

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

(Brotherhood Railway Carmen of the United States  
( and Canada  
Parties to Dispute: (  
(Baltimore and Ohio Railroad Company

Dispute: Claim of Employees:

1. That Carrier violated the rules of the controlling Agreement, specifically Rule 29, when on the date of July 22, 1981 they allowed Supervisors (a total of 6) to engage in the performance of carmen's work, at a derailment at West Dana, Indiana. Claimants were available and qualified to perform the work at this derailment and were left to stand idle while those not contractually entitled to perform the work were allowed to do so.

2. That accordingly, Carrier be ordered to compensate claimants for all monetary losses suffered account this flagrant violation of claimants agreement as follows:

Carmen A. E. Trosper and W. J. Hood each eight (8) hours pay at the time and one-half rate and six (6) hours pay at the doubletime 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.

Claimants are Carmen who are employed at Carrier's Indianapolis, Indiana facility.

On July 22, 1981, at approximately 4:00 PM, a derailment occurred on Carrier's line at West Dana, Indiana. Carrier dispatched two (2) Carmen (not the Claimants) to the derailment with a Wreck Truck. The men arrived at the

Wreck site at 7:00 PM and immediately began to move the train away from a grounded tank car which was fully loaded with flammable liquid. According to the Carrier, two (2) Supervisors, assisted the two (2) Carmen for approximately one (1) hour by carrying and placing blocking and rerailers. The Organization asserts that all six (6) Supervisors who were present at the derailment performed various Carmen work continuously until the assignment was completed at 7:00 AM on the following day, July 23, 1981.

On July 25, 1981, the Organization filed a Claim alleging that the six (6) Supervisors performed Carmen's work at the derailment on the days in question in violation of Rule 29 of the parties' Controlling Agreement. The remedy requested by the Organization in its Claim was for each Claimant to be compensated for eight (8) hours pay at time and one-half, and six (6) hours pay at the double-time rate, for a total of twenty-four (24) hours pay.

According to the record, during the handling of this case on the property, the Carrier offered to settle the Claim by paying each Claimant one hour's pay at the straight time rate of pay. The Organization, however, declined this offer. Consequently, the dispute was appealed by the Organization, and the matter is now before this Board for resolution. The Joint Council of Shop Craft Organizations, which is a Third Party to the dispute, declined to participate in these proceedings.

The Organization's basic contention in this dispute is that the six (6) Supervisors performed Carmen's work when Claimants were "employed, available, accessible, qualified, and stood ready for call . . ." Said action on the part of the Carrier, according to the Organization, was a violation of Rule 29 of the Controlling Agreement which is the Carmen's Classification of Work Rule. Said Rule, in pertinent part, reads as follows:

"None but mechanics or apprentices regularly employed as such, shall do mechanics' work as per the special rules of each craft, except Foremen at points where no mechanics are employed."

In an effort to prove its Claim, the Organization has submitted the report of an eyewitness (namely, the Local Chairman who was one (1) of the two (2) employees who were dispatched to the derailment on the day in question) who contends that the six (6) Supervisors worked continuously with him in an effort to rerail the tank car.

The Carrier, in its argumentation, readily admits that the two (2) Supervisors aided the Carmen for approximately one (1) hour in the performance of the wrecking work. However, the Carrier challenges the Organization's contention that all six (6) Supervisors continuously performed Carmen's work at the West Dana, Indiana wreck site.

Continuing, the Carrier next argues that the Organization has failed to sustain its burden of proof in this matter. According to the Carrier, the first evidentiary deficiency in this regard is the Organization's repeated failure/refusal to identify exactly what "Carmen's work" was performed by the Supervisors on the day in question. Such a failing, the Carrier argues, is itself grounds for the denial of a Claim (Second Division Awards 6603, 6878, 6893 and 7417). Secondly, the Carrier contends that the facts of this case, as presented, are in conflict, and, as such, the Carrier urges the Board to apply Board policy by declining to resolve conflicting evidence, and thus dismiss the Claim (Second Division Awards 6856 and 7051). Finally, without prejudice to its two preceding contentions, the Carrier also argues that the Claim, as presented, is excessive in that Claimants are each requesting twenty-four (24) hours of pay when the work performed by the Supervisors "consumed only one hour's time" (Third Division Awards 10690 and 14512); and, furthermore, the Claimant's request for payment at the overtime rates (time and one-half and double time) is equally excessive since the Claimants did not work the hours in question and the appropriate rate, in such cases, is the pro rata rate (Second Division Awards 1268, 1771, 2956 and 6359).

After carefully studying and reviewing the evidence which has been proffered by the parties in support of their respective positions, the Board concurs with the Carrier that the Organization, as the moving party, has failed to meet its burden of proof in this matter. Indeed, the only "evidence" which has been presented by the Organization in support of its position is an ambiguous, uncorroborated written statement by an eyewitness, who happens to be the Local Chairman, and who also happens to have initiated the Claim. That evidence conflicts significantly with that which has been proffered by the Carrier through its eyewitnesses. Because of these determinations, the Board is presented with insufficient evidence with which to resolve the factual conflict which has arisen in this case (Second Division Awards 6856 and 7051). Additionally, we must also refuse to consider the Carrier's settlement offer as an indication of the Carrier's admission of guilt in this matter as the Organization has suggested in its argumentation.

If this Board was to consider settlement offers as admissions of guilt in such cases, no responsible Carrier official or Organization Officer would be able to resolve a dispute on the property without prejudicing their respective positions before this Board. For this reason, this Organization argument must also be rejected.

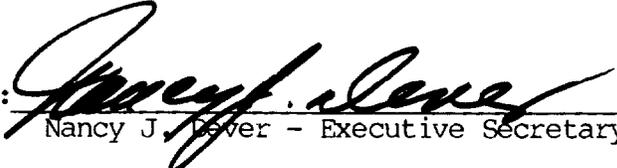
In summary, because the Organization, as the moving party, must prove its Claim, and has failed to do so in this instant case, the Board is compelled to find that the Claim is without merit.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy J. Lever - Executive Secretary

Dated at Chicago, Illinois this 7th day of January 1987.