

**IN THE CLAIMS COMMISSION FOR THE STATE OF TENNESSEE
WESTERN DIVISION**

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**BELLSOUTH TELECOMMUNICATIONS, INC.,
d/b/a AT&T TENNESSEE**

Claimant,

vs.

**Claim Number T20130802
Small Docket**

STATE OF TENNESSEE,

Defendant.

JUDGMENT

Claimant, Bellsouth Communications, Inc., d/b/a AT&T Tennessee, hereinafter referred to as AT&T, seeks damages pursuant to Sec. 9-8-307 (a)(1)(M), Tenn. Code Ann., arising from damages to an underground cable at the intersection of Highway 225 and Highway 100. Claimant avers this damage occurred when employees of the Tennessee Department of Transportation, hereinafter referred to as TDOT, drove a signpost through the cable.

On January 9, 2014, a hearing was held in this cause before the Honorable Nancy C. Miller-Herron, Claims Commissioner for the Western Division. Claimant was represented by Mark B. Regan, Esq. Elizabeth N. Taylor, Esq., and Dawn Jordan, Esq. represented the State of Tennessee.

I.

TRIAL TESTIMONY

Claimant first called Doug Gilbert, district supervisor of highway marking for TDOT Region 4. Gilbert stated that he was aware of the circumstances surrounding the sign replacement at the corner of Highways 225 and 100. (Tr., p. 19, lines 12-22) Gilbert explained that it was “a change out job,” (Tr., p. 19, line 24), meaning that the sign and post were taken down and state workers “put another post right in the same spot in the exact same depth and everything at that location.” (Tr., p. 19, lines 8-10) Gilbert further explained that the stubs are 36 inches long. (Tr., p. 21, line 25) “We leave the base three or four inches out of the ground. We put it back in the same spot right there. If we’re around stuff that we don’t know, we will get it checked out.” (Tr., p. 21, line 25- p. 22, line 4)

When asked how they go about removing an old sign, Gilbert testified that they first remove the two bolts in the back, use a block of wood and a bar to pull it out of the ground, then put the other sign in, put a cap on it and hit it with a hammer and put the post in the stub. (Tr., p. 22, lines 18-25) Gilbert said in this case there was a U-post which was replaced with a square post in a square stub in the same location, so they removed the stub that was there. (Tr., p. 23, lines 11-17) Gilbert said the stubs are usually buried about 32 inches in the ground. (Tr., p. 24, lines 9-11) He said they would have worked it up with pry bar, which they call a punch bar. (Tr., p. 24, lines 23-24)

Gilbert explained that there are different ways of driving the stubs or sleeves into the ground, including manual type like hammers and mechanical drivers mounted on

trucks and hydraulic drivers they use on the interstate. He said 60% of the time they use hammers. (Tr., p. 25, line 7- p. 27, line 20) Gilbert said he was sure the signs replaced on the day in question were replaced by manual means, using a hammer and a block of wood. (Tr., p. 31, lines 5-11; p. 43, lines 8-12)

While he was testifying, Gilbert produced a picture of the AT&T workers at the site in question working under a tent. Gilbert testified that they were already at the site working on December 10, 2012, before the TDOT workers arrived to replace the sign. (Tr., p. 34, lines 13-25; Tr. Ex. 1) Gilbert said that same day, one of his workers told him about the AT&T workers' presence at the site. (Tr., p. 36, lines 13-16) He said based on the picture he thought the cross connect box and the AT&T workers were about 25-30 feet from where TDOT workers were replacing the sign. (Tr., p. 37, line 24- p. 38, line 11)

Gilbert testified that TDOT's rules require utility lines to be "at least 36 inches below the ditch line where you're wanting water to run and 30 inches below your regular line." (Tr., p. 45, lines 14-16) He further testified that the TDOT sign is in a ditch area, so the utility lines should have been at least 36 inches down. (Tr., p. 46, lines 3-15)

