Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7744
SECOND DIVISION Docket No. 7610
2-MP-CM-'78

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. 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. That the Missouri Pacific Railroad Company violated Article VII, Section 1 and Note to Section 1 of Agreement of January 12, 1976 when they contracted out the work of rerailing diesel units No. 165 and 1738 on the industrial track at El Dorado, Arkansas, April 14, 1976, working from 4:45 P.M. until 10:15 P.M. same date.

2. That the Missouri Pacific Railroad Company be ordered to compensate the following members of the North Little Rock, Arkansas Wrecking Crew, P. A. Piechoski, W. M. Wilson, M. T. Linz, M. H. McGary, H. E. Ison, B. G. Pruitt, W. A. Hamilton, and H. A. Armstrong in the amount of thirteen (13) hours and fifteen (15) minutes at the pro rata rate for each claimant.

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 April 14, 1976, two diesel locomotives derailed while performing work on an industrial lead within the yard limits of El Dorado, Arkansas. One of the units was rerailed using rerailers, with the services of Carmen employed at El Dorado. For the other diesel unit, the Carrier determined that heavy equipment would be required and called in the services of an outside contractor which brought its own equipment by highway to the site. Drivers of the outside contractor assisted in the rerailing work. There is no wrecking equipment or wrecking crew headquartered at El Dorado.

Under Article VII, Section 1, and the NOTE to Section 1 of Mediation Agreement, Case A-9699 of December 5, 1975, the Organization claims that -- at a minimum --groundmen of the wrecking crew stationed at North Little Rock, Arkansas, should have been summoned to assist in the rerailing work.

The provision which the Organization states is applicable reads as follows:

"ARTICLE VII - WRECKING SERVICE

1. 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 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."

It is noted by the Board that the instant dispute follows shortly after the adoption of Article VII, Section 1, of the December 4, 1975, Mediation Agreement, thus offering recently agreed upon language for interpretation in this case.

One of the issues in dispute is whether or not the members of the wrecking crew from North Little Rock were "reasonably accessible" for the purpose. Since the outside contractor's force were called from a point only a relatively few miles closer than the headquarters of the North Little Rock wrecking crew, and since in both instances highway transportation was or could have been used, the Board finds that in this instance the Carrier cannot defend its position on the wrecking crew not being "reasonably accessible".

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.

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". Here, reference must be made to the underlying Agreement between the Organization and the Carrier which states in Rule 120:

> "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."

No conclusion can be reached that Article VII, Section 1, of the 1975 Mediation Agreement is intended to obliterate Rule 120. To the contrary, Article VII clearly commences, "When pursuant to rules or practices..."

The derailments in this dispute were within yard limits. Of course, the derailments were outside the yard limits of the nearest wrecking crew, but if this is taken as governing, it would mean that in any yard not having a wrecking crew, Carmen situated within such yard would be barred from the work. This is not what Rule 120 says.

Of the many awards dealing with this point, one of the most recent is Award No. 6495 (McGovern), in which the applicable rule (84 E) was similar:

> "When derailments or wrecks occur outside of yard or switching limits requiring assistance other than a wrecking derrick, a sufficient number of wrecking crew members will be called to assist."

In Award No. 6495, a derailment occurred within yard limits and a claim was made by a wrecking crew located 46 miles away when local Carmen were used, in that award, the Board held:

> "It is clear from a review of the factual situation in this record, that rule 84 E of the Collective Bargaining Agreement could not have been violated because the derailment occurred inside the yard and not outside. In order for 84 E to have been violated, the derailment would have had to occur outside the yard."

Awards No. 1069 (Mitchell), 5051 (Johnson), and 6030 (Zumas) and others similar are not supportive here, since these cases involve the actual use of Carrier's wrecking equipment and their operators, and the questions involved were whether or not additional wrecking crew members were entitled to accompany the equipment. No such question applies here.

The Board finds no conflict between Article VII, Section 1, of the 1975 Mediation Agreement and Rule 120. The former memorializes 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. To accept the Organization's position would be to give a new interpretation to Rule 120. Since the parties, however, have not disturbed Rule 120, the Board has no reason to change its interpretation of such rule.

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 29th day of November, 1978.

LABOR MEMBER'S DISSENT TO AWARD NO. 7744 - DOCKET NO. 7610

In denying the claim the Majority obviously misplaced and, therefore, misconstrued the phrase found in Article VII, "when pursuant to rules and practices, a carrier utilizes the equipment of a contractor...".

That phrase clearly refers to rules or practices under which the Carrier utilizes a contractor. The Majority in this award has in effect erroneously held that "if the carrier utilized the equipment of a contractor the work will be performed pursuant to rules and practices." That is not what Article VII states.

The Majority adopted that theory not withstanding the fact that the Carrier never presented such argument.

It was never alleged that Article VII of the National Agreement dated December 5, 1975 superseded Rule 120 of the Agreement. But Article VII modifies Rule 120 to specifically provide that where the equipment of a contractor is utilized a sufficient number of the Carrier's assigned wrecking crew will be called to work with the contractor, and that the contractors ground forces will not be used unless all available and reasonably accessible members of the assigned wrecking crew are called. That provision is not restricted to any geographic location on Carrier's property.

The Majority is in gross error and we dissent.

C. E. Wheeler
Labor Member