

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20676  
Docket Number MW-20632

Irwin M. Lieberman, 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 Foreman R. K. Brockett instead of Laborer W. **J. Crump** to perform laborer's work at Upton, Indiana on October 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, **18**, 19 and 20, 1972 (System File **1-12/E-265-18**).

(2) In addition to the pay he has received, Laborer W. J. **Crump** be allowed one hundred twelve (112) hours of pay at his straight-time rate because of the violation referred to in Part (1) hereof.

**OPINION OF BOARD:** This dispute involves the allegation that a foreman in the track sub-department performed the work of a Laborer; **foreman** are listed under **Rank 1** and laborers under **Rank 6** in Rule **5 - Seniority Rank**.

Carrier argues that the dispute herein was resolved in two prior awards involving the same parties: Awards 17360 and 20425. We note, however, that in both of those awards the question turned in Large measure on the fact that there were small gangs involved and the foreman, by virtue of Carrier's operating rules, was expected to participate in the work. Such is not the case herein and therefore those Awards are not controlling. However, in Award 19816, cited by Petitioner, involving the same parties and a related issue, we held that **"...claimant** had established seniority in accordance with **Rule 6** of the Agreement; and, that his contractual rights were violated when the Carrier assigned an employee of a higher seniority Rank to perform work of Claimant's seniority Rank." That Award is relevant to the instant dispute.

The principle issue in this dispute is a factual one. Carrier claims that the foreman in question was sent back to his own gang when the crane, with which he had been working, arrived at Upton. Petitioner, on the other hand has submitted a signed statement indicating that the foreman R. K. Brockett, worked on the gang in Upton on the claim dates herein; the statement was signed by eight employees including Brockett and the foreman of the gang in Upton. This statement was never denied or questioned by the Carrier and no rebuttal evidence, or indeed any evidence, to support Carrier's position appears in the record.

Based on the prima facie **unrebutted** evidence submitted by Petitioner and the principle affirmed on this property in Award 19816 supra, the Claim must be sustained. Carrier raised for the first time in its submission an issue with respect to the possible compensation due Claimant; since this issue was not raised on the property, it may not now be considered by this Board.

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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

  
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1975.