Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13836
Docket No. 13691
05-2-03-2-14

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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(Western Fruit Express Company

STATEMENT OF CLAIM:

"1. That; the Western Fruit Express Company (WFE) has violated Rules 16 and 35 of the January 1, 1997 controlling agreement when they allowed or otherwise directed a non-agreement employee of Railroad Refrigerator Services (RRS) to work in conjunction with WFE Carmen at Birmingham, Alabama to perform WFE Carmen's Work. Since May 22, 2000, said employee has been assigned to work alongside WFE Refrigeration Mechanic Robert Johnson, performing work that is in the WFE Carmen's Classification of Work which has historically and exclusively been performed by WFE Mechanics at Birmingham for decades.

2. That; accordingly, the WFE be ordered to compensate Carman E. D. Dickinson eight hours pay at the pro rata rate for each workday, commencing May 27, 2000, in accordance with the provisions of WFE Rule 26-A, Section 3, continuing until the work of pre-tripping cars at Birmingham is returned exclusively to WFE employees."

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.

The claim at bar is based on undisputed facts. On May 22, 2000, an employee of Railroad Refrigerated Services (RRS) began pre-tripping cars at Birmingham, Alabama. Additionally, when Lead Refrigeration Mechanic Johnson was on vacation, a second RRS employee came on the property and pre-tripped cars for the Carrier.

The Organization alleges that the Carrier has violated Rule 16 and Rule 35. Rule 35 states that the "work on mechanical refrigeration equipment is the work of the Carmen's craft." Rule 16 states in pertinent part that:

> "(b) While forces are reduced, if employees are needed at another seniority point, qualified furloughed employees who have filed written application with the Shop Superintendent or General Foreman will be given preference on a seniority basis over new employees, with privilege of returning to their home seniority point when force is increased. If a position develops at employee's home seniority point . . ."

The Organization alleges that the Claimant filed written application at Spokane to transfer to Birmingham to perform work that belongs exclusively to the craft under the Agreement. In denying the transfer and permitting RRS employees foreign to the Agreement to pre-trip cars, the Carrier violated the Agreement.

The Board notes that it is the Organization that must establish the proof that the Claimant is due compensation for alleged Carrier violation of the Agreement. With regard to this claim, the Organization submitted two statements from Carmen

Johnson and Jones that the disputed work was "the exclusive work of Western Fruit Express employees." The Carrier responded with the Superintendent denying the claim because:

> "The carrier has historically used contractors to provide this service during shortages, due to vacations, etc. The seniority roster was exhausted at Birmingham and therefore no Carmen were available to call back."

The Board finds no additional facts presented by the Organization to dispute the historical use of contractors "during shortages".

Similarly, the Organization's claim asserts that Rule 16 was violated "by not allowing Claimant to transfer to Birmingham to perform the work." The Organization argues that the Claimant made a proper request to perform pre-tripping of cars at Birmingham and was denied. The burden of proof for this assertion lies with the Organization. The Carrier responded on property that:

> "Neither Claimant nor any other furloughed employee from any other WFE seniority point filed a written application to transfer to Birmingham under provisions of Rule 16(b). Claimant requested to work vacation vacancies in Spokane under provisions of Rule 23 . . . that . . applies only to a furloughed employee's seniority district . . . Claimant has no seniority at Birmingham and has no rights to perform relief work at a location at which he has no seniority."

The Board has reviewed the evidence and Rules at bar. The Claimant's "written request" does not demonstrate a properly filed written application to transfer to work at Birmingham. Nor is there any proof by the Organization that Rule 16(b) was violated, particularly since the language provides preference over new employees. The Board finds no evidence of new hires, nor does it find sufficient probative evidence to support the Organization's arguments to prove Carman Dickinson to be a proper Claimant.

We find that the Organization failed in its burden of proof. Rule 16 is misplaced and not shown to mandate the Carrier to allow a furloughed employee at

Spokane to work at Birmingham. The Claimant's written request is not proven to be a request to work at Birmingham. The trip reports fail to document work performed by contractors versus work performed by employees or to explicitly show what work was performed. The Organization provided evidence of exclusivity which was rejected by the Superintendent. There is no further showing that the Superintendent was wrong; that the Carrier did not historically use contractors for pre-tripping during shortages.

The Board has carefully considered the extensive Award support presented by the parties, including Public Law Board 5503 and Dissent; Public Law Board No. 6414, Award No. 1 and Dissent; Third Division Awards 29068, 20228, 18331. Each differs from these circumstances in significant aspects. With the state of this record, the Board is unable to find the Carrier has violated the Agreement. The Board would not even be able to conclude that had the Carrier violated the Agreement, the Claimant with seniority in Spokane Washington, is a proper Claimant for work in Birmingham, Alabama. The claim must be denied.

AWARD

Claim denied.

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 1st day of April 2005.

LABOR MEMBER'S DISSENT TO AWARD 13836-DOCKET NO. 13691
REFEREE M. ZUSMAN

It is respectfully submitted that the Majority failed to recognize documents submitted by the Employees establishing certain facts supporting the Organization's position in this case.

In review of the erroneous Award, we find the Majority based it's finding on the Employees alleged failure of not proving all elements of its claim. The Employees respectfully disagree with this analysis.

The Majority contends on Page 3 of the Award; "The Board finds no additional facts presented by the Organization to dispute the historical use of contractors during shortages." This is not supported by the record in this case. In the Organization's initial claim of July 27, 2000, (Employees' Exhibit A) statements from two Birmingham WFE Carmen fully substantiated the fact that since the establishment of Carman positions at Birmingham in 1985, no one but WFE Carmen ever performed work at the facility. The Majority then states; "there is no further showing that the Superintendent was wrong." Once again, the record does not support such a position. The Organization pointed to correspondence of record (Employees' Exhibit S, Page 4) wherein the Carrier stated in another case; "The first time that a contractor was used to perform pre-tripping of cars at Birmingham was on May 22, 2000 when Railroad Refrigerated Services (RRS) began performing some of this type of work." To say "The Boards finds no additional facts presented by the Organization to dispute the historical use of contractors during shortages" is simply not supported by the record in this case. The Organization has firmly and indisputably shown that no one but WFE Carmen has ever performed work at Birmingham. We have effectively rebutted the Carrier's wholly unsubstantiated allegation that they have historically used contractors during shortages at Birmingham. It is the Carrier that has relied on bare assertion, not the Organization. When the Carrier did begin using contractors for the first time on May 22, 2000, the Organization promptly filed claim resulting in this dispute.

Furthermore, we also respectively disagree with the Majority's contention that "The trip reports fail to document work performed by contractors versus work performed by employees or to explicitly show what work was performed." The record in this dispute is replete with literally hundreds of pages of documentation of what work was performed on which freight cars. There can be no doubt what work was performed by the contractors.

Based on the above, the Employees are compelled to vigorously dissent to the findings of this Award, finding it void of any precedential value whatsoever.

Alexander M. Novakovic
Organization Member