Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8697
Docket No. 8748
2-B&O-CM-'81

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Baltimore and Ohio Railroad Company

Dispute: Claim of Employes:

No. 1. That under the controlling Agreement the Carrier failed to call the Cumberland assigned wrecking crew for work in connection with a derailment at Orleans Road a location approximately twenty-three (23) miles East of Cumberland, Maryland on the date of December 15, 1978. The Carrier enlisted the service of an outside contractor, Hulcher Emergency Service, and allowed them to perform, not only carmens wrecking work, but also carmen's work contractually recognized as such, exclusively.

No. 2. That the Carrier failed to comply with the rules of the controlling Agreement, specifically, Rules 29, 138, and 142 of the Shop Crafts' Agreement, as well as Article VII of the December 4, 1975 Agreement, Wrecking Service Rule, effective March 27, 1976.

No. 3. That accordingly the Carrier be ordered to compensate the following identified employes for their losses arising out of this incident; L. B. Mathias, A. T. Rice Jr., P. H. Sibley, W. C. Shaffer, G. R. Shafferman, A. F. Hinkle, J. E. Bierman, and J. E. Price, each, for twelve hours pay at the time and one-half rate and eight hours pay at the doubletime rate; L. D. Saville and R. H. Schriver, each, for eight hours pay at the time and one-half rate and eight hours pay at the doubletime rate; W. D. Rawnsley, H. E. Fraley, and E. F. Ellis, each, for eight hours pay at the time and one-half rate and four hours pay at the doubletime rate; S. E. Teets, for twenty hours pay at the time and one-half 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 December 15, 1978, at approximately 2:10 p.m., a derailment occurred along Carrier's tracks at "Orleans Road", a point approximately 23 miles from

Cumberland, Maryland and 77 miles from Brunswick, Maryland. The derailment involved thirteen cars. The Carrier called Hulcher Emergency Service and the Carrier's own wrecking crew from Brunswick to the scene. The issue to be dealt with in this case is whether the Claimants had a contractual right to be called to the derailment in lieu of the Hulcher Emergency Service used by the Carrier.

The Organization primarily supports its claim by its reading of Article VII which states:

> "... 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 ..."

The Organization argues that the use of the contractor violated Article VII because they were not called to work with the Brunswick crew. It is argued that Article VII allows the use of a contractor only in conjunction with Carrier's forces. In this case,it is suggested that at no time did Hulcher work with the Carrier's forces. This was a result of the Hulcher crew working at one end of the derailment and the Brunswick crew at the other. The Brunswick crew worked separately and therefore not with the contractor, they assert.

The Carrier makes a threshold argument that the claim should be barred as a result of a procedural defect. The Carrier contends that the Organization significantly altered the basis for the claim during its appeal on the property.

The Carrier further argues without prejudice to their position on the procedural defect, that Article VII only requires the Carrier to call the assigned wrecking crew in a singular sense. Only one crew has to be called, asserts the Carrier, in order to comply with Article VII. The Brunswick crew was the assigned crew and therefore no violation of Article VII can be established. In support of this contention, they cite Second Division Award 8106 which in the Board's opinion is principally identical to the facts in the instant case. The award is quoted in pertinent part:

> "Article VII sets down several conditions for the use of a Carrier's wreck crew when the carrier uses a contractor's equipment: 1) 'a sufficient number of the Carrier's assigned wrecking crew, if reasonably accessible to the wreck will be called ... to work with the contractor'; 2) The Carrier's assigned wrecking crew will be called 'with or without the Carrier's wrecking equipment and its operators'; and 3)

'The contractor's ground forces will not be used, however, unless all available and reasonably accessible members of the assigned wrecking crew are called.'

Applying these three conditions and Rule 96 to the instant case we find the Carrier called out the Hagerstown Wreck Train and regularly assigned crew. This met the requirement of Rule 96. It also met conditions 1 and 2 of Article VII; that is, Carrier called out the Hagerstown 'assigned wrecking crew' with its own 'wrecking equipment and its operators.'

