

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 28166
Docket No. MW-27167
89-3-86-3-236

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Southern Pacific Transportation Company (Eastern Lines)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it used Laborer L. Green instead of furloughed Laborer-Driver P. Jeanlouis, Jr. to perform truck driving work from February 11 to February 21, 1985 (System File MW-85-72/431-78-A).

(2) Furloughed Laborer-Driver P. Jeanlouis, Jr. shall be allowed sixty-eight (68) hours of pay at the laborer-driver's straight time rate because of the violation referred to in Part (1) hereof."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

This dispute arises over the alleged use of a laborer to perform truck driving work from February 11 to 21, 1985. The regularly assigned laborer/driver of Extra Gang 162 sustained an off-duty injury requiring him to be absent during the disputed period. The Organization argues the Carrier violated the Agreement when it did not utilize Claimant.

The Carrier denied a violation and insists the record shows the Foreman of Extra Gang 162 operated the gang truck during the period in question. The Organization argues before the Board that if the Carrier intended to defend itself against this Claim, it should have presented probative evidence, such as a statement from the Foreman of Extra Gang 162 or any other witness to his operating the gang's truck. According to the Organization, the Carrier's contention is an affirmative defense which must be supported by probative evidence.

The record discloses the Carrier's initial denial states its District Manager advised that a Laborer had not been used to operate the gang truck. In response, the Organization informed the Carrier by letter that "... we have a letter sign(ed) by Mr. L. E. Green that he operated this truck." Despite the Organization's claims to the contrary, there is no evidence that Green's purported letter was given to the Carrier in the on-the-property handling of this dispute. Although the Carrier alleged before the Board that the record indicates the Foreman of Extra Gang 162 was used to operate the gang truck, there is no such indication in the record. The Carrier's on-the-property defense was simply that Laborer Green was not so utilized.

In a Rules case, the burden of proof initially lies with the Organization to establish its claim. Herein, the Organization has not shown by any probative evidence that Laborer Green drove the gang truck from February 11 to 21, 1985. Once the Carrier disputed its initial claim, the burden shifted back to the Organization to demonstrate that Green did drive the gang truck. The on-the-property record amounts to no more than an unproven allegation.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 16th day of October 1989.