

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

Award No. 29913

Docket No. MW-29652

93-3-90-3-654

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes  
(CSX Transportation, Inc. (former Louisville  
(and Nashville Railroad Company)

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

- (1) The Carrier violated the Agreement when it used Welder W. L. Fletcher and Welder Helper R. Fountain, Jr. to perform Track Subdepartment maintenance work of pulling and driving track spikes and spacing cross ties on August 17, 1989 [System File 16(15)(89)/12 (89-941) LNR].
- (2) Track Subdepartment employee Mr. N. Trawick shall be paid three (3) hours' pay at his respective straight time rate of pay."

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 waived right of appearance at hearing thereon.

The Organization raised a timely objection to evidence offered by the Carrier de novo in its Submission. None of that evidence will be considered by this Board. The Board's findings are based solely upon the record established on the property.

At the time the instant claim arose, Claimant was a Track Sub-department employee assigned to Gang 5M12, with headquarters at

Flomaton, Alabama. On August 17, 1989, Carrier assigned a Welder and a Welder Helper to make field welds at Mile Post K-607.7. The work took approximately three hours, during which time Claimant was employed elsewhere on Carrier's property. In the course of their work, the Welders unspiked, moved, and respiked some crossties that were proximate to the welding points. By letter of September 18, 1989, the Organization filed a claim alleging that the Welders had performed Track Sub-department work, and requesting Claimant be paid three hours straight time at his regular rate.

At the crux of this case is Appendix No. 34 of the Agreement between the Parties, dated December 6, 1974. Appendix No. 34 reads in pertinent part as follows:

"...in the future on all Seniority Districts of this Company when field welds are being made a track repairman will be assigned to work with the welding gang to perform the track work unless the ties have already been spread to permit the field weld...."

The language of Appendix No. 34 is clear and unambiguous. It is uncontested on this record that Carrier failed to assign a Track Repairman to work with the Welder and Welder Helper in question. The Board is not persuaded by Carrier's argument that the Welders performed Track Sub-department work without Carrier's authority, thus absolving Carrier of any culpability in this regard. (See, for example, Second Division Award 6898.) Had Carrier complied with the specific provision of Appendix No. 34, and assigned a Track Repairman to work with the welding gang, there would have been no opportunity for the Welders to "voluntarily" perform Track Sub-department work. Accordingly, the Board finds that Carrier did violate Appendix No. 34 in this instance.

With respect to the Organization's claim for monetary damages, Carrier asserts that such damages are inappropriate where Claimant was fully employed during the incident at issue. However, this Board concurs with Third Division Award 27614 as follows:

"...While we recognize that there is a divergence of views on this subject, it is our view...that full employment of the Claimants is not a valid defense in a dispute such as involved here. As we noted in Third Division Award 26593, '...in order to provide for the enforcement of this agreement, the only way it can be effectively enforced is if a Claimant

or Claimants be awarded damages even though  
there are no actual losses."

There is no showing on this record that an emergency existed,  
thus potentially mitigating Carrier's responsibility to fully  
comply with Appendix No. 34. Accordingly, the Claim is sustained  
in its entirety.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest: Catherine Loughrin  
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 9th day of November 1993.