

The Second Division consisted of the regular members and in addition Referee Thomas F. Carey when award was rendered.

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

Dispute: Claim of Employees:

1. That under the controlling Agreement, the provisions of Article VII of the December 4, 1975 Agreement, were violated on September 30, 1978, when the Carrier refused to recognize and call the regular assigned wrecking crew from Benwood, West Virginia, to a derailment at Allen, West Virginia.
2. That accordingly, the Carrier be ordered to compensate Carmen W. C. Church, G. R. Wade, and L. A. Sharpe, for sixteen (16) hours pay at the time and one-half rate and five (5) hours' pay at the double time rate each, and Carmen John J. Wagner, W. S. Phipps, H. A. Conti and E. Magnone, for eight (8) hours' at the straight time rate, twelve (12) hours' at the time and one-half rate and one (1) hour at the double time rate each.
3. That the Carrier, be ordered to pay the claim in its' entirety, account of defaulting, under Article V., of the January 1, 1955 Agreement.

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 record indicates the previously mentioned Carmen, from Benwood, West Virginia were employed by the Baltimore and Ohio Railroad at Benwood, West Virginia. The basic facts of the case are not in dispute.

The record indicates that on September 27, 1978, at approximately 7:55 p.m., Train CU 36 derailed 4 cars at Allen, West Virginia. Donahue Brothers Emergency Service was contacted on the evening of September 29, 1978 and instructed to arrange to be at the derailment site at approximately 6:00 a.m. on September 30, 1978. Donahue arrived at the scene of the derailment at approximately 7:00 a.m. on the morning of September 30, 1978, cleared the derailment, was relieved and departed the property at approximately 1:30 p.m., September 30, 1978.

The Carrier reports that "prior to August 1978, Carrier had maintained at Benwood a wreck derrick and an assigned wrecking crew. In August of 1978, however, it was determined that the wreck derrick assigned at Benwood was in need of extensive repair. Therefore, during August 1978, the wreck derrick was removed from Benwood and forwarded to Carrier's locomotive repair facility at Glenwood, Pennsylvania. At that time, it was determined that it was not feasible to repair the derrick, and it was removed from service. Since August 1978, there has been no wrecking derrick or wrecking crew at Benwood."

The Organization asserts that "there is in existence a seven (7) man wrecking crew, assigned by bid and bulletin, at Benwood, West Virginia. The Carrier, on the date in question, failed to call the regularly assigned crew, from Benwood. A time claim under date of October 2, 1978, was submitted in behalf of the regularly assigned crew. The carmen's wrecking assignments have been longstanding and assigned by bid and bulletin. These positions remain intact and have not been abolished and all the Claimants are still standing on these positions."

The controlling provisions of Article VII of the December 4, 1975 Agreement reads 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 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 Carman 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.
(Emphasis added)

The issue of whether there did exist an "assigned wrecking crew", as advocated by the Organization, or whether "without a wrecking derrick there can

be no wrecking crew", as advanced by the Carrier, was addressed in Second Division Award No. 7926 (Larney). That decision of the Board, relied upon by the Organization, sets forth its reasoning and conclusions as follows:

"In reviewing the record, the Board finds the logic of Carrier's argument appealing but not persuasive. Even if this Board were to accept the following fundamentally core argument, Carrier has sequentially advanced that:

- (1) A derrick of the 150 ton steam variety is the central piece of equipment comprising a 'wreck outfit' and without a derrick there can be no 'wreck outfit'; and
- (2) A 'wreck outfit' presupposes a 'wreck crew' and the two are so inextricably bound together, that where no wreck outfit exists there can be no wreck crew;

nevertheless, there still remains the fact that wreck crew assignments are bulletined positions and as such are subject to the abolishment procedures set forth in Article III, Rule 24(h) of the June 5, 1962 National Agreement. The Board notes that such wrecking crew positions apparently were never formally abolished at Washington, Indiana in accordance with Article III, Rule 24(h) either at the time the derrick was reassigned in 1972 nor any time subsequent to the removal of the derrick.

... The Board finds that the mere removal of the derrick from Washington, Indiana in the instant case, did not simultaneously automatically cause the elimination of the wrecking crew positions. Abolition of said assignments could have been accomplished by complying with Article III, Rule 24(h) of the June 5, 1962 National Agreement."

The Carrier vigorously dissented from the aforementioned award as being "palpably erroneous". However, a similar finding, on a comparable incident, is reflected in another relatively recent Second Division Award, No. 8766 (Marx), in which the Board found:

"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 record does not dispute the Organization's representation that the seven (7) man wrecking crew at Benwood was a bulletined assignment during the month immediately preceding the derrick's removal "during August 1978". The derailment occurred September 27, 1978.

The language of Article VII of the Agreement addressed the interests and concerns of both Parties as they were reflected in December 1974. The utilization of "the equipment of a contractor (with or without forces)" and the calling of "the carrier's assigned wrecking crew" (with or without the Carrier's wrecking equipment) are both referenced. Carrier's arguments assert the logic of their claim that without a "wrecking derrick" there can be no "assigned wreck crew". The Carrier cites several awards in support of its position, particularly Second Division Awards 6498, 5405, 7085, and 4821. However, such awards, in pertinent parts, discuss "wreck outfits" and the equipment necessary to constitute an "outfit".

Even accepting the Carrier's arguments and citations in their most favorable light, the language of the Article VII Agreement cannot be ignored. The language is not found to preclude the existence of an assigned crew "with or without the Carrier's wrecking equipment". This potential was recognized in Award 8766 (heretofore cited) in which the Board observed:

"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 hereafter to retain the status quo, as called for in Article VII, certainly at least until such is specifically disavowed."

The record sets forth that an "assigned wrecking crew" had been established at Benwood, West Virginia and was assigned by bid and bulletin. This fact is not refuted.

The language of Awards 8766 and 7926 establishes that the presence of a "wrecking derrick" is not an absolute requirement or the sine qua non of the existence of an "assigned wrecking crew". The absence and removal of the "wrecking derrick" was not found contractually to be the sole determinant which automatically and instantaneously abolished an "assigned wrecking crew". It has been demonstrated that when the Division has previously considered and ruled on disputes involving the same Parties, rules, and comparable facts, that those prior decisions should control. The Board cannot pass upon this issue as a matter of first impression unless it has been demonstrated that the prior Awards are patently erroneous or the facts strikingly different. The prior decisions are not found to be arbitrary or capricious so as to warrant reversal.

Whatever other proper actions the carrier pursues to achieve its purpose relative to the existence of an "assigned wrecking crew" at Benwood, West Virginia, is a matter left to the Carrier. Absent a showing of such a determination by the Carrier concerning the Benwood, West Virginia wrecking crew, the Parties are bound by the terms of their Article VII Agreement.

The Board notes the general direction of prior Second Division Awards concerning compensation under comparable situations. The Board accordingly determines that compensation in the instant case, for each Claimant properly on the assigned wrecking crew, shall be at the straight time rates for that precise period the contractor was actually on the site, based upon official records.

A W A R D

The claim is sustained as specified in the Findings contained above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of April, 1982.