

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31085
Docket No. MW-30868
95-3-92-3-625

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(CSX Transportation, Inc. (former 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 assigned Car Shop employe Lance to perform Track Subdepartment work (tearing out crossing timbers and putting rock back in) at the New Car Shop on February 22, 1991 [System File 10(37) (91)/12(91-918) LNR].
- (2) As a consequence of the violation referred to in Part (1) above, Backhoe Operator E. M. Ray shall be allowed eight (8) hours' pay at his respective straight time rate of pay."

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 holds seniority as a Rank No. 3 Operator within the Track Subdepartment of the Maintenance of Way and Structures Department.

On February 22, 1991, the Carrier assigned a Car Shop employee to operate a backhoe. Since the Car Shop employee holds no

seniority under the Agreement, the Organization filed a claim contending that the work performed by the Car Shop employee was "customarily and traditionally performed by Rank No. 3 operators."

The Carrier investigated the matter and discovered that the Claimant was assigned to his regular duties on the date in question. In addition, the Carrier questioned the Claimant's Roadmaster who had "no knowledge of any Car Department employee operating a backhoe on that date." Consequently, the Carrier denied the claim.

The Organization appealed the claim and the Carrier again denied it and requested that the Organization "present evidence, if any, to support its position."

On December 3, 1991, the Organization presented a copy of statements from two BMW employees supporting its case. The Carrier contends that the statements are not credible because they could have been written by anyone; the statements were written five months after the alleged incident; and the Carrier's payroll records conflict with the statements.

This Board reviewed the evidence and testimony and we find that the Organization met its burden of proof that the Carrier violated the Agreement when it assigned a Car Shop employee, who holds no seniority under the Organization's Agreement to perform work that is customarily and traditionally performed by Maintenance of Way employees. The Organization successfully proved that on February 22, 1991, the Carrier assigned a Car Shop employee to operate a backhoe to perform Track Subdepartment Machine Operator work of tearing out crossing timbers and placing ballast rock in the crossing at the north end of the new Car Shop.

The Organization also proved that that work is customarily and traditionally performed by Rank No. 3 Operators and is reserved to Maintenance of Way employees under the Scope Rule.

Although the Carrier denied that it had any record of another individual operating a backhoe on the date in question, the Organization brought forth a written statement signed by two Carrier employees who stated that they observed a Car Shop employee operating a backhoe on February 22, 1991. That evidence was not refuted by anything presented by the Carrier. The Carrier's complaint that the statement was obtained five months later and therefore, the two employees could not remember such an occurrence given all the "commotion and ado in and around the yards," is specifically rejected by this Board. The statement is believable and unrebutted.

Finally, with respect to payment of a monetary award, this Board relies on the language of Third Division Award 24897 in which we stated, "If the Claimant was not available where and when the

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disputed work took place it was because he was not assigned there by the Carrier. (See Third Division 13832 and 15497 inter alia)."

For all of the above reasons, the claim must sustained.

AWARD

Claim sustained.

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 1st day of September 1995.