

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19864
Docket Number MW-19550

Job" H. Dorsey, Referee

(Brotherhood of Maintenance of Way **Employees**
PARTIES TO DISPUTE: (
(Louisville and Nashville Railroad Company

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

(1) The Carrier violated the **Agreement** when it used Construction Supervisor L. J. Smith instead of J. E. **Spruell** to perform service **as** a foreman on each work day during the period from September 3 to October 2, 1970, both dates inclusive (System File **1-12/E-304-18**).

(2) Mr. J. E. **Spruell** be allowed one hundred seventy-six (**176**) hours of pay at the foreman's straight time rate and forty-seven and one-half (**47-1/2**) hours of pay at the foreman's time and **one-half** rate because of the violation referred to in Part (1) hereof.

OPINION OF BOARD: A work train, with three Track Sub-department machines (with MW operators) was engaged in picking up scrap rail and other track scrap between Mile Post 359 and Mile Post 405. The machine operators -- all of whom were qualified to work without **supervision** -- were instructed by the Assistant Division Engineer and Roadmaster to clear the right of way of all scrap. Mr. L. J. Smith, Supervisor of Construction, was with the work train most of the time. MW alleges that Smith was acting in the capacity of Foreman in **violation** of the Agreement. Carrier denied the allegation.

To prevail MU bore the burden of proving by convincing substantial evidence of probative value that Smith was de facto performing the duties of a Foreman's position. The evidence of record does not satisfy the burden. Consequently, we are compelled to dismiss the claim for failure of proof.

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 Employee involved in this dispute are respectively **Carrier** and Employee 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

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That the claim must be dismissed for failure of proof.

A W A R D

Claim ~~dis~~missed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulose
Executive Secretary

Dated at Chicago, Illinois, **this** 27th day of July 1973.