

The Second Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

(Brotherhood Railway Carmen of the United States
(and Canada

Parties to Dispute: (

(The Baltimore and Ohio Railroad Company

Dispute: Claim of Employees:

1. That the Baltimore and Ohio Railroad Company violated the terms of the Agreement, specifically, Rules 142 and 142 1/2, when on the date of November 18, 1982, they allowed on outside contractor, Hulcher Emergency Service, and forces to perform wrecking work at Newton Falls, Ohio, and failed to utilize Carrier's assigned Wrecking Crew out of New Castle, Pennsylvania, who were reasonably accessible and available.

2. That accordingly, Claimants, members of the New Castle, Pennsylvania assigned wrecking crew are entitled to recovery account such violation of Agreement, as follows: Carmen: W. B. Ford, S. C. Perrotta, R. A. Perrotta, and W. Rogers, each for six (6) hours pay 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 employee or employees involved in this dispute are respectively carrier and employees 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.

Claimants are assigned wreck crew members employed by the Carrier at New Castle, Pennsylvania.

On November 17, 1982, Carrier's engine #3508 derailed while being operated by Carrier's train crew. The derailment occurred while using the lead track servicing Trumbull Metal at the wye switch, also known as the "Hole Area" Newton Falls, Ohio.

On November 18, 1982, an outside Contractor, Hulcher Emergency Service and its forces, performed the necessary rerailling service in lieu of the Claimants who were reasonably accessible and available. Carrier's Supervisors were utilized to supervise the rerailling operations.

The Carrier has asserted throughout that the trackage involved where the derailment occurred was owned and maintained by ConRail and, upon ConRail's instructions, Hulcher Emergency Service was contracted to reraill the derailed engine. The Organization has asserted that the trackage in question is used by both ConRail and the Carrier. The Organization has requested that the Carrier supply proof of any Agreement that has been made between ConRail and the Carrier wherein ConRail would be responsible for the Carrier's trains when traveling over the trackage where the derailment occurred. According to the Organization, no such proof has been forwarded.

Rule 142 reads, in pertinent part, as follows:

"When wrecking crews are called for wrecks or derailments outside of yard limits, a sufficient number of the regularly assigned crew will accompany the outfit. . . ."

Rule 142 1/2 reads, in pertinent part, as follows:

"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 Carrier has asserted that the derailment occurred on ConRail's property, and not on the Carrier's property and therefore the aforementioned Rules do not apply. The Organization offers nothing to dispute the Claim that the trackage involved was owned by ConRail and not the Carrier, but argues that since the Carrier's equipment was running over this particular trackage, the equipment remains the responsibility of the Carrier, especially for wrecking requirements under the above quoted Rules.

Trackage rights alone do not give the Organization exclusive Claim to derailment work in circumstances such as these. See Second Division Award No. 6210:

"That contractor did work which, if it belonged to Carmen, was work of Illinois Central Carmen, and not of Claimants. The mere fact that this Carrier had trackage rights on the Illinois Central tracks does not give the instant Claimants the right to clear the IC tracks. Many trains operate on this route. It was the right of the Illinois Central to clear the track so that its trains could operate over the main line where the wreck occurred."

See also Second Division Award No. 2405:

"The claim involves wrecking service performed by a New York Central crew on a track owned by that carrier. The claim alleges that such track is leased to this carrier but that is denied and the carrier asserts that it has only a trackage right agreement with New York Central.

It is shown that this carrier has assumed responsibility for the maintenance of the track but there is no evidence that it has any operating control nor any exclusive right to the use of same. Under such circumstances the claim cannot be sustained."

The above concepts have been consistently followed. See Second Division Awards Nos. 6127, 6159, 6070, 5857, 5810 and 2213.

The burden of proving all of the essential elements of its Claim in this case lies with the Organization. Third Division Award No. 20943. That burden must be met through the presentation of probative and substantial evidence. Second Division Award No. 6369. A close and thorough examination of this record shows that the Organization has not met its burden. At most, all that existed here were trackage rights on the ConRail track at the point of the derailment. There is no evidence in this record sufficient for us to conclude that the Carrier has sufficient control or exclusive rights to use the track. The fact that the Carrier's train crew was involved in the derailment, or that the Carrier's Supervisors were present for the rerailing by the Contractor does not change the result. Similarly, in light of the burden placed upon the Organization to prove its case, and further in light of the cases cited above, the assertion that the Carrier has not furnished the Organization with proof that there is an Agreement that ConRail is responsible for the Carrier's trains when traveling over this trackage does not require a different result.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 15th day of October 1986.