

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30715  
Docket No. MW-30342  
95-3-92-3-95

The Third Division consisted of the regular members and in addition Referee W. Gary Vause when award was rendered.

(CSX Transportation, Inc. (former Louisville  
( Nashville Railroad Company)  
PARTIES TO DISPUTE: (  
(Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM:

"R. Prowell, ID# 186541 is entitled to eight hours pay at Dump Truck Operator time and one-half rate for each date of January 26 and 27, 1991." Carrier's file 12 (91-853), Organization's file 10-26-91."

FINDINGS:

The Third 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 waived right of appearance at hearing thereon.

When the instant dispute arose, Claimant held seniority as a Truck Driver in the Track Subdepartment, was assigned as such and working in the Radnor Yard, Nashville, Tennessee. C.L. Anderson had established and held seniority as a Track Repairman in the Track Subdepartment. There is no dispute over the fact that the Claimant's seniority was greater than that held by Anderson. Moreover, there is no dispute over the fact that Anderson held no seniority as a Truck Driver.

Evidence adduced by the Organization showed that on Saturday, January 26, and Sunday, January 27, 1991, Claimant's rest days, the Carrier used Track Repairman Anderson to operate a dump truck hauling cross-ties in the Radnor Yard. Anderson worked eight hours on each day. A June 28, 1991 handwritten note signed by Anderson states:

"To Whom it May Concern,

On January 26 and 27, 1991, I operated the dump truck assigned to R.E. Prowell, on his rest days, at Radnor Yard."

In its Letter of Objections filed under date of June 3, 1992, the Organization objected to the following new material and arguments raised for the first time in the history of the dispute in the Carrier's Submission:

- "(1) Track Repairman C.L. Anderson was working the first two days of his regular workweek when the dispute involved here occurred;
- (2) The written statement furnished by Track Repairman Anderson was not factual;
- (3) There is a conflict in facts present in this case; and
- (4) The remedy requested was excessive."

Additionally, the Organization objected to the Carrier's Submission on the grounds that its Exhibits "B" and "C" were never exchanged by the parties during the handling of this dispute on the property and should be barred from any consideration by the Board.

It is well established that a party may not introduce arguments or evidence for the first time before this Board. The Railway Labor Act promotes the policy of resolving issues on the property to the extent possible. Accordingly, the above new contentions and evidence raised by the Carrier before the Board, to the extent they were not raised during the handling of this dispute on the property, will not be considered.

In the handling of the dispute on the property, the Carrier did not question the Claimant's availability, qualifications and willingness to perform the subject overtime service. Nor did the Carrier rebut the fact that it failed to call the Claimant. Finally, the Carrier did not question the fact that the Claimant held greater seniority than Anderson, nor that the Claimant was the "regular employee" as that term is used in Rule 30(g).

The Carrier did not rebut the Organization's contention that the Claimant complied with Rule 30(b), which provides:

"30(b) Employees, who desire to be considered for calls under Rule 31, will provide the means by which they may be contacted by telephone or otherwise, and will register their telephone number with their foremen or immediate supervisory officer. Of those so registered, calls will be made in seniority order as the need arises.

A reasonable effort must be made to contact the senior employe so registered, before proceeding to the next employe on the register. Except for section men living within hailing distance of either their foreman's living quarters or their tool house or headquarters station, and for men living in camp cars when they are present at the camp cars, an employe not registered as above shall not have any claim on account of not being worked on calls."

The Organization contends that the Carrier violated Claimant's rights under Rule 30(g), which provides:

"30(g) Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."  
[Emphasis added.]

The Carrier defended by arguing that because Anderson was paid at the Laborer's rate of \$11.82 per hour for eight hours on each claim date, rather than at the Truck Driver's rate of \$12.33 per hour, it is established that Anderson did not operate the dump truck as alleged by the Organization. This is tenuous circumstantial evidence at best, and does not disprove the Organization's contention (buttressed by Anderson's signed statement) that Anderson was actually driving the dump truck.

We are persuaded that the Organization and Claimant met the initial burden of going forward to prove a prima facie case of violation, which was not adequately rebutted by the Carrier on the property.

We therefore conclude that Claimant should be made whole, and compensated at the overtime rate for all work he could have performed if properly utilized under the Agreement. Carrier should compensate the Claimant eight hours pay at the Dump Truck Operator time and one-half rate for each date of January 26 and 27, 1991.

AWARD

Claim sustained.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 31st day of January 1995.