

The Second Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

Parties to Dispute: ( Brotherhood Railway Carmen of the United States  
( and Canada  
( Ashley, Drew & Northern Railway Company

Dispute: Claim of Employees:

1. That the Ashley, Drew and Northern Railway Company violated the controlling agreement and the Railway Labor Act when it used company officials or train crews to buckle air hose, make the initial terminal brake test and release the train on the dates of December 28, 1980, January 2, 1981, January 18, 1981 and January 17, 1981.
2. That the Ashley, Drew and Northern Railway Company be required to pay Carmen Ralph Hudson, Jim Shirey, O. E. White and Jack Burchfield fo three (3) hours pay at the proper pro rata 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.

This claim is based on the asserted use of Carrier officials to buckle air hose, conduct a terminal brake test, and release of train on four occasions. By way of background, until February 15, 1980, the employes now represented by the Carmen had not been covered by a labor agreement. The Organization contends the pertinent agreement controlling this dispute is Article 7 which, in part, states:

"Section 1. It is understood and agreed that the employees covered by this agreement shall perform and equally share in the various work requirements pertaining to cars and other work normally and customarily performed by said employees on this Railroad."

The Carrier points out that, under the controlling Agreement, management has a right to work and test outbound trains when Carmen have not been on duty. In support thereof, the Carrier refers us to Article 7, Section 5, which provides:

"The Railroad specifically reserves the right to continue any and all past or present practices related to the assignment of work, including but not limited to the following practices:

- (a) Contracting out of work.
- (b) Inspection and classification of inbound train and interchange cuts by management of supervisory personnel.
- (c) Cleaning and washing of cars.
- (d) Rerailing of cars."

This assertion of fact may very well be accurate. Notwithstanding, the record reveals the Organization submitted five employee statements which, in effect, claim the Carrier did not run an outbound train without a carman making the initial terminal brake test and working the train. Subsequent to the receipt of that information and conference discussion of April 16, 1981, the Carrier took no steps to refute these statements by submitting probative evidence to support its assertions that carmen were used during their regularly assigned hours and that Carrier officials did the work outside the carmen's hours. As stated above, the Carrier claims of past practice may be accurate, but this Board is limited to the evidence adduced during the on-the-property handling of a dispute. Once the Organization produced the statement which, on its face, contradicts the Carrier's claim of consistent past practice, the Carrier had the burden of rebutting those statements. Not having done so, it must now be viewed as uncontradicted. In effect, despite Carrier's argument that the record, at most, demonstrates a conflict in evidence, we view the record differently, and on the narrow issue of burden of proof, we must sustain the claim on the basis that the statements submitted by the Organization which contradict Carrier's claimed past practice were left unrebutted.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy J. Devel - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of May, 1985.