Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30782
Docket No. MW-30372
95-3-92-3-115

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

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

STATEMENT OF CLAIM:

"J. R. Lackey, ID #186244, N. C. Bess, ID #187783 and R. D. Daniel, ID #187786 are entitled to 8 hours pay each at an unspecified straight time rate for May 8, 1991." Carrier's file (91-1087), Organization's file 10-71-91."

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.

Claimant J. R. Lackey established and holds seniority as a Section Foreman in the Track Subdepartment. Claimants N. C. Bess and R. D. Daniel established and hold seniority as Track Repairmen in the Track Subdepartment. Foreman Lackey was regularly assigned as a Section Foreman at Radnor Yard, Nashville, Tennessee, and Claimants Bess and Daniel were furloughed, awaiting recall, when this dispute arose.

On March 29, 1991, the Organization submitted a claim on behalf of Track Foreman Lackey and Track Repairmen Bess and Daniel for eight hours pay each at the straight time rate due to Carrier's violation of Agreement Rules 1, 2(d) and 22(e) when it allegedly had Car Department employees cut weeds in the track and along the right-of-way at the north end of the "D" Yard, Nashville, Tennessee.

Carrier denied the claim asserting that: "Roadmaster Reese and General Foreman Norris both report that they have no knowledge of any carmen cutting weeds in the track or on the right-of-way. In fact, the 'D' Yard area was sprayed this past April to control vegetation." Carrier further asserted that Claimant Lackey worked eight hours straight time and seven hours overtime on May 8, and "could not have performed this service if it had taken place." Finally, Carrier submitted that there was "no record" of Messrs. Bess and Daniel complying with Rule 21(g).

The Organization appealed Carrier's declination, reiterating that: "Car Shop employees were used to cut weeds along the track and along the right-of-way, and Claimants are qualified subdepartment employees and should have been allowed to perform the work." The Organization further maintained that Claimants Bess and Daniel "did comply" with Rule 21(g), and "should have been called."

On June 14, 1991, Carrier submitted a statement signed by Roadmaster Reese asserting:

> "I don't have any knowledge of car shop employees cutting weeds in the D Yard. We just sprayed the D-Yard area in April of this year."

It is critical to note that during handling on the property up through the claims conference of January 21, 1992 and Carrier's final denial letter of February 12, 1992, the Organization did not furnish any evidence to prove the material facts of the claim. It was not until several weeks after Carrier had filed Notice of Intent with the Third Division that the Organization attempted to supplement the record with the following statement dated October 14, 1991 and date stamped into the General Chairman's office on October 31, 1991:

> "I am writing this statement pertaining to claim 10 (71)(91), where car shop employees were used to cut weeds in the track and along the right of way to the north end of the D yard and near the L line.
>
> I saw this work done and here is a list of employees that also saw this work done."

This Board has often held that in conflicts of material facts such as presented here, the moving party must establish sufficient probative evidence to permit a finding that the Agreement was violated. In this dispute, the Organization failed to present sufficient evidence during handling on the property to make out a prima facie claim that Carrier violated the Agreement on May 8, 1991. Carrier submitted a June 14, 1991 statement signed by

Roadmaster Reese, contesting the claim that Car Shop employees performed weed cutting on May 8, 1991. The Organization never came forward to refute that assertion or to prove the basic facts of its case until after handling on the property was concluded and the dispute was referred by the Carrier to the Board on February 12, 1992. No reason is indicated why the Organization waited until March 3, 1992 to present the evidentiary document which apparently was at its disposal as early as October 1991. Had the Organization submitted this evidence while the issue was still being discussed on the property, it might well have prompted a resolution at that level or a different result at this level. However, the failure to do so was fatal to the Organization's position before this Board and that oversight cannot be rectified by the device of submitting a duplicate Notice of Intent to the Board on April 10, 1992, inclusive of the belated document which is inadmissible on this record as de novo evidence. We have no alternative but to deny this claim for failure of the Organization to carry its burden of proof.

AWARD

Claim denied.

O R D E R

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 Third Division

Dated at Chicago, Illinois, this 6th day of April 1995.