Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9138
SECOND DIVISION Docket No. 9051
2-SOU-CM-'82

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

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Southern Railway Company

Dispute: Claim of Employes:

1. That the Carrier violated the current Agreement when they failed to call Carmen Jimmy Lash and Randall Tucker for a derailment within the yard limits of Muscle Shoals, Alabama on March 31, 1979.

2. That the Carrier be ordered to pay Carmen Jimmy Lash and Randall Tucker thirteen (13) hours pay each at the rate of time and one-half.

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 were given due notice of hearing thereon.

Claimants S. Lash and R. Tucker are Carmen at Muscle Shoals, Alabama. They hold regular Carmen assignments, as well as bid assignments as extra members of the wrecking crew. On March 31, 1979, a derailment occurred within the Muscle Shoals Yard limits. The regular wrecking crew, consisting of the derrick operator, four groundmen, and extra men, were called. Carrier also obtained the assistance of an outside contractor. The contractor utilized its crane and three groundmen.

Carrier's crew worked one end of the wreck, while the contractor worked the other end, with the assistance of one of Carrier's extra men who had been called.

The Organization filed a claim on behalf of Claimants because they were extra list wreckers and were not called while Carrier hired outsiders to do the work of bargaining unit members. The Organization argues that by so doing, Carrier has violated Rule 135 of the March 1, 1975 Agreement and Article VII of the December 4, 1975 Agreement. These rules read in pertinent part as follows:

"Rule 135 - When wrecking crews are called for wrecks or derailments outside yard limits the regularly assigned crew will accompany the outfit. For wrecks and derailments within the yard limits sufficient carmen will be called to perform the work if their services are needed."

"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."

The Organization specifically points to the following sentence of Rule 135 as the cornerstone of its claim: "For wrecks and derailments within yard limits sufficient carmen will be called to perform the work if their services are needed." The Organization argues that Carrier should have utilized Carmen to work with the contractor's crane and should not have allowed three outsiders to work in the place of Carmen.

Carrier contends that it met the requirements of Rule 135 and Article VII. It called all members of the regular wrecking crew and one extra man. These rules only require that regularly assigned wrecking crew members be called. Extra list wreck crew members are not regularly assigned and they are not covered by these rules.

A careful review of the record of this case and the awards submitted by each side in support of its position reveals that the cited awards are not precisely "on all fours" with the facts of this case. None of the cases cited address the issue of the use of outside equipment and outside forces for rerailing operations within yard limits. We therefore must rely on the facts contained in the record, the Agreement language in dispute, and generally accepted labor relations principles to support a decision.

The facts of the case are not in dispute. The derailment occurred within yard limits. Carrier used the regularly assigned wrecking crew, one man from the extra list, an outside contractor's crane and operator, and three outside ground hands. Two Carmen (Claimants) were available to work but were not called. The issue quite simply is should these men have been called to work with the contractor's crane rather than allow the contractor to utilize his own ground hands?

It is the opinion of this Board that Carrier should have utilized Carmen to work with the contractor's crane rather than allow nonbargaining unit employes to do the work. Rule 135 clearly states that for wrecks and derailments within yard limits, sufficient Carmen will be called to perform the work.

In its submission, Carrier stated that it exercised its managerial discretion to use the assigned wrecking crew to clear the derailment, but that if it so chose, it could use any Carmen on duty to work derailments within yard limits. This Board does not find fault with that position, but we cannot subscribe to the concept that so long as Carrier utilizes the regular wreck crew, it can then go outside and hire whomever it chooses to supplement that crew and disregard the Carmen employed at the location. That interpretation of Rule 135 could render the rule meaningless when carried to its ultimate conclusion.

Rule 135 states that sufficient Carmen will be called to perform the work. It is obvious from the facts presented that three Carmen could have been utilized in place of three of the contractor's ground hands. Eight ground hands, two cranes, and two operators were required to clear the wreck. The ground hands should have been Carrier's employes (Carmen). Rule 135 so states. The Organization's argument that Argicle VII does not supercede Rule 135 or render it inoperative when outside contractors are used is persuasive. The first two lines of that article clearly state that Article VII is applied contingent on and in harmony with other rules of the agreement. Rule 135 specifically applies to the situation present in this case. It requires that Carrier utilize Carmen and not other classes of employes to clear a wreck or a derailment in yard limits. Carrier has violated the agreement by not doing so.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 16th day of June, 1982.

