Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8766
SECOND DIVISION Docket No. 8509
2-B&O-CM-'81

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. 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:

1. That under the controlling Agreement, the provisions of the December 4, 1975 Agreement was violated on October 6, 1976, when the Carrier failed to call five (5) members of the assigned wrecking crew and Assistant Wreck Coreman, to a derailment at Tower Hill, Illinois.

2. That accordingly, the Carrier be ordered to compensate Carman C. L. Hicks, L. E. Lemons, E. Matteson, L. D. Daily, R. E. Clark and Assistant Wreck Foreman G. McCracken, for twenty-six (26) hours' pay each at straight time 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.

This dispute concerns the claim by the Organization that five Carmen and an Assistant Wreck Foreman should have been called for work on October 6, 1976 for a derailment inasmuch as the Claimants were members of an "assigned wrecking crew" at Washington, Indiana. The provisions of Article VII of the December 4, 1975 Agreement are cited as being violated. Pertinent provisions of Article VII read as follows:

> "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 reasonable accessible to the wreck, will be called (with or withour 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 record shows that this and three other cases were held in abeyance by agreement of the Carrier and the Organization, pending resolution of a fifth case, substantially similar in nature. This fifth case became Second Division Award No. 7926 (Larney), in which the Board sustained the claim of two employes, based on a finding that an "assigned wrecking crew" was in existence in 1976 and that the terms of Article VII mandated the use of such crew in the particular circumstances.

In addition to raising the same full defense in the instance here before the Board, the Organization argues that Award No. 7926 should be recognized as stare decisis -- to adhere to decided cases -- and should apply to this dispute without the necessity of a new review by the Board. The Carrier, on the other hand, argues that Award No. 7926 is "palpably in error" and that it thus should have no precedential value.

The wisdom of applying previous awards to identical situations covered by identical agreement language -- especially involving the same parties -- has been strongly urged by the Board in countless previous awards. The Board here associates itself with that position, which is taken for the obvious meritorious purpose of avoiding repeated time-consuming review of identical circumstances. There are valid exceptions, however, where such cases are fully reviewed by the Board, rather than being resolved simply by reference to a previous award. The Board will make such an exception here. One reason for such review is that Award No. 7926 placed substantial reliance on a rule (Article III, Rule 24 (h)) which, as best as can be determined, was not cited on the property in that dispute.

The Board turns now to the merits of the case. The Carrier agrees that there formerly was an "assigned wrecking crew" at Washington, Indiana, but that in 1972 the removal of the wreck derrick and some other related equipment eliminated any basis for continuation of the "assigned wrecking crew". Despite the contrary contention of two of its subordinate officers in 1976 (when the dispute arose), the Carrier cites numerous awards to prove that without a properly equipped wrecking outfit (including a wreck derrick), there cannot be an "assigned wrecking crew", with rights involved for certain employes, cannot be simply assumed to be required absent the necessary equipment.

But this is patently inapplicable to the present circumstance. Until the end of 1976, it was the Carrier who not only recognized an "assigned wrecking crew" but also put certain strictures as to availability on members of the crew.

The chronology requires review. Up to 1972, the Carrier maintained a fully equipped wrecking outfit at Washington, Indiana, with an "assigned wrecking crew". Thereafter, various parts of the wrecking outfit -- though not all of it -- were removed. The record makes no mention of recognition or non-recognition of the crew between 1972 and 1975.

Next comes the Agreement of December 4, 1975, Article VII, which provides employers' rights to use contractor equipment in exchange for specific rights for "assigned wrecking crews". Even the number of employes in such crews is frozen "as of the date of this Agreement". Article VII alerts the Carrier to remaining obligations, if any, to "assigned wrecking crews".

On June 2, 1976, a Carrier representative, B. A. Kidwell, (not identified by title) wrote a memorandum to five of the six claimants in this dispute as follows:

> "In case of a derailment outside Yard Limits that is serious enough that we call an outside Contractor, you as a member of the Washington, Indiana Wrecking Crew per Article VII of the December 4, 1975 Agreement will be called providing you are reasonably accessible to the wreck. Please leave your phone number with Wreckmaster Sturgeon and this office so that in case such an emergency occurs after your regular tour of duty, or on your rest days you may be contacted."

The knowledgeable reference to Article VII of the December 4, 1975 Agreement is noted; this is hardly an ordinary notice of potential work assignment by a foreman. It can more readily be taken as the Carrier's interpretation of its obligation at Washington, Indiana under Article VII.

