CORRECTED

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 11644
Docket No. 11293
89-2-86-2-133

The Second Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen of the United States and Canada
(Houston Belt & Terminal Railway Company

STATEMENT OF CLAIM:

1. That the Houston Belt & Terminal Railway Company violated the controlling agreement, particularly Rule 23, Paragraph A, on August 2, 1985 when Carman J. Tymniak was not called from the overtime board to assist in performing carmen's work on the repair track and a car foreman performed carmen's work on BN 239305, PTLX 120263, PTLX 120258 and GATX 98587.

2. That accordingly, the Houston Belt & Terminal Railway Company be ordered to compensate Carman Tymniak in the amount of four (4) hours at straight time rate for August 2, 1985.

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.

A claim was filed by the Local Chairman on September 30, 1985 on grounds that a Car Foreman had performed work reserved to the Carmen craft. According to the claim the work was done on August 2, 1985 and consisted in various repairs being done on several different cars located on the HB&T Rip Track in Houston. The cars involved were BN 239305, PTLX 120263 and 120587, and GATX 98587. The claim alleged that there was a violation of Rule 23. This Rule reads in pertinent part as follows:

"RULE 23
Assignment of Work

(a) None but mechanics or apprentices regularly employed shall do mechanics' work as per special rules of each craft, except foremen at points where no mechanics are employed.

(b) This rule does not prohibit foremen in the exercise of their duties to perform work."

Declination of the claim under date of October 17, 1985 by the Mechanical Superintendent stated that he could not see "...any (Agreement) violation in the facts (the Organization) stated based on information that (he) ha(d)...." After further exchange on property a conference was held on June 3, 1986. Two days later the Carrier's Director of Labor Relations wrote to the General Chairman that at this conference "it was agreed that the claim...would be held, pending further information." On August 25, 1986 the General Chairman responded that he "would very much appreciate knowing if (the Carrier) obtained this information, as (the Organization) was preparing this case for the Board." Under date of September 2, 1986 the Director of Labor Relations responded to the General Chairman whose office is located in Kansas City, Missouri. In this letter the Carrier's officer stated the following:

"This will acknowledge receipt of your letter of August 25, 1986, concerning the claim of Carman J. Tymniak for August 2, 1985.

During our conference on June 3, 1986, this claim was held for additional information and facts. This information has been secured, in the form of a written statement by Car Foreman B. J. Cates.

Mr. Cates' statement is attached and clearly shows that he acted strictly in an instructional manner. As a supervisor, he has the right to instruct his carmen on the procedures and problems they are having while performing their duties.

In addition, it was discussed in the conference that Mr. Tymniak was the claimant on another claim on the same date. It is impossible for the same man to be at two places at the same time, therefore your claim is not only without merit or contractual basis, but is also improper. Accordingly, the claim is respectfully declined."

The statement accompanying this letter, which was written by Car Foreman Cates, who is the Foreman cited in the original claim dated September 30, 1985, states the following:

> "At 8:00 AM on August 2, 1985 Carmen P. White and J. Burney were instructed to work bad order cars on repair tracks 6 & 7, after 12:20 PM I asked Carmen Ramirez and White why they had only worked four cars on these tracks. Carman Ramirez said he was having trouble with a ladder in Track #6 on BN 239305. I noticed at 1:05 PM that Carmen White and Ramirez were still working on this same car. I approached and asked what the problem was. Carman Ramirez said they were trying to make a bracket for the A.L. end ladder on BN 239305 and could not get it bent right so it would fit. I proceeded to instruct him how he would have to do it. He asked if I could bent it right would I do so. I did while he heated the bracket with a actylen torch. I told Carman Ramirez to bolt the bracket into place and instructed Carman White to procede repairing BO cars on Track #6 at 1:45 PM. Carman White was trying to remove the pipe bracket bolts from PTLX 120263 and asked if I would help him by burning the bolts into small pieces while he got on top of walk way and removed the pieces. I did this at his request. I checked what was written up for repairs on PTLX 120236-PTLX 120258 and GATX 98587 and went to the storeroom and brought back the bolts needed for these repairs and layed them on each car. I did not remove are apply any bolts except the ones I was asked to by Carman White." (sic)

On September 9, 1986 the Organization wrote to the National Railroad Adjustment Board of its intent to file an ex parte Submission involving the instant claim.

