

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31868
Docket No. MW-30817
97-3-92-3-626

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: (
(CSX Transportation, Inc. (former
(Louisville & 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 employees to perform Maintenance of Way and Structures Department work (cut up old rail, haul rail, crossties and scrap out of the yard and cleaning the right of way) in the 'C' Yard at Radnor, Nashville, Tennessee on February 21, 22 and 23, 1991 [System File 10 (38) (91)/12 (91-917) LNR].
- 2) As a consequence of the violation referred to in Part (1) above, furloughed Track Repairman J. P. Bradley and Welder W. L. Love, Jr., shall each be allowed eight (8) hours' pay at their respective straight time rates of pay for each of the dates cited in Part (1) above."

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 were given due notice of hearing thereon.

As Third Party in Interest, the Transportation Communications International Union, Carmen's Division was notified of the pendency of this dispute, but chose not to file a Submission with the Board.

In this case the Organization alleges that Carrier used Shop Craft employees (Carmen) to perform work which is reserved to MofW employees by the Scope Rule. Claimants J. Bradley and W. Love Jr. have established and hold seniority in the Track and Welding Subdepartments, respectively. At the time of this dispute, Claimant Bradley was on furlough status.

By letter dated April 1, 1991, the General Chairman filed a claim asserting that on three consecutive days in late February 1991, Carrier "allowed" Car Department employees to cut up old rail and haul rail, crossties and scrap when clearing the right-of-way at Carrier's Yard at Radnor, Nashville, Tennessee. According to the General Chairman, Carrier violated Rules 1, 2(d) 22(e) and 38(b) of the Agreement when it allowed Carmen to perform work "accruing" to Maintenance of Way employees.

In his reply to the Organization's assertions the Roadmaster advised the General Chairman:

"I don't have any knowledge of Car Shop people doing M/W work in the C-Yard.

I have cleaned the entire C-Yard of M/W scrap using Gang 6M07 and Gang 6M30.

I have seen Car Shop people picking up old brake shoes and cutting up old air lines in the C-Yard."

Predicated on that information, the Division Engineer denied the Organization's claim maintaining that:

"Inasmuch as you have failed to offer any evidence to support your claim, and my investigation did not reveal any violation of the agreement, I find your claim lacks merit as well as contractual support."

The claim was discussed in conference wherein it was further declined.

On December 3, 1991, the General Chairman submitted a statement ostensibly signed by three MofW employees asserting that they had "observed two Car Shop employees loading and hauling scrap rail and used crossties out of the C-Yard at Radnor on February 21 and 22, 1991." In his final declination, Carrier's highest appellate officer stated that he was "not impressed" by the proffered statements "submitted some 5 months after the alleged incidents."

As the moving party, it was incumbent upon the Organization to prove the material aspects of its claim by a preponderance of probative evidence on the record. The rather tardy statement signed by three MofW employees is insufficient to effectively refute the Roadmaster's statement that Car Shop employees did their work in cleaning the Yard and did not perform MofW work.

On balance the Board is faced with an irreconcilable conflict of material fact which redounds to the detriment of the Organization which has the burden of persuasion on that fact. From the state of this record, we are unable to make an informed judgement as to whether the Agreement was violated or not. Therefore, we must dismiss the claim for failure of proof.

AWARD

Claim dismissed.

ORDER

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 4th day of March 1997.