

The Second Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Missouri Pacific Railroad Company

Dispute: Claim of Employees:

1. That the Missouri Pacific Railroad Company violated Rule 120 of the controlling Agreement and Article VII of the Agreement of January 12, 1976 when they contracted to an outside contractor the rerailling of freight cars at Mt. Olive, Arkansas, January 21, 1978, after their own employees and equipment had been called for this derailment.
2. That the Missouri Pacific Railroad Company be ordered to compensate wrecking crew members, Carmen L. W. Wise, P. A. Piechoski, M. H. McGary, W. M. Wilson, H. Phillips, B. G. Pruitt, H. A. Armstrong, J. D. Cantrell, and C. G. Womble in the amount of twenty-four (24) hours each at the pro rata rate.

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 date of January 21, 1978, a derailment involving four (4) cars on one of Carrier's through freight trains operating between Kansas City, Missouri and Houston, Texas, occurred at Mt. Olive, Arkansas, at Milepost 329, approximately 155 rail miles from North Little Rock, Arkansas. As a result of the derailment, the main line was blocked thus giving rise to an emergency situation. On same date of January 21, 1978, at about 9:45 P.M., Carrier responded to this emergency situation by dispatching a wrecking crew of nine (9) Carmen, the Claimants here in the instant case, along with the 250 ton wrecker and in addition, called for and hired the services of an outside independent contractor, the Hulcher Company, who sent their emergency service forces with over-the-highway equipment from Pine Bluff, Arkansas to Mt. Olive, a distance of approximately 190 highway miles. Carrier's wrecking crew arrived at the site of the derailment some time on January 22, 1978 and proceeded to clear the main line thus ending the emergency situation. Carrier notes that although it had intended for its wrecking crew and the Hulcher forces to work together in performing the necessary clearing and rerailling duties,

this was not ultimately possible because the Hulcher forces, encountering severe inclement weather conditions of ice and snow on the highway, did not arrive at the scene of the derailment until 12:30 P.M., January 23, 1978. Prior to Hulcher's arrival and following the clearing of the main line, Carrier directed the wrecking crew to return to North Little Rock, Arkansas. When Hulcher forces finally arrived, they proceeded to perform the remaining rerailling work which took, according to time records, five and one-half (5½) hours to accomplish.

The Organization argues that Carrier's action of sending the wrecking crew back to North Little Rock after the crew had cleared the main line was violative of Rule 120 of the Controlling Agreement, effective June 1, 1960, amended November 1, 1974, as well as Article VII of the December 4, 1975 National Agreement, in that the crew was deprived of performing the remaining non-emergency work associated with the derailment that was ultimately performed by employees of the outside contractor, Hulcher. Rule 120 and Article VII read respectively in relevant part and in whole as follows:

"Rule 120. When wrecking crews are called for derailments outside yard limits, a sufficient number of the regularly assigned crew will accompany the outfit ***."

"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.

2. This Article shall become effective 75 days after the effective date of this Agreement except on such roads as the general chairman of the carmen elects to preserve existing rules in their entirety and so notifies the carrier within 45 days of the effective date of this Agreement. Where this Article does become effective, it modifies existing rules only to the extent specifically provided in this Article."

The Organization asserts that once the emergency was dealt with, the wrecking crew was quite capable of completing the work at Mt. Olive without the assistance of the Hulcher Company equipment or forces. The Organization contends, that under the circumstances, there was no justifiable reason for the Carrier to fail to use their own equipment and employees to perform work which is contractually theirs. In that Carrier permitted employees of an outside contractor to perform the disputed work, its actions, contends the Organization, is capricious, arbitrary and represents an intrusion of the ~~Carmen's~~ job domain. Finally, in support of its position, the Organization cites several Second Division Awards of which it identifies as key, Award 7436. The Organization notes said Award involves the same issue as well as the same parties and quotes the following passage wherein the Board held:

"We find in the instant case that the 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."

Throughout the handling of this dispute, the Carrier has advanced different reasons at different times in attempting to explain why it directed the wrecking crew to return to North Little Rock after the crew had cleared the main line but before it had an opportunity to complete the remaining rerailling work. These reasons, not necessarily set forth in chronological order, are as follows:

1. "The safety of our employees is always first. We (Carrier, could not get help (reference to Hulcher), into Mt. Olive account bad road conditions and it was the opinion of the Carrier that to try to reraill these cars without help of some kind would not be safe with snow and ice on the ground."
2. "Facts in this case are that due to location of some of the wrecked cars it was necessary to use outside contractor's off-track equipment to handle the damaged cars. Since Hulcher Emergency Service was unable to get to the derailment site on January 21, 1978, the wrecking outfit and crew was released to return to North Little Rock."
3. Carrier made reference to a portion of Article VII of the December 4, 1975 National Agreement wherein it quoted the following: "The contractor's ground forces will not be used, however, unless all available and reasonably accessible members of the assigned wrecking crew are called."

