Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 10653
SECOND DIVISION Docket No. 10155
2-B&O-CM-'85

The Second Division consisted of the regular members and in addition Referee Eckehard Muessig when award was rendered.

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

Dispute: Claim of Employes:

1. That the Baltimore & Ohio Railroad Company violated the controlling agreement, specifically Rule 142 and 142 1/2, when they called an outside contractor, Hulcher Emergency Service, with their equipment and ground forces, to perform wrecking service at Troy, Ohio in lieu of the Cincinnati, Ohio assigned wrecking crew.

2. That the Baltimore & Ohio Railroad Company be ordered to compensate the members of the Cincinnati assigned wrecking crew as follows: R. L. Frey, T. Risdon, C. Lambert, A. Mackey, J. Durdsall and L. Robinson, Jr., in the amount of eleven (11) hours and ten (10) minutes pay each at the time and one-half rate; L. H. Salmons, in the amount of ten (10) hours and forty-five (45) minutes at the time and one-half rate; J. C. Smith in the amount of five (5) hours and fifty-five (55) minutes at the time and one-half 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 employes 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.

At approximately 6:15 P.M. on October 29, 1981, Train District Run, Engine 3890 derailed five cars at Troy, Ohio. The Carrier called Hulcher Emergency Service from Mercer, Pennsylvania, located approximately 236 road miles from Troy. The Carrier states that the Contractor arrived at the derailment at 3:30 A.M. October 30, 1981, commenced working at 4:35 A.M. and was relieved at 9:30 A.M. that same date.

The Organization contends, and Carrier does not refute, that the Contractor's work force consisted of eight (8) men. The Organization asserts that the Contractor was relieved at 9:45 A.M., not 9:30 A.M., as contended by the Carrier.

This dispute is controlled by the interpretation and application of Rule 142 1/2, which reads:

"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 employes 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 record sets forth that an "assigned wrecking crew" had been established at Cincinnati, Ohio. The Board, on the record before it, also finds that a sufficient number of the Cincinnati wrecking crew was available and reasonably accessible to the wreck. Accordingly, the issue remaining is the amount of compensation, if any, due the Claimants.

There was unquestionably lost work opportunity to the Claimants in the decision to use outside forces to perform work which is reserved to them by the Agreement (although the parties are not in agreement as to the exact number of hours). Accordingly, since the Agreement here does not contain provisions to make an award as advanced by the Organization, we follow the long line of awards and Court decisions that the breach of the contract, under the facts and circumstances here, entitles the wronged party to the amount it would have earned if the breach had not occurred. We are also guided by the general thrust of decided cases on the property under comparable situations, particularly Second Division Awards 8766, 9014, 9091, 9712 and 9887, with respect to the rate of pay. Moreover, while the Board is not unmindful of Second Division Award No. 9014 concerning that part of its holding that compensation was due for Contractor time "actually on site", here we do not find the facts and circumstances precisely on point in this matter. Accordingly, after a complete review and consideration of all the contentions and submissions of both parties, we embrace the pro rata rate concept, having been established that this is the measure of work lost. Applying the make whole principle, we conclude from the record that the Contractor was called at

approximately 8:00 P.M. on October 29, 1981 and finished at 9:30 A.M., on October 30, 1981, a total of thirteen (13) and one-half hours. In view of the foregoing, we sustain the claim as to the number of hours claimed for each Claimant at the straight time rate, less time worked by each of the Claimants during the period of time used here for this Award (8:00 P.M. on October 29; 9:30 A.M. on October 30, 1981).

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of November 1985.