Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8090
SECOND DIVISION Docket No. 7814-T
2-BNI-CM-'79

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

Parties to Dispute: (System Federation No. 7, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Burlington Northern Inc.

Dispute: Claim of Employes:

1. That the Burlington Northern Inc. violated the Scope Rule and Rule 86(b) of the current agreement when they enlisted the services of Union Pacific 100 ton Pettybone Wrecker Unit #592 and four (4) Union Pacific Groundmen to rerail four (4) cars in the Burlington Northern Inc. Denver Yard.

2. That accordingly, the Burlington Northern be ordered to additionally compensate Carmen J. C. Lombardi, A. R. Coe, A. Bredl and J. W. Recknor, Denver, Colorado, for six and one-half ($6\frac{1}{2}$) hours each at the punitive rate for March 1, 1976.

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.

Four cars were derailed at Carrier's Denver Yard. Since no wrecker is maintained at the Yard, Carrier called several local crane companies, without success. It finally secured the services of a Union Pacific Railroad crane, which was accompanied by four groundmen. Carrier assigned three Carmen to the rerailing work, each of whom, Petitioner alleges, "worked with the Union Pacific men in clearing up this wreck".

Petitioner argues, in substance, that Carrier "augmented these three (3) Carmen with four (4) Carmen from the Union Pacific Railroad", thus using 7 Carmen. Hence, it claims, Carrier should have used seven Burlington Northern Carmen from its wrecking and rerailing list.

Petitioner further asserts that the derailment created no emergency situation at the Yard, inasmuch as the Yard has 40 tracks.

Petitioner alleges a violation of Rule 86(b), which reads in part:

> "... For wrecks and derailments within the yard limits, sufficient carmen will be called to perform the work."

Petitioner relies on sustaining Award 6447 (Shapiro), in which the Board stated, with respect to Rule 88(c), identical in language to Rule 86(b):

> "We have consistently held, in effect, that Rule 88(c) is a special rule which deals with a specific situation and provides the standard to be followed when it arises. The parties negotiated and codified the Agreement. This Board is not empowered to substitute our judgement of what may be right or preferable in an operation for that agreed upon and set forth in the Agreement."

Carrier contends, on the other hand, that it complied with Rule 86(b) by having called "sufficient" Burlington Northern carmen, based on past practice of calling two or three carmen, "especially when only one to four cars are involved". It adds: "The Union Pacific wrecking crew accompanied their crane but this does not mean that additional BN carmen would have been called if they had not". Furthermore, Carrier insists: "That Union Pacific employees accompanied their crane provides no support for this claim, because they did not perform work which the claimants would have performed".

Carrier also defends its action on the ground that rerailing a car within yard limits is not exclusively carmen's work, citing Awards 5812 (Stark) and 6454 (Bergman).

Carrier also claims it was faced with an emergency, which required it to use the UP crane to rerail the cars, citing Award 7074 (Norris).

Both the Union Pacific Railroad Co. and the UP Carmen were given due notice as interested Third Parties, but submitted no statement.

At each step of the handling of the claim on the property, Petitioner asserted that the four UP groundmen worked with the tree BN carmen in the rerailing. The Local Chairman's original claim stated that Carrier:

> "... contacted the Union Pacific Railroad and used their wrecker and Union Pacific's men.
>
> Three (3) people from our rerailing list were called for this derailment and each worked with the Union Pacific men in clearing up this wreck." (Underlining in original)

Carrier's response to this claim was that local supervision

"contacted the Union Pacific Railroad and their crane was dispatched together with their wrecking crew. Three (3) people from Burlington Northern rerailing list were also called for the derailment.

Due to the fact sufficient Burlington Northern carmen were called to this derailment to perform work necessary to comply with Rule 86, Para. (B), your claim is not valid and is respectfully declined."

Petitioner, in progressing the claim to Carrier's top official authorized to handle such matters stated:

"The Carrier ... used four carmen from the Union Pacific Railroad to augment the three (3) Burlington Northern carmen at the derailment..."

