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Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31903
Docket No. MW-30291
97-3-92-3-4**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The agreement was violated when the Carrier recalled and assigned junior employe R. D. McCauley to perform trackman's work on Gang 420 headquartered at Pitcairn, Pennsylvania, beginning on May 28, 1990, and continuing, instead of recalling and assigning furloughed Trackman W. Devlin (System Docket MW-1562).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. Devlin shall be allowed compensation at his applicable straight time and overtime rates of pay for all time junior employe R. D. McCauley performed trackman duties."**

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.

The Claimant's seniority as a Trackman is superior to that of R. D. McCauley. Both individuals were on furlough as a result of force reductions. On May 22, 1990, R. D. McCauley was recalled to work. The Claimant is a Trackman; McCauley is a Machine Operator. The Organization argues that, despite being called back to work as a Machine Operator, McCauley performed Trackman duties while the Claimant remained furloughed.

According to the record, two torsion beam machines were assigned to the CAT Gang. The Carrier contends McCauley was recalled from furlough to "work pending assignment as a Machine Operator in Gang SC- 420 . . . " By memorandum dated September 17, 1990, Division Engineer Hunt asserted McCauley performed Trackman duties only "on days when the second tamper was not required or operative." The record indicates McCauley claimed he never worked the machine because it was broken down and at a different location.

Once this assertion was made known to the Carrier, the burden of proof shifted to the Carrier. But, in this case, the Carrier continued to rely upon the earlier statement of the Division Engineer, which was not represented to be a first hand account of the events. Clearly, McCauley's statement provided the Carrier with the opportunity to challenge the accuracy of his statement through the submission of records related to the second torsion beam machine. This failure requires the Board to credit McCauley's statement because it has not been effectively rebutted. Accordingly, the claim is sustained as presented.

The Carrier argues in its Submission that the claim is excessive. This contention was not raised in the on-the-property handling of this case.

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**

Date at Chicago, Illinois, this 4th day of March 1997.

**CARRIER MEMBERS' DISSENT
TO AWARD 31903 (Docket MW-30291)
(Referee McAllister)**

It has been accepted and upheld in this Industry, and particularly at this Board, that the Organization, as the proponent of the claim, has the burden of proof to substantiate its position.

In the on-property handling Carrier pointed out:

"...Mr. McCauley performed trackman duties sporadically, when he was not needed in a machine operator capacity. There has been no evidence produced to support your contention that Mr. McCauley was assigned exclusively to trackman work.

The occasional use of Mr. McCauley to perform trackman work is permitted under Rule 19, and the fourth paragraph of our Scope, and did not require the return of the claimant from furlough solely for limited use.

System Docket MW-738 is cited in support of the foregoing."

Since the Majority NOW contends that the Carrier did not "...challenge the accuracy..." of Claimant's statement, we offer the following from the on-property correspondence:

"Regarding the statement you presented from Mr. McCauley, we note that it is more conspicuous by what it does not say than by what it does say. Mr. McCauley merely states that he did not use one particular piece of equipment. He does not state that he did not work as a Machine Operator, nor does he state that he worked as a Trackman on a regular basis as you contend. One has only to check payroll records to see that the reason Mr. McCauley did not so state because he was, in fact, working as a Machine Operator and was paid as such."

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The only conclusion that can be drawn in this matter is that the Majority ignored
the record that was before it.

We Dissent.


P. V. Varga


M. W. Fingerhut


M. C. Lesnik