

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37120
Docket No. CL-36360
03-3-00-3-611

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

PARTIES TO DISPUTE: (Transportation Communications International Union
(Duluth, Missabe & Iron Range Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood (GL-12646) that:

1. Carrier violated the TCU Clerical Employees Agreement at Proctor on Thursday, January 28, 1999, when it required and/or permitted persons, not covered by the Clerical Employees Agreement, to perform the work of hauling a truck set and two wheel sets from Proctor to Keenan and then hauling two truck sets back to Proctor from Keenan for the Car Department.
2. Carrier shall now be required to compensate K. D. Johnson and C. M. Shovein three (3) hours pay each at punitive rate of the Truck Driver position for Thursday, January 28, 1999 which they would have received had they been properly allowed to perform 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 were given due notice of hearing thereon.

As Third Party in Interest, the Brotherhood of Maintenance of Way Employees was advised of the pendency of this dispute, but chose not to file a Submission with the Board.

Procedural objections raised by the Carrier to the Board's jurisdiction over this matter are dismissed for reasons set forth in Fourth Division Awards 5074, 5075 and 5076.

On the claim date, Claimant K. D. Johnson, Employee No. 11641 and Claimant C. M. Shovein, Employee No. 11952, were both working a position of Truck Driver-Asset Management Department-Building 145, Proctor, with assigned hours of 7:00 A.M. - 3:30 P.M., Monday through Friday. The record amply supports the Organization's assertion that the Claimants' regularly assigned duties consist primarily of driving two and one-half ton trucks at this facility to deliver material for use by other Departments on the property and to transport material from other Departments back to the Asset Management facility. Finally, nothing in this record persuasively contradicts the Organization's assertion that the regular routine work of transporting truck and wheel sets for the Car Department in Asset Management trucks has been historically assigned to and performed by TCU-represented Truck Drivers, specifically including the Claimants in this case.

The gravamen of this case is the undisputed fact that on Thursday, January 28, 1999, the Carrier utilized D. Loncke, a BMW-represented Bridge and Building (Engineering Department) employee, to haul a truck set and two wheel sets from the Asset Management Department in Proctor (where the Asset Management trucks are located) and then haul two truck sets back to Proctor from Keenan. The instant claim filed by the Organization, on behalf of each Claimant, alleges a violation of their rights under the "positions and work" Scope Rule. The Carrier's general denial of the claims on grounds that the Organization failed to establish a custom, practice or tradition of "exclusive system-wide performance" of the disputed work by the Claimants is misplaced, for reasons explained fully in Award 2 of Public Law Board No. 5554. See also Third Division Awards 33148, 29401 and Public Law

Board No. 5836, Award 8. Nor does the record show that any of the historical exceptions to the Claimants' performance of this particular work e.g., emergency, utilization of cranes, unavailability of Asset Management trucks, intra-Department hauling around the job-site, applied to the work performed by the B&B employee on the claim date.

Based on all of the foregoing, Part 1 of the claim alleging a Scope Rule violation is sustained but, so far as we can tell from the record, only one employee foreign to the TCU Agreement performed the disputed work on January 28, 1999. In that circumstance, we shall not require the Carrier to make a payment to each Claimant as claimed in Part 2. Rather, the appropriate remedy for the proven violation is for the Carrier to compensate the senior of the named Claimants three hours' pay at the overtime rate of the Truck Driver position for Thursday, January 28, 1999.

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 25th day of August 2004.