In regard to this provision Carrier related to the Organization that "in this particular case, the wrecking crew members (the Claimants), were not available, ... (as they) were rerailling five cars at 9th Street - East Little Rock, at the time Hulcher personnel rerailled the cars at Mt. Olive, Ar., January 23, 1978."

4. "Our (meaning Carrier's), wrecking crew cleared the main line and

restored same to full operations ... Since Hulcher had not yet arrived, the wrecking crew returned to North Little Rock."

5. "The members of the wrecking outfit cleared the main line on January 22 and were returned to North Little Rock so that the wrecking outfit would be available in the case of other emergencies.

When the derailment occurred, the plan was to have the full wrecking crew at the site of the derailment and have the crew assisted by the outside contractor. This did not work out since the contractor could not move his equipment over the highway quickly. It would have been impossible to send groundmen from North Little Rock over the highway back to the derailment site because of the snow and ice."

Of all these several explanations, Carrier now insists before this Board that the wrecking crew was directed to depart Mt. Olive for the specific mission of working on the second derailment which occurred at East Little Rock, Arkansas, at Milepost 346 on January 22, 1978. Carrier argues that when this second derailment occurred and Hulcher equipment and forces had not yet arrived at Mt. Olive, it acted properly in dispatching its wrecker and crew from Mt. Olive to the site of the second derailment at East Little Rock. Had it not dispatched the crew to the second derailment, its only other alternative, Carrier asserts, was to hold the wrecker and crew at Mt. Olive for an unknown amount of time awaiting the Hulcher equipment as the location of some of the derailed cars precluded use of the wrecker to rerail them. However, this alternative notes Carrier, would have had the effect of ignoring the East Little Rock derailment where, maintains Carrier, the wrecker was capable of performing the necessary work. Carrier further contends the Claimants were performing wrecking service at East Little Rock at the very same time Hulcher was rerailing the remaining cars at Mt. Olive. Thus, reasons Carrier, the Claimants could not have worked in two places at one time. Carrier asserts Claimants performed an equal amount of wrecking service, if not more, at East Little Rock, that Hulcher employees performed at Mt. Olive and therefore, none of the Claimants incurred an economic loss as a result of having been sent to the second derailment.

The Organization alleges that the second derailment at East Little Rock occurred within yard limits and that a wrecker was not required for this derailment. That being the case, the Organization notes it was not necessary for Carrier to use the wrecking crew but instead other Carmen could have been called to perform the wrecking service at the second derailment. Furthermore, the Organization refutes Carrier's contention the wrecking crew was performing wrecking service at East Little Rock at the very same time Hulcher was performing wrecking service at Mt. Olive, asserting that the wrecking crew completed its work at East Little Rock at 2:30 A.M., January 23, 1978 while Hulcher did not arrive at Mt. Olive until 12:30 P.M., January 23, 1978. Thus, concludes the Organization, Carrier had more than sufficient time to send the wrecking crew back to Mt. Olive.

The Carrier retorts that even assuming arguendo, it could have sent the crew back to Mt. Olive, it doubts whether the crew could have made it back in time as it would have sent only the ground forces back and not the whole crew, and said ground forces would have had to travel the very icy and snowy highways rather than travel back by rail.

From a review of all the facts and evidence before it, the Board believes that neither the Carrier nor the Organization has been successful in providing conclusive support for its position. We are faced here with mere assertions and allegations, counter-assertions and counter-allegations with regard to the central arguments advanced by both sides. For either side to prevail a number of ifs appear in need of satisfaction. For example, if the remaining cars at Mt. Olive could only have been rerailed by off-track equipment and if Carrier did, in fact, have certain knowledge at the time that Hulcher would be substantially delayed in its arrival at Mt. Olive, and if it were an accurate assessment the wrecker was truly needed for the second derailment and finally if the work at the second derailment was performed simultaneously with that performed by Hulcher at Mt. Olive, then Carrier would have been justified in directing the wrecking crew to the site of the second derailment after the crew cleared the main line at Mt. Olive. However, an analysis of the evidence before us leads us to the conclusion Carrier was not in a position of certain knowledge about any of its determinations at the time, as reflected mainly by the various explanations it provided the Organization during the on-property handling of this dispute as to why it directed the wrecking crew to return to North Little Rock. Was the crew returned because the Carrier wanted the wrecker available for other emergencies or was the crew ordered back specifically for the purpose of working the second derailment? Did the Carrier actually know when Hulcher would finally arrive at Mt. Olive and did it know for certain at the time Hulcher was even needed after the emergency was dealt with and the main line was cleared? In not being able to resolve these questions to our satisfaction it is our judgment the Claimants here should be given the benefit of the doubt. We therefore direct the Carrier to compensate each of the Claimants five and one-half (5½) hours pay at the pro rata rate, which represents the amount of time it took Hulcher employees to rerail the remaining cars at Mt. Olive.

A W A R D

Claim disposed of as per 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 15th day of April, 1981.