Petitioner acknowledges that had Carrier employed the UP Wrecker Unit with only the driver and operator, but without the additional four UP groundmen, Carrier would have complied with "past practice" at the Denver Yard. But since the four UP groundmen "worked side by side with the three Burlington Northern carmen inside the yard limits of the Burlington's ... Yard rerailing four cars", the Agreement was violated and Carrier could not rely upon past practice.

In support of its position Petitioner cites Second Division Award No. 5810 (Stark) which involved Chicago and Eastern Illinois Railroad v. Carmen. The Carrier in that case took the following position:

"It is evident in reviewing the awards of the Second Division that the principle is well established that when a derailment occurs on a foreign railroad, employees of another Carrier have NO contractual right to any work involved and that is precisely the case in the present claim. ...

There is no dispute to the fact that the derailment occurred on the Chicago Heights Terminal Transfer Railroad and in view of the preponderant weight of precedent established in the above cited awards, it is easily apparent that the claimants had no contractual right to the work in question or to accompany the derrick."

In sustaining the Carrier's position the Board issued the following denial Award:

> "In a line of decisions involving this Organization and various carriers, the Board has consistently held that the wrecking crew rule (Rule 101 here) applies to wrecks and derailments on carrier's property but does not apply when the wrecker is loaned to another carrier for rerailing work on its property. ..."

Petitioner also cites with approval Award 6257 (Shapiro):

> "... 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 employees and most particularly total strangers to the Railroad in place of them. Its failure to do so brings it within the limitations upon its use of its discretion and judgment referred to hereinabove."

Carrier, in its Rebuttal Statement, asserts that Award 6257 is relevant to the instant case, notwithstanding that it involved a wreck outside yard limits, "in that it points out that the carrier had the right to use other than the claimants, provided only that it offered a reasonable explanation for doing so. In this case, Carrier has shown that it used the Union Pacific's crane because it was the only one available. This is certainly a reasonable explanation for doing so, and therefore Award 6257 is authority for denial of this claim."

Carrier's comments quoted supra are not on point. Petitioner has raised no objection to, dor does the claim apply to Carrier's use of the UP crane, its driver and its operator. The claim is based on the work allegedly performed by the four UP groundmen, which allegedly deprived Carrier's carmen of work opportunity under the provisions of Rule 86(b).

Carrier has asserted that no UP employee performed work which the Claimants would have performed, because "sufficient" BN Carmen were called to perform the work. Carrier did not state that the UP groundmen performed no work -- in which case this Board would have been confronted with conflicting statements by Petitioner and Carrier. Instead, Carrier consistently used the phrase, "no UP employee performed work which the claimants would have performed"; or, as stated in its Rebuttal, "the Union Pacific employees did not perform work which otherwise would have been performed by the claimants, because the same number of Burlington Northern carmen were called to perform the work as were called in similar situations in the past". This language, in our judgment, does not constitute a denial of Petitioner's claims that its members "worked with the Union Pacific men in clearing up this wreck"; or that the four UP groundmen "worked side by side with the three Burlington Northern carmen ... rerailing four cars".

While we are disinclined and reluctant to engage in conjecture, we submit that Carrier's response to the claim leaves the clear reference that the UP groundmen did perform some work on the BN property at the time of the rerailing operation at the BN Denver Yard. To assert, as Carrier did, that the UP employees "did not perform work which otherwise would have been performed by the claimants, ..." is tantamount to stating that UP employees, employees of a foreign carrier, performed work on BN property. (Underlining added). Carrier at no time explicitly denied Petitioner's contention that UP groundmen "worked side by side" with Carrier's groundmen in the rerailing.

Petitioner's claim does not apply to Carrier's use of the UP crane, its driver and operator, but on Carrier's use of the four UP groundmen. Hence, Carrier's statements in defense of its action, quoted supra, must refer to the four UP groundmen.