Claimant also called Niklus Wilsey to testify in this cause. Wilsey is a Highway Worker 2 for TDOT. (Tr., p. 50, line 17) Part of his job is to take a team out to install signs. (Tr., p. 50, line 21) When asked whether he and his team had installed the sign at the corner of Highways 100 and 225 on December 10, 2012, Wilsey replied, "It is very possible that we installed this sign, yes, sir." (Tr., p. 51, lines 3-4) When asked whether he had personal recollection of the installation, he said, "Yes, sir. I believe I was there and that my team installed it." (Tr., p. 51, lines 20-21)

When asked about the nature of the installation on December 10, Wilsey testified that, “[b]ased on the work order we completely removed the sign and signpost and installed a new post with the new sign on that.” (Tr., p. 53, lines 11-14) He said that there was a U-post on this particular sign, which didn’t require a stub. “It goes directly in the ground.” (Tr., p. 54, lines 23-24) Wilsey indicated they put the square stub into the existing hole. (Tr., p. 56, lines 8-13) Wilsey did not have any recollection about how they got this particular U-post out of the hole, but he did recall putting in a regular square stub. (Tr., p. 57, lines 3-8) Wilsey testified that only very minimal preparation was required to replace a U-post with a square post. (Tr., p. 61, line 18) He said no digging was required. (Tr., p. 69, lines 5-6) He did not recall having any problem driving in the new post. (Tr., p. 73, lines 10-12)

Wilsey testified that he did notice AT&T workers nearby. (Tr., p. 57, lines 22-24) He did not ask what they were doing, though he said that “[t]hey were working on a box that was relatively close by.” (Tr., p. 58, lines 15-16) He could not recall just how close the AT&T workers were. (Tr., p. 65, lines 3-6)

Wilsey testified that TDOT workers use mechanical equipment to drive signposts into the ground when they are installing new signs. (Tr., p. 59, lines 10-16)

Mike Steltmann, claims investigator and claims manager for AT&T, testified on behalf of Claimant. He became the investigator on the instant claim after the original investigator retired. (Tr., p. 80, lines 13-23)

Steltmann testified that he prepared a damages report in this case that is broken down into four separate categories: \$1,138 in labor costs, \$352.98 for materials,

\$673.42 for contractor costs and \$780 for loss of use. He said AT&T's total losses came to \$2,994.40. (Tr., p. 81, lines 9-13; Tr. Ex. 3)

Steltmann testified that the labor costs on the report include two employees for six hours at a rate of \$94.83/hour, for a total of \$1,138. (Tr., p. 90, lines 19-24)¹ He acknowledged that the employees do not actually get paid \$94.83/hour. He said AT&T came up with that rate using generally accepted accounting principles. (Tr., p. 91, lines 5-12) Steltmann stated that \$94.83 is "what it costs AT&T to have that person on the payroll." (Tr., p.93, lines 5-6) He emphasized that the Telecommunications Act of 1996 prohibits phone companies from punishing ratepayers for third party damages. (Tr., p. 93, lines 7-10) He further noted that there "is no profit in AT&T's numbers." (Tr., p. 94, lines 2-3) The hourly number includes a small component for the worker's technical supervisor, for administrative costs related to the worker, for his tools and vehicle, for insurance and other employee benefits. (Tr., p. 94, lines 10-22) Steltmann testified he did not know the actual wage of the AT&T workers working at the site. (Tr., p. 116, lines 17-18)

On cross-examination Steltmann stated that he had under billed on the claim because there were two or three more technicians whose time should have been included in labor costs. And, he said, AT&T employees were at the site until 11 p.m. So phone service actually was out for twelve hours, not six. (Tr., p. 108, lines 1-11)

With regard to the contractor expense, Steltmann explained that "AT&T doesn't dig." (Tr., p. 95, line 20) So the company has to hire a contractor to come out and dig up a cable that has been damaged. (Tr., p. 95, lines 20-23) He said that was a hard

¹ He later testified that he had underbilled for the labor costs because an additional 2 or 3 employees had worked at the site and the numbers of hours was 12, not 6. (Tr., p. 108)

dollar cost for AT&T, as was the cost for the materials used for the repairs. (Tr., p. 96, lines 9-12; p. 95, lines 12-15)

