

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33970
Docket No. MW-32599
00-3-95-3-528**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(National Railroad Passenger Corporation (Amtrak -
(Northeast Corridor)

STATEMENT OF CLAIM:

- “(1) The Carrier violated the Agreement when it assigned other than Electric Traction Department forces to perform the work involved with providing lighting at various work sites on June 19, 23, 28, July 14, August 2 and 3, 1994 and continuing (System File NEC-BMWE-SD-3438 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, E.T. Substation Electrician H. Klenk shall be compensated at the substation electrician’s time and one-half rate for all overtime hours expended by other than E.T. forces in the performance of the work in question on June 19, 23, 28, July 14, August 2 and 3, 1994 and continuing.”**

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.

On the claim dates, B&B forces set up lighting, either for themselves or for a contractor, to perform various work assignments. The lighting has been accomplished by light stands attached to a portable gas operated generator.

The claim is on behalf of a Substation Electrician who holds seniority within the Electric Traction Department.

On the property, at this point, both employees within the B&B Department and the Electric Traction Department are listed within the Scope of the Maintenance of Way Agreement, and are both represented by the same Organization.

The Claimant contends that the work necessary to furnish lighting is exclusive to Electric Traction Department employees, both by Agreement and past practice. They have furnished some 47 statements, each making the same statement only with a fill-in to reference the years worked for Amtrak and/or the preceding Carrier, stating as follows:

“ . . . In all my years of experience, whenever another department worked night time projects, lighting for those overtime projects was provided by the M&W department (supported when needed by E. T. Electricians). It has come to my attention that the B&B department in Wilmington, Delaware has acquired lighting equipment and has recently begun to provide its own lights for night work. This practice, without a doubt, violated the precedent set by past practice.”

The Organization also furnished some 25 copies of work reports wherein an Electric Traction Department employee furnished lighting.

It is, therefore, the Organization's position that by Agreement and a past practice established by the signed statements and copies of work reports that an Electric Traction Department employee has exclusively furnished lights when night work was required, whether it was for emergency work, or in the instant claim, non-emergencies.

The Carrier's defense is that both the B&B and Track Departments work at night and do supply their own incidental lighting associated with the project. This practice

has been normal procedure since at least the early 1980's. The Carrier does admit that when more complex lighting is required, Electricians from the E. T. Department are called.

The Carrier never furnished any details concerning situations where others performed such work, but it does reference and rely on Award 36 of Public Law Board No. 5090. That Award involved the International Brotherhood of Electrical Workers and the Carrier. The genesis of the claim was that of B&B Electricians who argued their Agreement was violated when the Carrier assigned maintenance crews to furnish lighting on six days in May 1992, by the use of gasoline powered portable light generators.

In that dispute, the Organization was asked to participate as a third party. As a third party participant, they are reported by the Neutral as having said:

“... welding and surfacing gangs have always been responsible for lighting of their work area”

The wording of the afore quoted statement does support the Carrier's position as it is apparent that each gang set up and maintained their own lighting. Thus, the past can easily derail the current argument existing in this dispute. The burden of proof is always upon the shoulders of the petitioning party, but when it becomes a disagreement as to which sub-department has the exclusive right to specific work over another sub-department when both sub-departments are within the Scope of the same Agreement, the burden of proof necessary has to be overwhelming. This is even more so when the contract contains a Rule such as Rule 58 which reads:

“The listing of work under a given classification is not intended to assign work exclusively to that classification. It is understood that employees of one classification may perform work of another classification subject to the terms of existing Rules or Agreement between the parties hereto.”

The Board, in reviewing the submissions and positions of both parties, cannot find an Agreement Rule that provides exclusivity for one sub-department over another to perform the work that is the case of this dispute.

The preamble to the Scope Rule does recognize that the work of the Maintenance of Way Employees includes "station lighting, power lines, floodlights," but the classification for Electricians-Substations does not refer to flood lights.

An Electrician-Substation employee's only claim to the work of furnishing lights is the Agreement of May 12, 1976. Even then the work of furnishing lighting is for emergency situations, and even then, the Substation's Electrician is not included in emergencies unless:

" . . . additional forces are required. Electric Traction Substation Electricians will be assigned to augment the force"

But the May 12, 1976 Agreement has absolutely no applicability to this dispute, as has been stated previously, the work that had been done was not emergency work. So, the Organization has no other Rule support than the preamble to the Scope Rule which does not categorize flood light work as being within the classification of Electrician-Substation.

The Board does not doubt the veracity of any one of the 47 employees who signed the pre-printed statements, but such statements cannot be used to secure an Award of the Board that would, in essence, preempt the Carrier's prerogative to assigning work that has not been restricted by Agreement.

AWARD

Claim denied.

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 28th day of March, 2000.