor in lieu of its own wrecking crane and crew to clear up the derailment at Spadra, for that period of time after the main line was opened and the emergency conditions of the main line blockage had ceased."

We are thus upholding the Organization. On the claimed remedy, as we have already indicated, we see no warrant for the punitive approach which the Organization is urging. The affected Carmen are to be compensated at the straight time rate for the hours claimed.

A W A R D

Claim sustained as and to the extent given in Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By _____
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 15th day of August, 1978.