Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7829
SECOND DIVISION Docket No. 7491
2-SCL-EW-'79

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

Parties to Dispute: ( System Federation No. 42, Railway Employes' Department, A. F. of L. - C. I. O. (Electrical Workers)
( Seaboard Coast Line Railroad Company

Dispute: Claim of Employes:

1. That the Seaboard Coast Line Railroad Company violated the current working agreement, in particular the Letter Agreement dated December 20, 1967, when Carrier allowed subcontractor of Queen City Constructors to work in excess of the Communications Maintainers' normal work day on the dates of October 15, 16, 17, 21, 22, 23, 24, 25, 29, 30 & 31 and November 1, 4, 5, 6, 7, 8 and 11, 1974.

2. That, accordingly, the Carrier be ordered to additionall compensate Communications Maintainer G. T. Langston twenty-seven (27) hours at his punitive rate of pay.

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.

A Letter Agreement between the parties dated December 20, 1967 provides that when work is contracted out:

> "...a telephone maintainer will be present to lend assistance to the contractor. In the event a telephone maintainer is not available, and the contractor performs work in excess of the maintainer's normal workday, penalty payment will be made to the telephone maintainer for such excess hours worked."

Claimant, a communications maintainer, alleged that a subcontractor had worked in excess of his work day on specified dates, starting October 15 and ending November 11, 1974, and accordingly requested compensation at the punitive rate of time and one-half for overtime worked by the contractor's crew on such dates, in accordance with the Letter Agreement.

The issue in this case is a relatively narrow one: Did the subcontractor perform work in excess of the Claimant's work day on any of the dates specified in the grievance and if so, what was the total number of such excess hours worked? Claimant named 18 days on which the subcontractor allegedly worked in excess of his normal work hours and thus claimed a total of 27 hours. Carrier, on the other hand, contends that the subcontractor worked only one hour in excess of the Claimant's work day on each of two days, and, therefore, offered to compensate Claimant for two hours at the penalty rate of pay. Carrier's offer was rejected.

In support of his claim that the subcontractor had violated the Letter Agreement, Claimant cited "outside sources" and filed a personal notarized statement dated June 20, 1976, submitted after his claim had been declined by Carrier's highest officer of appeal. Claimant's June 20, 1976 affidavit states, in pertinent part:

> "I was with contractor from November 5 through 12, 1974. My hours were from 7:30 a.m. to 4:30 p.m. I came on duty at Dillon, S.C., by the time I checked all circuits, I arrived where contractor was working approximately 8:30 a.m. to 9 a.m., I remained with contractor until 3 p.m. to 5:30 p.m., leaving him working. In conversation with Milam crew, I learned that they were working from sunrise which was around 7 a.m. to dark which was around 5:45 p.m. each day, had been since returning to job. I received this information from members of crew, Fritz Milam, brother of contractor, crew members Junior and Harold (I do not remember their last names)."

Claimant submitted no substantive evidence from any of the "outside sources" to which he referred.

Claimant's own notarized statement, quoted above, indicates that he was not at the site where the subcontractor was working on 9 of the 18 days for which claim was filed.

The record reveals that on 5 of the remaining days, Claimant arrived at the subcontractor's work site after Claimant's 7:30 a.m. regular starting time (8 a.m. on one day, 8:15 a.m. on another day, and 9:00 a.m. on the other three days). On these same 5 days, Claimant left the job site at 4:00 or 4:30 p.m. on one day; between 4:00 and 4:30 on another day; between 4:30 and 5:00 p.m. on two days; and at 5:30 p.m. on the fifth day. On three of

these days, Claimant states the subcontractor was still working when he left. (On one of these days, Claimant left the job between 4:00 and 4:30 p.m.; on the other two, at 5:00 p.m.)

Carrier, in rejecting the claim, submitted a transcript of the hearing hereinabove referred to, the subcontractor's payroll records for the dates in question, and two affidavits by signal maintainers who denied that the subcontractor worked overtime. One signal maintainer specifically stated that the subcontractor's crew left for work at the same time he did.

The subcontractor's payroll records show that one hour overtime was worked by the subcontractor's crew on two days (including November 12), and Carrier offered to pay the claim for these two days, notwithstanding that the claim as submitted was for a period ending November 11. It was on November 11 that Claimant left the job at 5:00 p.m. and asserted that the subcontractor was still working when he left.

We must conclude, on the record before us, that Petitioner has not met the burden of proof. It is a truism that the burden of proof lies upon the party which asserts the affirmative of the issue. The burden here is upon the Claimant, not the Carrier. Claimant submitted no substantive evidence from any of the "outside sources" to which he referred, to confirm or buttress his allegations. The evidence submitted by Claimant, in the form of assertions not otherwise supported by probative evidence, fails to make his case.

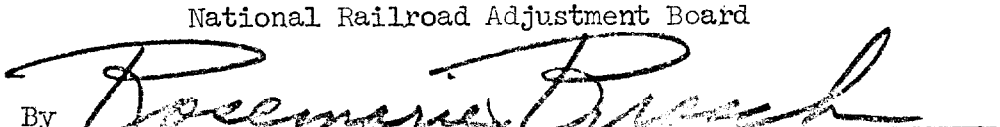
Claimant's own statements indicate that he was not present at the subcontractor's job site at least half the days for which he filed his claim, and thus had no personal knowledge of the hours during which the subcontractor performed work. On several of the days when he worked with the subcontractor, he either showed up after his normal 7:30 a.m. starting time or left before his normal 4:30 quitting time. The subcontractor's payroll records for the period in question must be given considerable weight and accordingly, we conclude that Claimant is entitled, as Carrier offered, to two hours' compensation at time and one-half for the excess hours worked by the subcontractor on November 11 and 12.

A W A R D

Claim sustained to the extent indicated in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 7th day of February, 1979.