

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12650
Docket No. 12347
94-2-91-2-143

The Second Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/Division TCU
(Norfolk Southern Railway Company

STATEMENT OF CLAIM:

- "1. That under the current Agreement the Southern Railroad Company violated the Memorandum of Understanding dated January 7, 1982 concerning adjustments to shifted loads when it failed to call Carmen R. L. Campbell and R. Vest to adjust shifted loads to "D" Yard at Louisville, Kentucky on May 7, 1990.
2. That accordingly, the Southern Railroad Company be ordered to compensate Carmen R. L. Campbell and R. Vest in the amount of nine (9) hours and fifteen (15) minutes each at the overtime rate in effect on the date of the violation."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

On May 7, 1990, Carrier employed an outside contractor, Midwest Commodities, to adjust loads on cars in the "D" yard at Louisville, Kentucky. Two employees of the contractor worked on this task from approximately 10:45 a.m. until 8:00 p.m.

The Claimants were the first two (2) carmen out on the overtime board on May 7, 1990. The Organization contends that they should have been called to perform this work rather than using an outside contractor. In support thereof, the Organization cites the

Memorandum of Understanding, dated January 7, 1982 as the basis for its claim. The Memorandum states as follows:

"This shall confirm our understanding that as a transitional arrangement and without creating precedent, routine load adjustments such as adjustment of shifted loads or bandings that have been performed by former K&IT employees on K&IT Terminal Shop Tracks will continue to be performed by such employees.

Signed at Louisville, Kentucky, this 7th day of January, 1982."

The Organization's position is that the foregoing memorandum guarantees the disputed work to the carmen's craft and prohibits the contracting out of said work. The Organization rejects Carrier's contention that the Memorandum is no longer in effect, and points out that there are no provisions within the language of the Memorandum regarding its termination or expiration. Had the parties intended that the Memorandum expire on a date certain, they would have drafted language so stating, the Organization urges.

Carrier defends by asserting that the Organization has failed to meet its burden of proving a contractual violation in this case. It contends that the January 7, 1982 Memorandum was a transitional agreement not intended to extend in perpetuity and that the parties expressly recognized the transitory nature of the Agreement by stating that it was to be a "Transitional Agreement" which would not create a precedent.

Moreover, Carrier argues that no other rules or provisions of the current agreement provide support for the Organization's claim. Therefore, Carrier requests that the Board deny the claim in its entirety.

As Carrier correctly points out, it is incumbent upon the party asserting a claim to substantiate that claim by a preponderance of the evidence. Third Division Awards 16881, 9261, 18515. After careful review of the record in its entirety, we find that the Organization in the instant claim has failed to meet its evidentiary burden.

According to the unrefuted information supplied by Carrier during the handling of this dispute on the property, the work of employees in the carmen's craft on the K&IT was coordinated with that of the carmen of the Norfolk Southern Railway on January 7, 1982. At the same time, all agreements between K&IT and the Organization were canceled, with the understanding that the Norfolk

Southern Railway Agreement would apply to employees of K&IT. In conjunction with this arrangement, the parties also agreed to the Memorandum of Understanding, set forth in full above.

Viewed in this context, it is clear that the Memorandum of Understanding sought to insure that, despite the fact K&IT employees would henceforth be covered under the Norfolk Southern Railway Agreement, those employees would nevertheless continue to adjust routine loads "as a transitional arrangement" and "without creating precedent..."

The Organization now, over eight years later, seeks to rely on the Memorandum of Understanding as the basis for the employee's exclusive entitlement to the work at issue. The Memorandum by its own terms, however, expressly states that its terms are not to be relied upon as precedent. Moreover, though the parties did not specify an end point at which time the Memorandum would no longer be effective, the specific reference to the "transitional" nature of the Agreement plainly suggests that it was intended to apply during the period of adjustment following the January, 1982 coordination. Under these circumstances, it is our view that the Memorandum of Agreement did not create a contractual entitlement to perform the work so as to prohibit Carrier's utilization of outside contractors in this instance.

The Organization has also cited Rule 132, Classification of Work, but it is apparent that there is no mention of the precise work performed in the instant case. Absent some showing that there was a reservation of work by contract or practice, we must rule to deny the claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 19th day of January 1994.