With regard to loss of use, Steltmann explained that not all of the wires in the 900 pair cable were cut. Only 400 were cut, and they were out of use for one day. So loss of use is a conservative estimate of what it would cost AT&T to rent a 400 pair cable for one day. (Tr., p. 96, line 13- p. 97, line 11) He admitted on cross that although service was out for twelve hours, they billed for loss of use for one full day. "It's a minimum increment of a day." (Tr., p. 108, lines 24-25)

Mr. Dave Teddy, an investigator for AT&T, also testified in this cause. He stated that he has had years of experience installing and repairing the 900 pair Air Core PIC cable like the one damaged in this case. (Tr., p. 126, lines 19-24) Teddy testified that 4-6 personnel would be needed to deal with a problem like the one in this case. (Tr., p. 129, lines 5-7) After some electronic trouble shooting, the cable is dug up and then cleaned up. The cable is bundled in groups of 25 to 100. (Tr., p. 128, lines 1-18) Then for every single wire in the 900 pair cable, "you have to break down, separate, and then you have to put them back together with connectors. You have to re-ground, rebond it." (Tr., p. 128, lines 21-24) He also noted you "find out what phone number is attached to each individual pair or what signal." (Tr., p. 130, lines 11-13) Teddy characterized the process as "very tedious." (Tr., p. 129, line 2)

II.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commissioner has thoroughly reviewed the record in this case, including the testimony of the witnesses who appeared at the hearing of this cause, the arguments of

counsel and, indeed, the entire record as a whole. After carefully weighing the credibility of each of the witnesses, the Commissioner makes the following findings of fact.

The State argues that Claimant has not proven that AT&T's cable was damaged when TDOT workers installed a new sign at the corner of Highways 100 and 225. The Commission **FINDS**, however, that Claimant has proven by a preponderance of the evidence that the 400 pairs of the 900 pair cable were damaged on December 10, 2012 by TDOT employees.

The State also argues that Claimant has not proven its damages by a preponderance of the evidence. Specifically, the State argues that the Claimant's fully distributed costing methodology, which includes certain fixed overhead costs, is not the correct measure of damages for costing the labor expended on these repairs.

The Commission is aware of no court in Tennessee which has allowed for indirect labor expenses connected with repairing or replacing damaged property as recoverable damages. Since the Claimant offered no testimony on the actual wages of the workers who did the repairs, the Commission is not able to calculate the actual labor costs. A claims investigator for AT&T did testify that a minimum of four workers worked twelve hours on the repairs. (Tr., p. 108, lines 1-11) Using the federal minimum wage (which is most assuredly much less than these worker were paid), the Commission **FINDS** that AT&T sustained actual labor costs of at least \$348.00 (4 x 12 x \$7.25).

The Commission **FINDS** that Claimant proved by a preponderance of the evidence that it sustained material costs of \$352.98 and contractor costs of \$673.42. The Commission further **FINDS** that the claim for loss of use of \$780 to be reasonable.

In sum, the Commission **FINDS** that Claimant sustained damages in the amount of two thousand one hundred fifty-four dollars and forty cents (\$2,154.40)

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That Claimant is awarded \$2,154.40 in damages for the cost of repairs and loss of use of its cable lines;
2. That the costs of the trial are taxed to the State of Tennessee.



NANCY C. MILLER-HERRON
COMMISSIONER

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Order has been mailed, electronically transmitted or hand delivered to:

Mr. Mark B. Reagan, Esq.
Robinson, Reagan & Young, P.L.L.C.
105 Broadway, Suite 300
Nashville, TN 37201

Ms. Elizabeth N. Taylor, Esq.
Ms. Dawn Jordan, Esq.
Civil Rights & Claims Division
P.O. Box 20207
Nashville, Tennessee 37202-0207

on this 13th day of March, 2014.



PAULA SWANSON, Clerk
Tennessee Claims Commission