

"CORRECTED"

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13828

Docket No. 13720

05-2-03-2-64

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

(Brotherhood of Railway Carmen Division of TCU

PARTIES TO DISPUTE: (

(The Springfield Terminal Railway Company

STATEMENT OF CLAIM:

- "1. That the Springfield Terminal Railway Company violated the terms of our current agreement, in particular Rule 2.1 (a), (b), (j) and (q) when they arbitrarily abolished Carmen positions at East Deerfield, MA and simultaneously advertised and awarded these positions to Utility Trainmen.
2. That accordingly, the Springfield Terminal Railway Company be ordered to compensate H. O. Dufresne, R. Thomas and J. Greene in the amount of eight (8) hours pay at the overtime rate, for each day this inequity continues."

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 were given due notice of hearing thereon.

This dispute arises as a result of the February, 2003 abolishment of three yard carmen positions held by the Claimants at East Deerfield, Massachusetts and the subsequent awarding of the work performed by those positions to utility trainmen — non-scope covered employees. As a result of the abolishment, the three Claimants were forced to exercise their seniority and displace junior carmen.

According to the Organization in the Claim, “[t]he carrier has always had carmen perform the necessary mechanical air brake inspections, initial terminal tests and the related coupling of hoses for trains originating and departing East Deerfield, MA.”

The Carrier responded in its September 4, 2002 denial that “... on this railroad, bleeding of brakes and terminal air brake testing has never been exclusively Carmens work.” Further, in its June 12, 2003 letter, the Carrier states:

* * *

“... Carmen on this property do not have exclusive rights to perform terminal air brake tests or to bleed off cars. Trainmen on this property have been properly performing this work for many years. This predated the last two Agreements and continued through the current Agreement without protest. Trainmen have almost exclusively performed terminal air brake tests at every location on the system, except East Deerfield for at least 15 years. This includes locations where Carmen have been employed and available, such as Lowell, Waterville and Lawrence.

There has been a mixed practice in East Deerfield. Where the Carrier chose to have Carmen perform inspections, they did so. The Carrier chose the hours where Carmen would perform this work. When the Carrier chose not to have Carmen perform this work, Trainmen properly performed the work.

At present, the Carrier has the need to have all available Carmen perform the work of repairing freight cars. ... Trainmen will continue to perform initial terminal brake tests and bleed cars at all locations, including East Deerfield, as required by the Carrier and as they have done for many years."

* * *

The Organization disputes the factual assertions made by the Carrier concerning the performance of the work at issue.

The relevant rules provide:

Rule 2. Classification of Work

"2.1 Employees qualified under the provisions of this Agreement to perform the following will be classed as Carmen:

- (a) Inspect car components for compliance with A.A.R., F.R.A., and Company standards.
- (b) Test brakes and inspect cars, lubricate moving parts, and clean components.

* * *

- (j) Prepare various required written forms and reports.

* * *

- (q) Other work generally recognized as Carmen's work."

The Carrier argues that the Organization needs to show system wide exclusivity for the disputed work and that the evidence shows that the work has been performed at East Deerfield and elsewhere by scope covered and non-scope covered employees. The Organization argues the contrary, asserting that the disputed work is specifically reserved to scope covered employees by the above cited rules and that, in practice, assignments of the work at East Deerfield have followed that classification of work.

The burden is on the Organization to demonstrate all of the essential elements of its claim. Giving the Organization the benefit of the doubt and assuming that the rules specifically reserve the work to the Carman craft, the evidence shows a serious factual dispute concerning the work performed at East Deerfield. Assuming that the work is exclusively reserved by rule to the Carman craft, there is evidence that in the past and on more than an isolated basis, the work has been performed by strangers to the Carmen's Agreement at East Deerfield. Aside from assertions made by the Carrier in its positions on the property, the Carrier provided statements to that effect [emphasis in original]:

"I have been employed by the Boston & Main and/or Guilford Rail System as a Carman, Foreman/Wreck master and Manager Car Maintenance for thirty-three (33) years.

In that time I have worked and/or managed many locations across the system.

I would like to state that in that time and at these many locations, (Boston, Lowell, West Cambridge, East Deerfield, Ayer, Rigby, Waterville, and Bangor) the testing of freight train air brakes has never been the exclusive work of Carmen. Traditionally trainmen have also performed these duties.

* * *

I have over thirty-seven (37) years service with the Carrier and its predecessor railroads.

Transportation employees, namely train crew personnel, have in fact coupled train line hoses on cars and locomotives, performed inspections and air brake tests over the years from Bangor, Me. to Mechanicville, N.Y. including East Deerfield, Ma. This work has not belonged "EXCLUSIVELY" to the Carman craft. Although Carmen have also performed this work, the work historically was assigned at the carrier's discretion.

The Carrier has exercised its right to designate and assign the task of coupling hoses, inspecting cars and testing the air brakes on trains to maximize efficiency and the utilization of its employees. Presently, Carmen are employed to repair cars in order to keep freight moving by rail with the least possible delay."

* * *

At best then, there is a factual dispute concerning the work performed at East Deerfield. If the Organization were correct, the work is exclusively scope covered and has been performed consistent with that classification of work. If the Carrier is correct — and even if the work in dispute is specifically reserved to scope covered employees — then the Organization has allowed non-scope covered employees to perform that work over a substantial period of time. That acquiescence in the performance of scope covered work by strangers to the Agreement would serve to bar the Organization by estoppel from now claiming that the work can only be performed by scope covered employees at East Deerfield.

One other factor weighs against the Organization's position. The record contains evidence from the Carrier's officials that during contract negotiations in 1995, the Organization sought to have the exclusive right to the performance of the work involved in this dispute. The record further discloses that the Carrier did not agree to the Organization's proposal. One of the fundamental rules of contract construction is that the arbitration process cannot grant a party that which it could not obtain in bargaining. That rule of construction requires denial of the claim.

Again, the burden is on the Organization to demonstrate all of the essential elements of its claim. Given the evidence presented by the Carrier, the Organization cannot show that its present claim for the work can avoid the estoppel conclusion shown by the Carrier's evidence as well as the applicable rule of contract construction. Given the status of this record, the Organization cannot prevail in this matter. The claim must therefore be denied.

AWARD

Claim denied.

Form 1
Page 6

Award No. 13828
Docket No. 13720
05-2-03-2-64

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 8th day of July 2005.