Shortly thereafter -- on July 29, 1976 -- the Manager, Car Department wrote to the Organization in part as follows (in turning down a request to add to the "assigned wrecking crew"):

> "The regularly assigned positions on the relief train which was assigned at Washington, Indiana prior to 1972 were held by bid and following removal of the relief train in 1972 these positions were not abolished. The remaining employes who held regular assignments on the relief train are C. L. Hicks, L. E. Lemon, E. Matteson, L. D. Daily and R. E. Clark. Technically speaking, therefore, these employes could be considered the "regularly assigned crew" as of December 4, 1975. Article VII of the December 4, 1975 Agreement specifies that the number of employes assigned to Carrier's wrecking crew for purposes of the rule will be the number assigned as of the date of the Agreement and the fact that time cards may have a work code for clearing wrecks does not constitute an assignment to the regularly assigned crew. In this regard, it should be noted that in any payroll period that the employe does not perform wrecking service, the clearing wrecks work code is deleted from the time card.

Under these circumstances, the incident leading to this dispute occurred on October 6, 1976, with a claim filed in reference thereto on October 20, 1976.

On December 22, 1976, the same Manager, Car Department, in denying the claim, wrote in part as follows:

> "Initially, both Mr. Kidwell's June 2, 1976 letter and my July 29, 1976 letter were in error concerning the existence of a regularly assigned wrecking crew at Washington, Indiana. No assigned wrecking crew exists except at locations where a wrecking "outfit" is assigned and notwithstanding the fact that there were once positions bulletined to work on the wrecking "outfit" that was assigned at Washington prior to 1972, such would not constitute continuance of an assigned wrecking "crew" at that location.

"Contrary to your contention, the claimants herein do not constitute and are not members of a regularly assigned wrecking crew and failure to call the claimants for the derailment at Tower Hill, Illinois was not in violation of Article VII of the December 4, 1975 Agreement."

This is echoed, using identical words, in a later letter from the Manager, Labor Relations on March 8, 1977.

The Carrier argues that erroneous interpretations of an agreement by a subordinate official need not be binding on a carrier. Reference is made to numerous previous awards to this effect. Most of these awards, however, refer to an occasional practice varying from the norm or to a subordinate official initiating or condoning a practice which differs from the carrier's usual interpretations; or a practice in contradiction to an unambiguous rule. Third Division Award Nos. 21130, 21182 and 21857 are examples of such findings. Carrier here seeks a retroactive change in its own written interpretation. Surely the Organization and the affected employes at Washington, Indiana, may put some reliance on the clear statements of two Carrier representatives interpreting the newly adopted Article VII. Such interpretations had not been repudiated by a higher level of Carrier authority by October 1976 when the incident under review (and others apparently similar) occurred. The repudiation which came in December 1976 simply means that the Carrier has changed its position as to the meaning of "assigned wrecking crew" at Washington, Indiana, and presumably will act accordingly thereafter.

But the Board has under review here only the incident of October 6, 1976, at which time evidence was produced that the Carrier fully concurred in the existence and maintenance of an assigned wrecking crew.

The Carrier goes to great lengths to cite awards which find, in general, that without a wrecking derrick there can be no wrecking outfit; the Board here has no quarrel with such conclusion. The Carrier further argues that without a wreck outfit there is no wrecking crew. Many awards may substantiate that a wrecking crew need not be established or maintained absent a proper wrecking outfit, or that employes may not insist on service as a wrecking crew absent an outfit. But the Board finds nothing in such awards or in applicable rules which prohibit a Carrier, as here, from maintaining an "assigned wrecking crew" even with limited equipment up to adoption of Article VII in 1975, and becoming required thereafter to retain the status quo, as called for in Article VII, certainly at least until such is specifically disavowed.

The Carrier is correct in pointing out that the General Chairman had resolved claims with findings that assigned wrecking crews at certain locations had been abolished or did not exist. But the contention at Washington, Indiana was that an assigned wrecking crew did exist; was used in wrecking services; and was specifically recognized in writing under Article VII by the Carrier.

Whether the Carrier's change of viewpoint in December 1976 alters matters thereafter is not now at issue before the Board. The existence of an assigned wrecking crew up to December 1976, while perhaps not required in view of limited equipment, was certainly not prohibited. The Board need not resolve when or how

the Carrier might have abolished the crew; the facts of record are that it not only did not do so but, until well after the October 6 incident, accepted and endorsed the crew's existence, thus requiring compliance with the strictures of Article VII, as here claimed.

The Carrier argues that one of the Claimants, G. McCracken, was on temporary duty as an Assistant Car Foreman at the time of the incident. The Award will take this into account.

A W A R D

1. Claim sustained as to all Claimants except G. McCracken.

2. The parties shall review the status of G. McCracken on October 6, 1976, to determine if he would have been eligible and available for the wreck assignment; if so, claim sustained in his behalf; if not, claim denied in his behalf.

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 30th day of September, 1981.