

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19818
Docket Number MW-19663

Benjamin Rubenstein, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Norfolk and Western Railway Company (A&P Regions)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it used Transportation Department employees instead of Track Department employees to protect track at Lick Run beginning December 1, 1970 (Carrier's file MW-RO-71-1).

(2) Section Foreman H. H. Hamlin be allowed pay at his straight time rate for a number of hours equal to the total expended by Transportation Department employees in performing the work referred to in Part (1) hereof.

OPINION OF BOARD: The issue to be determined here, is one of fact, rather than interpretation of contractual provisions. The claimant contends that the work performed by an employee of the Transportation Department, instead of a member of the claimant, was done on the track, at Lick Run, where a contracting firm was engaged in widening and improving the drainage channel adjacent to the Carrier's tracks.

The Claimant contends that the track duties consisted of a flagman to protect the tracks, as well as the contractor's operations and machinery.

The Carrier, and the UTU (Intervenor), whose member was used to do the work, contend that the work consisted of flagging and routing trains, rather than protecting the tracks and the contractor, and was therefore, properly, a job within the jurisdiction of the U.T.U.

Furthermore, the Carrier denies that the Claimant had exclusive rights to the job in question either by contract, history, past experience, etc.

Even though the question of exclusivity is raised by both parties, there seems to be little disagreement between them as to the issue. In fact, the Carrier admits that, were the work involved, one of protecting the tracks and the roadbed, it would have gone to the claimant. It further alleges, that whenever work did involve watchmen, it was referred to claimant. The work done by the trainman, according to the Carrier and the Intervenor, did not involve protection of the tracks, but routing and flagging of trains, which, concededly, is part of the trainmen's job.

Except for the contradictory allegations of facts, there is very little evidence to establish which party is correct. The Exhibits offered by Claimant, specifically, the Bulletins, are not sufficient to establish that the work involved herein was "protection for construction work" at the premises.

In view of the failure of the claimant to prove, by sufficient evidence, that the work performed, was that of protecting the tracks and the construction work, we must adopt the facts claimed by the Carrier and the U.T.U., whose members have actually performed the work, that it consisted of flagging and routing trains, and was therefore properly assigned to the Trainmen.

We have held on innumerable occasions that where there is a dispute of fact, it is incumbent on the Claimant to establish his claim by a preponderance of the evidence. No such evidence was presented here.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim is dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

E.A. Killen
Executive Secretary

Dated at Chicago, Illinois, this 20th day of June 1973.