Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8827
Docket No. 8743
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 terms of the Controlling Agreement the Carrier failed to call the Cumberland "assigned wrecking crew" to a derailment of twenty-four (24) cars, on the date of October 26, 1978, to Mud Pike Crossing on the S & C Branch Line, at which time the Carrier enlisted the services of two (2) outside contractors, Svonavec Construction Company, and Penn Erection Company, and utilized five (5) carmen, not members of an assigned wrecking crew, out of Somerset, Pennsylvania.

No. 2. That the Carrier failed to comply with the rules of the controlling Agreement, specifically, Rule 142, 138, Article VII of the December 4, 1975 Agreement and Article V, SUBCONTRACTING, as amended in the December 4, 1975 Agreement, Section 1 (a) of Article II.

No. 3. That accordingly the Carrier be ordered to compensate the following claimants for their losses arising out of this incident: L. B. Mathias, A. T. Rice Jr, P. H. Sibley, W. C. Shaffer, G. R. Shafferman, L. D. Saville, S. E. Teets, A. F. Hinkle, W. D. Rawnsley, J. E. Bierman, J. E. Price, R. H. Schriver, each, for twelve hours pay at the time and one-half rate and three and one half hours at the doubletime rate; H. E. Fraley for eight hours pay at the time and one-half rate and eight hours pay at the doubletime rate; E. F. Ellis for eleven and one-half hours pay at the time and one-half rate and four hours pay at the doubletime 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.

The facts are not essentially disputed. On October 27, 1978, a derailment involving 24 cars occurred at Mud Pike Road crossing, which is approximately 2 miles from Somerset, Pennsylvania. The Carrier called two outside contractors,

the wrecking crew from Connellsville and 5 carmen and a foreman from Somerset, Pennsylvania. The claim in this case is for the Cumberland wrecking crew which is about 40 miles from the scene of the derailment.

The most pertinent portion of the contract is Article VII of the December 4, 1975 Agreement which states:

> "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 employes assigned to the carrier's wrecking crew for the 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 ground men of the wrecking crew are called at approximately the same time as the contractor is instructed to proceed to the work." (Emphasis added)

Article VII has been the subject of several strong disagreements between this Organization and the Carrier. The parties, as previously noted in Award 8106, have widely divergent views on its meaning. This case is no exception. However, before we can approach the merits of this case there is at the threshold a procedural argument that must first be addressed. At the Board, the Carrier member registered an objection contending that the claim as presented to the Board in exparte submission form changed from the claim as presented on the property. It was argued the claim was argued on a basis at the Board which was entirely different than the basis it was argued on the property. It was argued in this connection that "it is also an established maxim that a claim cannot be one thing on the property and another thing before the Board. Petitioner must permit Carrier on the property the opportunity to answer all contentions relative to a dispute." The Carrier's objections refer to the following argument by the Organization in their exparte submission:

> "It is an undisputed fact that the claimants in the instant claim are, in fact, assigned wreck crew members, were available and reasonably accessible and were entitled to be called in compliance with the herein quoted Article VII. It is the position of the Employes, that the arbitrary action on the part of the Carrier whereas they enlisted the services of two outside contractors to perform work accruing to the Carrier's assigned wrecking crew, readily available and reasonably accessible, undisputedly so, is a direct and flagrant violation

of Article VII--Wrecking Services--December 4, 1975 Agreement. The Carrier ignored the contractual rights of its own Employes and contracted the work to two (2) outside contractors, Svonavec Company and Penn Erection Company, when in fact, Article VII specifically refers to one and only one contractor. The word contractor as used in Article VII refers to one contractor in the singular. Had the authors of this rule intended for the Carrier to enlist the services of more than one contractor, it is apparent to this Organization, they would have used the word contractors, in the plural. However, there are no provisions in Article VII whereas the Carrier is permitted to call more than one contractor as in the instant case, when in fact the Carrier's own Cumberland assigned wrecking crew and equipment stood ready and available, and more than reasonably accessible to the wreck." (Underscoring added by Organization)

This argument was elaborated by the labor member in the following way:

"In this instant case the Carrier states its position regarding the word 'the' which is suppose to mean 'one' ie; singular, meaning the Carrier would meet the requirements of the Agreement by calling 'the' 'one' 'single' assigned wrecking crew to work with the contractor's ground forces.