A procedural issue was raised by the Organization at the handling of this claim at the Adjustment Board which must be settled as a preliminary matter. According to the Organization Member of the Board the information contained in the Carrier's September 2, 1986 correspondence to it is not properly part of the record, because this information was received by the Organization after the filing date of this claim before the Board. The Organization intimates that although the letter sent by the Carrier may have been dated September 2, 1985, it was not actually mailed until after September 9, 1985. The Organization presents at the hearing at the Adjustment Board a photocopy of an envelope addressed to the General Chairman in question, Kansas City, with return address of the Carrier, Houston, Texas. Although the copy is difficult to read, it appears that the postmark on the copy of the envelope is September 15, 1985.

The Board has closely studied all of the points raised by the Organization with respect to this issue, including its Submission on this case, as well as objections by the Carrier Member of the Board at the hearing itself. The Carrier Member argues that the objection is de novo and not properly before the Board, in accordance with arbitral precedent and the requirements of Circular No. 1. The Organization basically argues the same thing about the two documents in question.

The Board notes that all the Organization states in its Submission is that "(t)his matter has been handled up to and including the highest designated officer of the Carrier who has declined to adjust it." It is reasonable to assume that the Organization was aware of the two documents when the Submission was being written: either they were in its possession, if the scenario painted by the Carrier is correct, even before this case was filed before the Board, or shortly afterwords if the scenario painted by the Organization is correct. It is the opinion of the Board that the Submission would have been the more, and given the logistics surrounding the objection raised, the only acceptable place to raise the issue at bar. The Board has a large body of arbitral precedent to lean on with respect to the issue of new materials presented to it after a case has been handled on property (Third Division Awards 20841, 21463, 22054; Fourth Division Awards 4136, 4137 inter alia). Both sides are abundantly familiar with this precedent and it unequivocally states that the Board will not consider new materials that were not submitted during the handling of a case on property. The Board continues to endeavor to follow this precedent in all circumstances. For whatever reason, the exhibits in the file under title of Carrier Exhibits G & H may not have been in the hands of the Organization until shortly after it docketed this case before the Board. Raising the issue post facto, however, after the Organization had the chance to raise it in its Submission and did not do so puts the Board in a difficult predicament with respect to this case. In this instance the rule of reasonableness must be applied: the parties dispute the facts over whether the two documents ended up in the hands of the Organization before or after the case was docketed and given information presented in the record on property the Board is in no position to resolve this disagreement. The single piece of evidence presented by the Organization is a copy of the outside of an envelope with postmark of September 15, 1986. First of all, that evidence was presented for the first time, at the Board hearing and is never mentioned in the Submission. Secondly, the evidentiary relationship between the dated letter of September 2, 1985 and the copy of the postmarked envelope has a built in weakness which is no fault of the Organization: it is not proven that the materials in question were actually sent in this envelope. The Board is not doubting the veracity of the Organization: it is simply pointing out the evidentiary problem here involved. On the other hand, it is indisputable that the objection raised by the Organization before the Board is an argument raised for the first time. The Board is positive that the latter implies new information before it and the strictures of Circular No. 1 and arbitral conclusions stemming therefrom indisputably apply. Such clear conclusion is not warranted, however, with respect to the two documents of September of 1986. The claim must, therefore, be resolved on the basis of merits and the objection raised by the Organization respectfully dismissed.

The Carrier asserts that the Claimant had filed two different claims for the same date which made the instant one improper. It is unclear how or why this happened and the Carrier offers no additional information to support such asserting and it must, therefore, be treated as such. The Board has ruled on many occasions that assertions are not the same as evidence.

There is also a conflict of evidence with respect to the facts relating to the actions of Foreman Cates on August 2, 1985. The Claimant states that the Foreman bent iron on the end ladder of one of the cars; and that he removed and replaced pipe bracket bolts and resevoir bolts. The Foreman states that he only assisted both Carmen Ramirez and White with the ladder and with removing bracket bolts in his capacity as Foreman. By established precedent this Board is not a trier of fact. Precedent found in Third Division Award 21612 is applicable to this case. There the Board held:

> "...(s)o long as (evidence presented by the Carrier) is not so clearly devoid of probity that its acceptance would be per se arbitrary and unreasonable, (the Board) may not substitute (its) judgment in case of this type." (Also Third Division Awards 10791, 16281, 21238).

In view of the record, therefore, the actions by the Foreman on this day came clearly under protection of Rule 23(b).... The claim must be denied.

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 25th day of January 1989.