NATIONAL RAILROAD ADJUSTMENT BOARD

Form 1 SECOND DIVISION Award No. 12701
Docket No. 12528-T
94-2-92-2-57

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/Division of TCU
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(Terminal Railway-Alabama State Docks

STATEMENT OF CLAIM:

"1. That the Terminal Railway Alabama State Docks (hereinafter referred to as the Carrier) violated the Agreement when, on June 8, 1991, they instructed or allowed other than carmen, namely switchmen, to inspect cars in the yard where carmen are employed.

2. And accordingly, the Carrier should be ordered to compensate Carman W. M. Moody (hereinafter referred to as the Claimant) for two (2) hours and forty (40) minutes at overtime rate as a result of said 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 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.

The claim of the Organization is that Carrier violated Rules 48, 22 and the April 18, 1950 Memorandum of Agreement. Rule 48 is a Classification of Work Rule which states that "Carman's work shall consist of ... inspecting all... freight cars...." Rule 22 is an Assignment of Work Rule which states that "none but mechanics regularly employed as such shall do mechanics work...." The April 18, 1950, Memorandum states in pertinent part:

> "In the application of working agreement...dated April 18, 1950, IT IS UNDERSTOOD that all work now being performed... will continue to be performed by the employees covered by that agreement...."

The Organization states that the Rules, supra, were violated by the Carrier when it permitted employees other than Carmen to inspect freight cars.

The case at bar is comprised of a dearth of material of record. The full argument of the Organization is the allegation that on June 8, 1991, in Track Number 11 of the Terminal Railroad interchange Switchmen assigned to work Job Number 2 inspected 12 specified freight cars delivered to the interchange by the Norfolk Southern.

The total case presented by the Carrier in its response is that there was nothing wrong with the practice which was performed in the absence of a Car Inspector and in compliance with FRA Rules. The Carrier provides no other argument beyond the assertion it violated no Agreement Rule. On the property, the Carrier does not rebut the Organization's contention that Carmen were employed, on duty and available at the time the work was performed.

A Third Party Submission was filed representing Yardmen on the Terminal Railway Alabama State Docks. Article VIII of the October 31, 1985 Agreement, Section 3(a) (4), the UTU argues, allows Switchmen to "Inspect cars."

As a preliminary point, the Board finds that although almost nothing exists in the record on the property, the parties presented substantial argument ex parte and before this Board. New arguments and contentions not expressly raised and discussed while the dispute was on the property are not properly before us. It is a firmly established principle codified by Circular No. 1 and at the base of numerous Awards that this Board cannot consider material argument not handled on the property.

Similarly, the basis of a decision from the on-property record lies with the Organization to produce evidence to sustain its claim. The Organization has the ultimate burden of persuasion which can be met only with substantial probative evidence of an Agreement violation. Until the Organization establishes a prima facie case, the burden does not shift to the Carrier. In the on-property record, the Board finds allegations and assertions of a violation which are denied by the Carrier. While both sides acknowledge that Switchmen inspected 12 freight cars, the Organization asserts it violates Agreement language and the Carrier denies it. The Carrier asserts that no Car Inspector was on duty and the Organization asserts that Carmen were employed and available. This Board denies the claim for lack proof. We do not find a prima facie case. The only evidence is the language of the Agreement and specifics of the June 8, 1991, incident. In this record, we cannot even determine what work was performed that constituted an "inspection" on June 8, 1991. In the absence of more evidence of probative value by which the Organization could clearly establish by factual data the probable violation of mechanics' work, the Board cannot assume that possibility. The record of the incident and repeating thereof through on-property correspondence is not a substitute for proof, any more than the deficiencies of the Carrier's replies.

As a consequence of a thorough review of the Organization's evidence, the Board denies the Claim for lack of proof that a violation occurred. The Board has no ability to resolve from this record the comparative validity of disputed arguments between Organization, the Carrier and the Third Party as to the contractual obligations herein disputed. This Board cannot determine from the evidence that the "inspection" by the switch crew was work that belonged to Carmen and was removed by the Carrier in violation of the Agreement. The Board found no letter attesting to that fact, no signed statements of Carmen that they had always performed said work and no letters from Switchmen that they were ordered to perform work not theirs by Agreement. The burden of establishing the case with evidence lies with the Organization. Its failure to meet that burden compels us to deny the Claim (Second Division Awards 12011, 11781, 11045, 8877 and 8548).

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Linda Woods
Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 8th day of June 1994.