Using this same Carrier's reasoning regarding the words 'the' 'one' 'single' we now refer to Article VII in pertinent part:

> '. . . A Carrier utilizes the equipment of a contractor . . . to work with the contractor. The contractor's ground forces will not be used, unless all available and reasonably accessible members of the assigned wrecking crew are called.'

It has always been the Carrier's position that 'the Crew means one (1) crew the agreement does not specify 'Crews' we cannot change from the 'singular crew' to plural crews ie; more than one.

Applying this same philosophy to 'the contractor' as referred to in Article VII, if we cannot change 'the crew' to mean more than one crew how then can the Carrier change the meaning of the words 'the contractor' to mean more than one. In order to be consistent with its own argument the Carrier cannot deny nor interpret the meaning of the words 'the contractor' to mean more than one. Had the authors of the Agreement intended to give the Carrier the right to call more than one contractor they would have so stated by stating:

> 'to work with the contractors they instead say . . . . . to work with the contractor.'

In this instant case the Carrier called more than one contractor it called two contractors in doing so this Carrier was obligated to call two assigned wrecking crews. The claimants are regular assigned members of the Cumberland Wrecking Crew and were all available and reasonably accessible and should have been called."

It is the above mentioned argument and the implication that for each contractor the Carrier should assign one wrecking crew, that the Carrier Member says was not made on the property. This, it is argued, changes the nature of the claim to a degree that the claim must be dismissed. The Labor Member vigorously argued in rebuttal to the Carrier's procedural argument that the "one crew for one contract" or "singular" vs. "plural" argument was in fact made on the property. The Referee's attention was directed to employee exhibit "E", which is a letter from the General Chairman to the Carrier's designated officer. It was asserted that a reading of exhibit "E" conclusively shows the argument was made on the property. It was further asserted that this is so because the argument was anticipated in Carrier's exparte submission and that the Carrier should have made their objection earlier.

In reviewing the competing arguments and after carefully reviewing the record including exhibit "E", it cannot be reasonably concluded that the claim now being argued before the Board was argued on the same basis as it was on the property. The "one crew for one contractor" or "singular vs. plural contractor" theory was not advanced by the General Chairman on the property. A reading of exhibit "E" finds that the General Chairman on the property only mentioned the fact that two contractors were used but did not make any direct reference to the "singular vs. plural" or "one crew for one contractor" argument. The fact and the theory are two different things and because the fact was mentioned it doesn't follow the theory based on that fact was automatically advanced. If the General Chairman meant for this letter to make that "singular vs. plural" argument they have a positive obligation to state the basis of the claim clearly enough that it can be said that the Carrier had an opportunity to respond. Throughout the handling of the claim on the property, the Organization primarily relied on two theories as to why the wrecking crew at Cumberland should have been called. These arguments were entirely different from the "singular vs. plural" theory or the "one crew for one contractor" theory. First, they argued that the Cumberland wrecking crew should have been called instead of the carmen from Somerset and second that the Carrier didn't call a sufficient number of the assigned wrecking crew. These arguments were still made in the exparte submission but the "one crew for one contractor" theory was added and seems to be given a primary role.

Having found that the basis or theory on which the claim was advanced on the property was different than the basis on which it was advanced at the Board, it must be considered whether this precludes us from considering the case based on its merits. It is our conclusion that we are compelled to dismiss the claim. This is consistent with the long standing precedent of this Board that the Railway Labor Act requires that the basis of a claim as handled on the property cannot be significantly altered on appeal to the Board. This is an appellate tribunal and our function is to consider disputes on the same basis as the parties themselves consider them. We understand the potential frustration the Claimants may find in not having their "day in court" on the merits. However, it would be

unworkable if our decisions were based on arguments one side or the other did not have an opportunity to respond to. Additionally, if we did, the Board's thinking would be short sighted and potentially inaccurate as a result of not having issues fully enjoined by the parties. Such a rule cuts both ways and a decision such as this is in the best interest of both parties as it would be erroneous and unfair if we were to hold that one party or the other's position could be prejudiced by a surprise argument. In this regard we should note this dismissal on a procedural basis in no way reflects on the merits of any arguments properly or improperly made within this record.

A W A R D

Claim dismissed.

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 2nd day of December, 1981.