

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32914
Docket No. MW-31852
98-3-94-3-152

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to assign Mr. D. R. Venoy to perform overtime service (drive the van for T&S Force 5XT5) beginning April 7 through May 12, 1992 [System File C-TC-5376-SPG/12(92-617) CSX].
- (2) The Agreement was violated when the Carrier assigned basic force men to perform service (build an unloading ramp, untie equipment and set rails between cars) on June 19, 1992, instead of assigning SPG Forces Foreman D. K. Landis, Assistant Foreman R. W. Smith, Class ‘A’ Operators A. B. Fryman, S. W. Fryman, Sr., L. Lewis and Trackman P. D. Rollins [System File SPG-8207/12(92-876)].
- (3) The Agreement was violated when the Carrier assigned basic force men to perform service (put up a ramp and set rails between cars) on July 5, 1992, instead of assigning SPG Forces Foreman D. K. Landis, Assistant Foreman J. L. Jones, Class ‘A’ Operators A. B. Fryman, S. W. Fryman, Sr., S. Ramier, L. Lewis, H. D. Napper and C. F. Peterson [System File SPG-8208/12(92-877)].
- (4) The Agreement was violated when the Carrier assigned basic force men to perform service (set up ramps and set rails between cars) on July 19, 1992, instead of assigning SPG Forces Foreman D. K.

Landis, Class 'A' Operators A. B. Fryman, S. W. Fryman, Sr., C. W. Colyer, L. Lewis and C. F. Peterson [System File SPG-8209/12(92-878)].

- (5) As a consequence of the violation referred to in Part (1) above, Claimant D. R. Venoy shall be allowed twenty-five (25) hours' pay at the SPG Trackman's rate.
- (6) As a consequence of the violation referred to in Part (2) above, Messrs. D. K. Landis, R. W. Smith, A. B. Fryman, S. W. Fryman, Sr., L. Lewis and P. D. Rollins shall each be allowed ten (10) hours' pay at their respective rates.
- (7) As a consequence of the violation referred to in Part (3) above, Messrs. D. K. Landis, J. L. Jones, A. B. Fryman, S. W. Fryman, Sr., S. Ramier, L. Lewis, H. D. Napper and C. F. Peterson shall each be allowed ten (10) hours' pay at their respective rates.
- (8) As a consequence of the violation referred to in Part (4) above, Messrs. D. K. Landis, A. B. Fryman, S. W. Fryman, Sr., C. W. Colyer, L. Lewis and C. F. Peterson shall each be allowed ten (10) hours' pay at their respective rates."

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 first allegation concerns the Organization's assertion that during the period April 7 through May 12, 1992, Assistant Foreman Jarrell improperly performed overtime work instead of Claimant Venoy. The disputed work was driving a van for T&S Force 5XT5. The Carrier asserted on the property that "[o]ur information is that Claimant Venoy was offered the opportunity to drive the van when the gang started and declined such opportunity" and that "Mr. Jarrell, an Assistant Foreman on the gang, then assumed the necessary driving duties. . . ." The Organization countered that assertion relying upon written statements. While two of those statements are general and not very helpful as probative evidence from individuals having firsthand knowledge of the events, Claimant Venoy gave a very specific statement which asserted that Claimant Venoy asked Jarrell if he could drive the van and Jarrell "said he [Jarrell] was going to drive the van."

The Carrier's argument here is that Claimant Venoy declined the work and, at best, the record is in conflict thereby entitling the Carrier to a denial of the claim. The Carrier's position that Claimant Venoy was offered and declined the work is only supported through a general hearsay assertion made by the Carrier on the property based on "[o]ur information." The Organization countered that assertion with a very specific statement from Claimant Venoy that he asked for the work but was told by Jarrell that he [Jarrell] would perform the work. No statements of similar probative weight were offered by the Carrier supporting its position.

While the positions of the parties are in conflict, the probative factual evidence is not. The Carrier has not, through probative factual evidence (i.e., a statement from someone with firsthand knowledge), refuted the factual assertions made by Claimant Venoy that he asked for and was not permitted to perform the work. The statement offered by the Organization sufficiently refuted the general assertion offered by the Carrier. The Organization's burden has been sufficiently carried. Claimant Venoy shall be compensated as requested in the claim.

The remaining allegations by the Organization assert that on three dates in 1992, the Carrier improperly used local forces rather than the SPG Gang involved to prepare for the unloading of SPG production machines (build unloading ramps, untie equipment and set rails between cars).

The claim concerning the use of local forces to perform SPG Gang work arose in 1992 under the terms of the 1992 Arbitrated Agreement ("SPG Agreement"). The

burden is on the Organization to demonstrate a violation of that SPG Agreement. That burden has not been met.

The Organization relies upon Section 7(B) of the SPG Agreement

“The right to work overtime, when required on System Gangs, will accrue first to the incumbent of the position on which the overtime is required. If declined by the incumbent, overtime will be performed by the senior qualified employee in the System Gang indicating a desire to work overtime.”

That provision is not dispositive. The assumption made by the Organization’s argument is that the preparatory work in dispute (build unloading ramps, untie equipment and set rails between cars) is SPG Gang work as opposed to work which can be performed by local forces. While the work of tie installation, surfacing and rail installation work is addressed in the SPG Agreement, as the Carrier argued on the property, nothing in the SPG Agreement clearly provides that the specific preparatory work in dispute belongs exclusively to SPG Gangs. Instead, the SPG Agreement clearly states:

“For the purposes of this agreement, production work that may be performed by a SPG is confined to the following work activities: tie installation and surfacing, surfacing, and rail installation. This definition, however, does not limit the Carrier’s right to utilize non-SPG gangs to perform these work activities nor does it limit the Carrier’s right to propose and reach mutual agreement that other production work be performed by SPG’s in the future.”

The preparatory work in dispute simply is not, by Agreement, reserved to SPG Gangs. In light of the above clear language, and because past practice in these circumstances is used to explain the intent of ambiguous language, the Organization’s past practice arguments concerning this preparatory work are not persuasive.

Third Division Award 31366 is different. That Award involved the performance of SPG Gang work (“... [T]he record supports a conclusion that District Forces were utilized on the rest days of Gang 6XT7 to perform tasks identical to those Gang 6XT7

would normally perform, with equipment assigned to the Gang.”) Here, the Organization has not shown that the disputed preparatory work was SPG Gang work.

The portion of the claim concerning the preparatory work shall therefore be denied.

AWARD

Claim sustained in accordance with the Findings.

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 23rd day of November 1998.