

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38022
Docket No. CL-37085
06-3-02-3-46

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

(CSX Transportation, Inc. (former Seaboard Coast Line
(Railroad)
PARTIES TO DISPUTE: (
(Transportation Communications International Union

STATEMENT OF CLAIM:

“Carrier File 6(00-1500) TCU File 1.2513(18)SCL

1. Carrier violated the Agreement on October 1, 2 and 5, 2000, when it allowed Data Processing Clerk C. N. McKee, located at Busch, Florida, to issue work orders on trains noted in the original claims at Busch, Florida, in violation of the Customer Service Center Agreement. This was done in lieu of allowing Clerk R. F. Bell, ID 166722, to perform this work at the Customer Service Center at Jacksonville, Florida.
2. Carrier shall now be required to compensate Clerk Bell eight (8) hours at time and one-half the current rate of \$147.14 for the above violations.

Carrier File 6(00-1501) TCU File 1.2514(18)SCL

1. Carrier violated the Agreement on October 4 and 7, 2000, when it allowed Data Processing Clerk R. D. Keefauver, located at Busch, Florida, Yard Office, to issue work order on train A78904 at Jacksonville, Florida, in violation of the Customer Service Center Agreement. This was done in lieu of allowing Clerk R. F. Bell, ID 166722, to perform this work at the Customer Service Center at Jacksonville, Florida.

2. Carrier shall now be required to compensate Clerk Bell eight (8) hours at time and one-half the current rate of \$147.14 for the above violation.

Carrier File 6(01-0645) TCU File 1.2756(18)SCL

1. Carrier violated the terms of the Agreement, specifically the Customer Service Center Agreement, on March 26, 2001, when it allowed Data Processing Clerk C. N. McKee, located at Busch, Florida, to complete the work order on Train A78926. This was allowed in lieu of allowing this work to be performed by the Clerical employees in the Customer Service Center at Jacksonville, Florida.
2. Carrier shall now be required to compensate the Senior Available Employee, extra or unassigned in preference, eight (8) hours' pay at time and one-half the applicable rate of \$149.30 for the above violation.

Carrier File 6(01-0349) TCU File 1.2617(18)SCL

1. Carrier violated the Agreement, specifically, Rule 57 of the General Agreement, and CSXT Labor Agreement No. 6-008-91, on November 30, 2000, when it allowed Data Processing Clerk R. D. Keefauver, located at Busch, Florida, to arrive rail car DODX 29501 from Kingsland, Georgia, to Busch, Florida. This was done in lieu of allowing Clerk R. F. Bell to perform this work at the Customer Service Center at Jacksonville, Florida.
2. Carrier shall now be required to compensate Clerk Bell, ID 166722, eight (8) hours at time and one-half at his current rate of \$147.14, the amount he would have earned from the overtime list if he had been called properly for the above violation."

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.

In these claims, the Organization alleges that the Carrier assigned Clerks at Busch, Florida, to issue work orders on trains rather than assigning that work to a Customer Service Representative ("CSR") at the Customer Service Center ("CSC") in Jacksonville, Florida.

The background for this claim is set forth in Third Division Awards 37227 and 37760.

As more fully set forth in Third Division Award 37760, the Board has jurisdiction to resolve this claim.

In Third Division Award 37562, the assignment of similar disputed work at Busch was addressed by the Board (with a different sitting referee - Referee Wesman). In that case, the Board applied the three-part test from Third Division Award 37227 and found a violation. The Board then imposed the \$15.00 remedy called for in Third Division Award 37227.

The Carrier argues that sufficient evidence required by the three-part test in Third Division Award 37227 (and the numerous cases following that Award) was not produced by the Organization in Third Division Award 37562 for the work at Busch and, therefore, that Award should not be precedent in this case. In short, the Carrier argues that with respect to the work at Busch and application of the three-part test in Third Division Award 37227, Third Division Award 37562 was incorrectly decided.

However, a prior Award on the same issue between the parties cannot be ignored because one party asserts that the prior Award was incorrectly decided. Where an Award between the parties has decided a dispute, the party disagreeing with the result is held to a higher standard to avoid the consequences of that prior Award. There must be showing that the prior Award was not only wrong, but was palpably erroneous. That higher standard of proof is required for purposes of stability and to avoid referee shopping with the hope that another referee will see things differently than the original referee deciding the same dispute.

But here there is more. As discussed in Third Division Award 37760, Third Division Award 37562 was part of the consolidated cases (including Third Division Award 37227) which were enforced by the federal court in *CSX Transportation, Inc. v. Transportation-Communications International Union, et al.*, Civil Action No. DKC-2005-0419 (D. Md. 2006). See *id.*, slip. op. at 35 (where the court found that “[h]aving rejected the arguments of CSXT and UTU, TCU’s counterclaim to enforce the eight Benn awards and the Wesman Award will be granted.”). In effect, then, the Carrier is asking the Board to now find that one of our Awards which was enforced by the federal court is palpably erroneous. That would take an extraordinary showing by the Carrier - a showing we believe has not been made in this case.

Giving the Carrier the benefit of the doubt, at best, its assertions concerning the sufficiency of evidence produced in Third Division Award 37562 are debatable. Under the circumstances, debatable arguments concerning the sufficiency of evidence in another case cannot equate with a showing of palpable error, particularly of the level necessary to have us decline to follow one of our Awards which was enforced by the federal court. Again, the palpably erroneous review standard in cases like this is used for purposes of stability. Under the circumstances and for those very reasons, the Board cannot find Third Division Award 37562 palpably in error.

If the Carrier desires a different result concerning the assignment of work at Busch, it is free to serve the appropriate notices and, after following the required procedures, move the work and thereby terminate its liability. But the Carrier cannot achieve that result by arguing that a previously decided Award enforced by the federal court concerning the work at Busch should not be followed.

Under the rationale stated in Third Division Award 37227, these claims shall be sustained at the \$15.00 requirement.

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 7th day of December 2006.