Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8161
SECOND DIVISION Docket No. 7919
2-B&LE-CM-'79

The Second Division consisted of the regular members and in addition Referee Robert A. Franden when award was rendered.

Parties to Dispute: (System Federation No. 16, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Bessemer and Lake Erie Railroad Company

Dispute: Claim of Employes:

1. That the Bessemer and Lake Erie Railroad Company violated Rules 19 and 107 of the controlling Agreement effective July 1, 1921, revised September 1, 1971, and Article VII of the National Agreement dated December 4, 1975, when it failed to call and use members of the regularly assigned wreck crew at Greenville, Pennsylvania for wreck clearing service at Coolspring, Pennsylvania, and in lieu thereof employed the equipment and manpower of Holscher Company on August 30, 1976.

2. That the Bessemer and Lake Erie Railroad Company be ordered to compensate Carmen S. L. Greleski, M. Yurisic, L. C. Miller, J. N. Little, J. A. Davis, R. K. Shreffler, J. L. Ferguson, D. C. Gensler, W. S. Massena, M. G. Smith, J. R. Powell and L. E. Young, who are members of the regularly assigned wreck crew at Greenville, Pennsylvania, in the amount of ten (10) hours each at the time and one-half rate and eight (8) hours each at the straight time rate, which includes "a differential of six cents (6¢) per hour over their regular rates" as stipulated in Rule 107 (a), for August 30, 1976.

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.

From the record in this case it is apparent that Carrier maintains its own wrecking derrick and assigned wrecking crew at Greenville, Pennsylvania. The claimants mentioned in the "Claim of Employes" are members of that assigned wrecking crew.

On August 30, 1976, Carrier experienced a main line derailment at Coolspring, Pennsylvania, which is located approximately 10 rail miles from Greenville, Pennsylvania. To clear the derailment, Carrier called the Hulcher Emergency Service, Inc. from Mercer, Pennsylvania, at approximately 5:30 A.M. Hulcher's equipment and nine (9) Hulcher groundmen arrived on the scene at 7:30 A.M. and worked continuously until 9:30 P.M. that date clearing the main line tracks.

Primarily involved in this dispute are Rule No. 107 of the appropriate Rules Agreement and Article VII of the National Agreement dated December 4, 1975.

Rule No. 107 - WRECKING CREWS - on this property contains language which is not found in the so-called "standard wrecking rule" found in most other Rules Agreements. Rule No. 107 reads in pertinent part as follows:

> "Rule 107(a). Wrecking crews, including wrecking derrick engineers and firemen, shall be composed of regularly assigned carmen, and will be paid for such services as per general rules. Meals and lodging will be provided by the company while crews are on duty in wrecking service.
>
> Wrecking service is any class of work involving the use of the wrecking derrick, in which case the wrecking derrick engineer will receive a differential of twenty-four cents (24¢) per hour, and wreckers will receive a differential of six cents (6¢) per hour over their regular rates." (Underscore ours)

Article VII of the December 4, 1975 National Agreement - which is effective on this property - provides 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 Carmen 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." (Underscore ours)

Because of the unique language of Rule 107, it is Carrier's position that wrecking service, per se, is not involved unless Carrier's wrecking derrick is used; and that the provisions of Article VII of the December 4, 1975 National Agreement: "*** simply modified existing rules, and in particular Rule 107, only to the extent provided therein. It did not revise, in any manner, any portion of existing Rule 107. ***" (Underscore theirs) They cite Second Division Award Nos. 5438 and 7744 in support of these contentions. Therefore, they argue, that on August 30, 1976, because Carrier's wrecking derrick was not used, there was no "wrecking service" involved and no obligation under Rule 107 to use any of the members of the assigned wrecking crew to work with the outside contractor who was employed to clear the main line derailment.

As we read and interpret the language of section numbered 1 of Article VII of the December 4, 1975 National Agreement, Carrier's position in this regard is untenable.

Prior to the implementation of Article VII of the December 4, 1975 National Agreement, the logic and reasoning contained in Second Division Award No. 5438 was valid and sound. However, when the parties agreed to the language as contained in Section 1 of Article VII - which includes the clear reference "(with or without the carrier's wrecking equipment and its operators)" they agreed to the use of "a sufficient number of the carrier's assigned wrecking crew" when an outside contractor was utilized in the performance of wrecking service.

We have also reviewed Second Division Award No. 7744 and can find no conflict therewith. The fact situation in Award No. 7744 differed substantially from that involved in the instant case. As we read Award No. 7744, its primary thrust was directed toward a situation involving a derailment within yard limits which is not found in this case. In fact, while we agree with the conclusions expressed in Award No. 7744 in the fact situation found therein, those conclusions simply do not lend any support to Carrier's contentions in this instance.

Therefore, it is our determination that part 1 of the Claim of Employes, with the exception of petitioner's reference to Rule 19 - which is not involved in this dispute, must be and is sustained.

From the record as developed on the property and as argued before this Board, it is apparent that the contractor employed nine (9) groundmen for a

period of time extending from 5:30 A.M. until 9:30 P.M. - a total of sixteen (16) hours. It is also apparent from the record that petitioner is seeking the six cent (.06) per hour differential as provided in Rule 107 for only the eight (8) hour period during which they worked at their regular assignments on the date claimed.

In addition, Carrier argues that one of the named claimants - J. A. Davis - had not presented a proper claim in that he had not identified the date on which the alleged violation occurred.

Carrier has also argued that, in any event, there was no proper basis for payment of overtime rates because no overtime service was actually performed by the claimants.

This Board has often enunciated the principle that the burden of establishing facts and evidence upon which a decision is requested rests with the petitioner. The failure to indicate the date on which an alleged violation occurs causes a particular claim to fall far short of that burden. Therefore, the claim of J. A. Davis is denied as being vague and indefinite.

Additionally, the claim for time-and-one-half rate is inappropriate. As was stated in Second Division Award No. 6359:

> "*** it is firmly established that the pro rata rate is the proper rate of compensation for work not performed; the overtime rate is applicable only to time actually worked, the pro rata rate is the measure of value of work lost."

See also Second Division Award Nos. 7507 and 7356.

Therefore, in relation to part 2 of the Claim of Employes, we will sustain the claim for the six cent (.06) differential for the eight (8) hour period during which the claimants worked their regular assignments plus eight (8) hours at the pro rata rate to cover the total sixteen (16) hour period during which the contractor's groundmen were utilized. This payment will apply to nine (9) carmen only and we remand the decision as to which nine (9) carmen should receive this adjustment to the property.

During the handling of this case, Carrier has raised several peripheral procedural arguments which are not germane to or dispositive of the primary issue here involved. While we have considered each of those arguments, we do not deem it necessary to delineate or answer them in this Award.

A W A R D

Claim No. 1 is sustained.

Claim No. 2 is disposed of as outlined in the Findings.

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 14th day of November, 1979.