

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
(Kansas City Southern Railway Company
(Former Louisiana & Arkansas Railway Company)

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

(1) The Carrier violated the Agreement when it assigned Roadmaster J. Rice instead of Section Foreman R. A. Norwood to perform the work of oiling rail curves on January 19, 23, 26, 30 and February 2, 1987 [Carrier's File 013.31-365 (1)].

(2) As a consequence of the aforesaid violation, Section Foreman R. A. Norwood shall be allowed fifteen (15) hours of pay at his straight time rate."

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 employees 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 Claim arises as the result of a Roadmaster, not subject to the coverage of the Agreement, oiling track in curves. This work is accomplished with a hi-rail vehicle equipped with a sprayer controlled from the cab of the truck. The Organization has filed this Claim on behalf of the Section Foreman on whose territory this work was performed, contending the oiling of track is reserved to employees covered by the Agreement.

In denying the Claim, the Carrier first asserts the Claim is barred because of a violation of the time limit rule on the part of the Organization. The record shows the Claim was first denied by the Carrier's letter of April 28, 1987, which was received by the Organization the following day. The Organization's letter of appeal, dated June 27, 1987, was received on July 3, 1987, according to the Carrier. As the Organization's appeal was mailed within sixty (60) days of its receipt of the Carrier's denial of the Claim, we conclude there was no violation of the time limit rule. See Awards 10490, 11575, 14695 and 16370.

With respect to the merits, the Carrier argues the work complained of is not covered by the Scope Rule. The Rule, the Carrier notes, merely lists the jobs which are covered by the Agreement, and makes no reference to the particular duties to be performed by covered employees. In such cases, this Board has consistently held that the Organization must show that the work has been historically performed by covered employees. The Organization has submitted letters from current and retired employees which state that section men had been responsible for oiling track. These letters were submitted to the Carrier two months prior to the Organization's Notice of Intent to file this Claim before this Board. During that time, the Carrier neither denied the allegations contained in the letters nor offered any statements in rebuttal. Statements submitted by the Carrier for the first time to this Board may not be considered.

The documents submitted by the Organization are sufficient to establish a prima facie case that the oiling of track is work which has historically been performed by covered employees.

Absent evidence to the contrary, we must conclude that the work performed by the Roadmaster on the dates in question was reserved to employees subject to the Agreement.

The Carrier submits that even if the Agreement were violated, the Claimant would not be entitled to the relief sought as he was on duty and under pay at the time the work was performed. The Organization responds by arguing that he lost work opportunity when the Roadmaster performed covered work. The Claimant, the Organization asserts, could have been assigned to perform the work at overtime or on his rest days. Both parties submitted Awards in support of their respective positions.

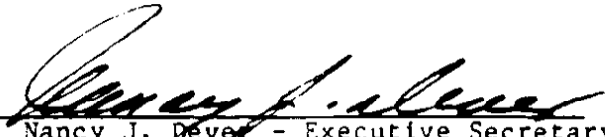
No Rule of Agreement has been brought to the Board's attention which would provide for a penalty payment in circumstances such as this. Whether or not the Carrier would have had the Claimant perform this work on overtime is simply too speculative to warrant a payment under the Organization's theory. While we find that the Agreement was violated, we will not award the relief sought by the Organization because there is no evidence this Claimant suffered any loss due to the violation. Part (1) of the Claim, therefore, is sustained, while Part (2) is denied.

A W A, R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1991.