

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman 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. Oney to perform the work of oiling rail curves between Lassiter and Pittsburg, Texas on June 18, 24, 26 and 29, 1987 [Carrier's File 013.31-365(9)].

(2) As a consequence of the aforesaid violation, Section Foreman R. Oney shall be allowed sixteen (16) hours of pay at his pro rata 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 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 were given due notice of hearing thereon.

In the instant dispute, the Organization argues that a Carrier Official performed Maintenance of Way work when he applied oil to rail and curves. The Organization supplies a factual base including dates, the Hi-Rail Truck number, license number and the name of the Assistant Roadmaster alleged to have performed the work. The disputed work is in the Organization's view, reserved to the employees by the Agreement.

The Carrier denied this Claim asserting that the work was not protected by the Agreement and had not been performed systemwide by only Maintenance of Way forces. It further argued that Claimant was fully employed and did not suffer any loss of work opportunity.

In its Submission, the Carrier has raised several issues which are not found in its correspondence on property. It has presented statements from Supervisors which were never made a part of its handling of the Claim. It has raised a time limits issue which the Board has fully considered. The Carrier's letter dated April 21, 1988, contains the statement that the Claim is "respectfully denied for reasons contained in Carrier's previous denial letters regarding those claims." It refers to Carrier Files 013.31-365 as stated. For the very first time, this Board finds in the Carrier's Ex Parte a time limits issue. Finding absolutely nothing addressed by the Carrier or Organization throughout the handling of this Claim on the property other than the above quote, we firmly hold that it is now improper. This Board has consistently reaffirmed the principle that only those facts and arguments made a clear part of the dispute on the property can now be considered.

Turning to the merits of the Claim, the record contains numerous letters presented by the Organization detailing the historical work performed by the employees in applying oil to rails and curves. We conclude from our reading of the general Scope Rule and other stated provisions of the Agreement that the work is that appropriate to Maintenance of Way and particularly the track department as claimed. We find that the signed letters support the Organization's Claim. They are unrefuted by the Carrier. In the whole of this record, we are convinced that the Carrier has violated the Agreement when it permitted the Assistant Roadmaster to perform work which belonged to the employees.

Having found the Agreement violated, the Claim is sustained. The Board notes that the Claimant was fully employed and also worked overtime. We have also studied Third Division Award 28693, which appears identical to the instant circumstances, but fails to sustain the monetary portion of the Claim. That Award reasons that it is "speculative" as to whether the Carrier would have had the Claimant perform the work "on overtime" under the Organization's theory. There is no such argument in the record on this property. We find nothing before us to warrant consideration of such an issue. We do not find Third Division Award 28693 as dispositive of the monetary portion of the Claim before us. The work herein was shown by probative evidence to have belonged to the employees. In this instance, that work was removed and performed by a Carrier official in violation of the Agreement. There is nothing in the record to indicate that the Claimant could not have performed the work at another time or on an overtime basis. The record documents that the work was there to be performed, was in fact performed by the Assistant Roadmaster, and therefore a loss of work opportunity did occur. This is not a speculative Claim. The Claimant is to be compensated at his pro-rata rate of pay. Claim is sustained as presented.


A W A R D

Claim sustained.

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Award No. 29036  
Docket No. MW-28612  
91-3-88-3-458

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Peyer - Executive Secretary

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