Carrier, as previously noted, maintains that in the past, for derailments of similar size, three carmen have been called as was done in the instant case. Carrier therefore maintains that "sufficient carmen" were called to perform the work, in compliance with Rule 86(b), and in conformity with past practice.

Second Division Award 7214 (Ritter) between the same parties involved a claim that employees other than Carmen were assigned to perform and did perform rerailing work within yard limits. A single freight car was derailed. No wrecker was called. The Board sustained the claim in behalf of four carmen basing its decision on Award 4770 (Johnson), on the former Great Northern (later merged into the BN), which stated, in part:

> "... But since it was within yard limits and the wrecker was not used, 'sufficient Carmen' with seniority at the point should have been called.
>
> The work of clearing the derailed cars from the tracks was wrecking service, and the use of maintenance of way employees in lieu of Carmen was improper."

Award 7214, on this property at least, confirmed and supported prior Awards that wrecking service within yard limits is carmen's work.

Award 5812 (Stark) and 6454 (Bergman) cited by Carrier denied claims by Carmen to the right to operate a "crane and lift truck", in the one case and a "crane or wrecking derrick" in the other. The case before us does not involve claims to operate such equipment, but rather that the Carrier used groundmen from a foreign carrier.

The Carrier Member, subsequent to the Panel Hearing, has called our attention to recent Second Division Award 8009 (Van Wart) involving a different Carrier, in which the Board denied a claim involving a rule similar in major respects to Rule 86(b). In the situation covered by Award

8009, two diesel units were derailed in the Carrier's switching yard. One of the diesel units was rerailed by the Carrier's own forces and the other by a contractor using his three yardmen plus the two Carrier carmen who rerailed the first diesel unit. There, as here, the claim was filed on the ground that the Carrier used the contractor's groundmen without calling additional carmen from its own forces, since it was claimed, the Carrier's employees had the right to perform the ground work.

The Board in Award 8009 denied the claim stating, in part:

> "... the record is silent as to the work role played by the contractor's three groundmen in rerailing Unit 1632. There were two on duty Carmen who were utilized ...
>
> The Board cannot determine on this record whether a sufficient number of carmen were used. The mere presence of the contractor's groundmen does not stand as a basis for alleging violation of Rule 120. The burden to prove the case here rested with the Petitioner. They failed."

Were the record in the instant case "silent as to the work role played" by the UP groundmen, we would, per force, agree with the Board's decision in Award 8009 and deny the instant claim. But as we have previously indicated, Petitioner's assertion that UP groundmen "worked side by side" with Carrier's Carmen in the rerailing remained uncontroverted; Carrier's assertions that the UP employees "did not perform work which the Claimants would have performed" do not, in our judgment, refute Petitioner's repeated statements during the progress of the claim on the property that the four UP groundmen worked with the three BN Carmen in the rerailing. In conformity with the Board's well-established principle that material statements made by one party and not denied by the other may be accepted as established fact, we hold that Petitioner has met the burden of proof.

In conformity with the Board's decision in Award 6257 (Shapiro) that a Carrier must "offer a reasonable explanation for its need to utilize other employees ...", Carrier in the instant case must offer an explanation for its decision to use forces other than its own employees when the applicable Agreement, as in this case, expressly provides that "For wrecks and derailments within the yard limits, sufficient carmen will be called to perform the work". Carrier's "explanation" related to its use of the UP equipment and its operators, not to the four UP groundmen, which is the issue before us. Accordingly, we will sustain the claim.

Claimants were on duty on the day in question, their assigned hours being 7:00 AM to 3:00 PM. We direct that the four Claimants be compensated only for such period beyond the end of their tour of duty (3:00 PM) and the time, based on Carrier's records (which may be verified by Petitioner) that the rerailing was completed and the UP employees were released from duty. The compensation for such time subsequent to 3:00 PM shall be at the rate of time and one-half.

Award No. 8090
Docket No. 7814-T
2-BNI-CM-'79

A W A R D

Claim sustained to the extent indicated in Findings.

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 27th day of September, 1979.