

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31604
Docket No. MW-30826
96-3-92-3-649**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Louisiana and Arkansas Railway Company**

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

- (1) The Carrier violated the Agreement when it assigned Roadmaster Larry Stout to perform Track Subdepartment work (oil curves) between Mile Posts T-98 and T-134 on October 23, 26 and 28, 1990 [Carrier's File 013.31-365(50)].**
- (2) The Carrier violated the Agreement when it assigned Roadmaster Gilcrease to perform Track Subdepartment work (oil curves) at Mile Posts T-49, T-49.5 and T-50 on October 23, 1990 and between Mile Posts T-0 and T-50 on November 2, 1990 [Carrier's File 013.31-365(51)].**
- (3) As a consequence of the violation referred to in Part (1) above, Section Foreman R. Oney and Laborers M. Bradshaw and G. Duffy shall each be allowed '... five (5) hours on each of the following days: October 23, 26 and 28, 1990, at their respective straight time rate of pay to be divided proportionately among the claimants....'**
- (4) As a consequence of the violations referred to in Part (2) above, Section Foreman R. A. Norwood shall be allowed five (5) hours' pay at his respective straight time rate of pay for each day (October 23 and November 2, 1990) Roadmaster Gilcrease performed said work."**

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.

There is no dispute that on October 23, 26 and 28, 1990, Carrier Roadmaster L. Stout performed rail oiling work from Mile Post T-98 to T-134. Additionally, on October 23, 1990, Carrier Roadmaster M. Gilcrease performed rail oiling work at Mile Posts T-49, T-49.5 and T-50, and on November 2, 1990 between Mile Posts T-0 and T-50. The oil railing work was accomplished using a Carrier hi-rail vehicle equipped with a sprayer controlled from the cab of the truck.

The Organization submitted a claim on behalf of Messrs. Oney, Bradshaw and Duffy (Claimants), alleging Carrier had violated Rules 1-Scope, 2-Seniority, Rule 11-Bulletining Positions, and 17(I)-Basic Work Week, when the two Roadmasters performed work which "rightfully" accruing to Claimants, thereby "depriving Claimants of work and wages." The Organization submitted numerous statements from employees who insisted that the work of oiling and greasing rails was work which they historically have performed.

Carrier's denial was premised upon the assertion that there was no evidence available which would support the claim. In that connection, Carrier asserted that it did not maintain work sheets which would indicate the whereabouts or activities of Roadmasters Gilcrease and Stout's on the claim dates. Carrier went on to note that each of the Claimants was fully employed on the dates in dispute. Finally, Carrier stated that the work of oiling and greasing rail had not traditionally and historically been exclusively performed by members of the Organization.

Third Division Awards 28693 and 29036, involving the same Parties, issue and contract language as the present case, are dispositive of the merits issue and require a sustaining Award. Each of the cited cases took a different approach to the damages issue, however. We find the reasoning in Award 29036 far more persuasive and elect to follow its holding with respect to the remedy for the proven violations in the present claim. Under the strictures of Circular No. 1, the assertion by Carrier before this Board that the amounts and time claimed are "excessive" is de novo and come too late for consideration. Therefore, this claim is sustained as presented.

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 29th day of August 1996.