The critical issue remaining, however, is whether or not calling the members of the Port Covington crew, Carrier failed to comply with the third condition set forth in Article VII; namely, 'the Contractor's ground forces will not be used, however, unless all available and reasonably accessible members of the assigned wrecking crew are called.'

We hold that Carrier did comply with the terms of Rule 96 and Article VII. The Hagerstown 'assigned wrecking crew', in its entirety, was called to work with the Contractor's equipment and crew. In essence, therefore, we interpret the references in Article VII to 'the Carrier's assigned wrecking crew', 'the assigned wrecking crew', and 'the Carrier's wrecking crew' as a crew in the singular and not in the plural; i.e. a crew at a specific location on Carrier's property and not to all wrecking crews at all locations on Carrier's property where wrecking crews have been established and/or designated. This construction is borne out by the language of the NOTE to Article VII which also refers to wrecking crew in the singular."

The Board must first address itself to the Carrier's procedural argument. It is the Board's opinion that no fatal defect exists.

In considering the contentions of the parties as they related to the merits, it must be said that it seems initially that Award 8106 is dispositive of the issue. Award 8106 is accurate in its interpretation of Article VII that only one wreck crew be assigned when a Carrier utilizes outside forces in a derailment and when two crews are reasonably accessible. Further, it is seen as applicable because the Organization's attempt to distinguish the instant case is without reasonable foundation. The Organization sought to establish a violation on the basis that the Hulcher crew did not work "with" Carrier forces. This attempt is strained in light of the facts. The Brunswick crew and the Hulcher crew, although they worked from different ends of the derailment worked the same derailment and at the same time.

Although Award 8106 seems dispositive of the instant issue, the Organization cited Second Division Award 8284 which raises the possibility that the Carrier can violate the agreement in their choice of which of two Carrier crews to assign when they both are reasonably accessible. The Board in Award 8284 endorsed Award

8106 in the respect to its holding that the Carrier need only assign one crew but added some other considerations. The Board stated:

> "Given our previous findings in Award 8106 that a carrier is not obligated under Article VII of the December 4, 1975 Agreement to call more than one (1) assigned wrecking crew, we now additionally add that where more than one assigned wrecking crew is determined to be reasonably accessible to the wreck, all other things being equal (ceteris paribus), Carrier is obligated under Article VII to call the crew whose consist contains a number of wrecking crew members sufficient to perform the wrecking service work. (Emphasis added)
>
> In so finding, we are of the belief that the determination as to which of the reasonably accessible assigned wrecking crews is of sufficient size (in those situations where more than one wrecking crew is reasonably accessible to the wreck, with all other things being equal), should be based, among other consideration, on the size of the independent contractor's crew arranged for by carrier relative to the comparative differences in crew size among the eligible wrecking crews. These determinations should be made on a case by case basis."

In reviewing the instant case, in light of Award 8284, however, we find no evidence or existence of any of the considerations referred to therein that would distinguish the instant case from Award 8106. For instance, the primary consideration in Award 8284 seemed to be the fact that Hulcher crew outnumbered the Carrier's crew. It was stated:

> "In the case at bar, the Carrier had a choice of at least two (2) assigned wrecking crews that we know of which were considered to qualify as being reasonable accessible to the wreck. Carrier exercised its prerogative and chose the smaller crew and the one based the furthest distance away from the derailment site. We might not have cast any objections to Carrier's choice of wrecking crews here no matter how dubious such choice may appear to be to us on the surface, had it not been for the fact that the crew arranged for by Carrier and provided by Hulcher, the independent contractor, outnumbered Carrier's crew by slightly more than two (2) to one (1)." (Emphasis added)

There is no suggestion by the Organization nor is there any evidence in the record that the Hulcher crew outnumbered the assigned crew in the instant case.

In conclusion, because there is nothing in the instant record that would distinguish the instant case from Award 8106, it therefore is held to be controlling.

Award No. 8697
Docket No. 8748
2-B&O-CM-'81

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 April, 1981.