DISSENT OF CARRIER MEMBERS
TO
AWARD 9138, DOCKET 9051
(Referee Dennis)

The Majority in this dispute gave a seriously flawed interpretation of the correlation between Article VII of the December 4, 1975, National Agreement, and Rule 135 of the applicable Agreement between the parties.

While the Majority correctly stated that Article VII did not supercede Rule 135, they effectively deprived the Carrier of the benefits of Article VII within yard limits by ruling that it was improper to utilize the services of a contractor and its ground forces in the present case. Article VII of the December 4, 1975 Agreement granted the Carrier's certain rights regarding the use of contractors and their ground forces within the paramaters of the rules or practices then in effect on the property. The rule on this property, Rule 135, stated that for wrecks and derailments within yard limits "Sufficient carmen will be called....if their services are needed." In the instant case, the Carrier called the regularly assigned wrecking crew, consisting of four groundmen and wreck engineer, as well as an extra groundman. In addition, the Carrier, pursuant to Article VII, utilized an outside contractor which utilized its own crane and three groundmen. It is hard to fathom in such circumstances how the Majority arrived at its ill-conceived conclusion that the Carrier failed to call "sufficient carmen" to assist in the rerailing operation. The mere fact that groundmen of the contractor were present on the scene does not, per se, constitute a violation of either Article VII or Rule 135. On the contrary, such action is expressly provided for in these Rules.

While the Majority at page 2 of the Award ostensibly implies that a careful review was made of the Awards cited by the parties, their statement that none of the Awards involved the use of outside equipment and outside forces within

yard limits belies such assertion. Second Division Award Nos. 7744 and 8009, which were presented in this case, both deal with this exact subject.

In Award No. 7744 (Marx), a derailment of two diesel locomotives occurred within yard limits. In order to rerail the engines, the Carrier in that case utilized the services of carmen at the location to rerail one unit called in the services of an outside contractor and its ground forces to rerail the other locomotive unit. The "Findings" in Award No. 7744 are germane to the instant case and read, in pertinent part, as follows:

> "The Board finds no conflict between Article VII, Section 1, of the 1975 Mediation Agreement and Rule 120. The former memorializes the Carrier's right to use outside wrecking service while requiring the use of wrecking crew members as specified but 'pursuant to rules or practices'. Rule 120 is not superceded by Article VII, Section 1. * * *"

The Board in Award No. 7744 recognized that Article VII did not supercede the pertinent Agreement rule, however, the Board also clearly stated that the then existing rules did not nullify Article VII. Both rules must be read and applied in conjunction with each other. It was in this task that the Majority so badly failed in the instant case.

Similarly, Second Division Award No. 8009 (A. VanWart) addressed the question of the use of a contractor and its ground forces within yard limits to assist in rerailing operations. In Award No. 8009, three of the contractors groundmen were used in tandem with two of the Carrier's carmen. This is as opposed to the use of five of the Carrier's groundmen with three of the contractors groundmen in the present case. As in the case at bar, the Employees in Award No. 8009 took the position that "sufficient" carmen were not called due to the fact that the contractor had used its ground forces. The Board in Award 8009 considered this argument and denied the claim on the following basis:

> "* * *The mere presence of the contractor's groundmen does not stand as a basis for alleging violation of Rule 120. The burden to prove the case here rested with the Petitioner. They failed."

The Majority in the present dispute allowed the Employees to abrogate their responsibility to sustain the burden of proof which was incumbent upon them as the moving party and in lemming fashion accepted the frivolous argument that the presence of any of the contractor's groundmen mandated the use of additional carmen. This was not the intent of either Article VII or Rule 135, nor do they so provide.

The Majority, in the guise of interpretation, did a severe injustice to the language of both Article VII and Rule 135 by adding restrictions to said Rules which do not exist. While this Dissent can not change the "bottom line" in the present case, it is hoped that it will be instrumental in advising the reader that Award No. 9138 is a maverick decision which should not be followed in the future.

Hence, We dissent:

J. M. Fagnani

D. M. Lefkow

J. E. Mason

J. R. O'Connell

P. V. Varga