

CORRECTED

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30719
Docket No. MW-30161
95-3-91-3-600

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
(
(St. Louis Southwestern Railway Company

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

(1) The Agreement was violated when the Carrier assigned Spot Rip Carmen W. L. McCullough and G. T. Phelps instead of B&B Carpenters T. H. Reynolds, J. B. Lybrand and R. C. Carey to perform building remodeling and repair work at the Spot Rip Facility at Pine Bluff, Arkansas on September 20, 21, 24, 25, 26, 27 and 28, 1990 (System File MW-90-68-CB/497-4-A SSW).

(2) As a consequence of the violation referred to in Part (1) hereof, B&B Carpenters T. H. Reynolds, J. B. Lybrand and R. C. Carey shall each be allowed pay in the amount of an equal proportionate share of the total number of man-hours expended by the carmen referred to in Part (1) hereof performing the work described above."

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 Carmen, represented by the Transportation Communications International Union, received required third party notification on January 29, 1992, and responded by letter of February 2, 1992 to that notification.

The basic facts are not in dispute. On September 20, 21, and 24-28, 1990, Carrier assigned Carmen to the work of converting a trailer into a lunch and locker room, with a rest room. The work consisted of nailing down new plywood subflooring, applying vinyl tile, partitioning and building lockers. Claim was filed by the Organization on behalf of the above-mentioned Claimants on October 8, 1990. The claim was denied and subsequently processed in the usual manner.

At the outset, the Carrier notes that the Organization previously presented three similar claims on this property -- all of which the Organization withdrew before adjudication. Carrier maintains that such action establishes a precedent of failure to protest Carrier's actions, and renders the instant claim invalid under the principle of stare decisis. It is a long-established tradition, in this and other arbitral forums, that pre-arbitration settlements are not per se dispositive of similar issues, and that to so hold would serve to discourage either party from withdrawing or otherwise settling matters prior to adjudication by arbitration. Accordingly, we shall not dismiss the claim in this case.

The Organization submitted statements by numerous MofW employees support of its claim for the work at issue. The Carrier responded to those statements with assertions that they are incorrect. It did not present any evidence beyond those assertions to support its position. In Third Division Award 30064, this Board held:

"It is well established that under a Scope Rule as the one in question, the Organization has the burden of showing that the work in question has been customarily and traditionally performed by employees it represents. In this connection, the Organization submitted several statements from B&B employees...asserting that they have always done the [work at issue]... The Carrier, throughout the handling, asserted, without any documentary evidence, that the work had not been exclusively done by members of the Organization.

The Board, in weighing the competing assertions as to the past practice of others doing [the work at issue] at this location, must conclude that the Organization has satisfied its burden of proof. The employee affidavits are more worthy of consideration than the bald assertions of the Carrier. ...[Carrier] is in the unique position, as the party having made those work assignments, to show when the work was done...by other crafts."

In light of the foregoing, the Board finds that Carrier in the instant case has not carried its burden of persuasion.

With respect to remedy, Carrier notes that Claimants were fully employed during the entire period at issue including 16 1/2 hours of overtime. Accordingly, Carrier maintains that any award of monetary payment is inappropriate, since Claimants suffered no monetary damage. In a similar claim before this Board involving these Parties (Third Division Award 25813) the Board sustained a claim for payment to the affected employees. We are in agreement with the holding of the Board in Third Division Award 16430, however, that such payment must be limited to the straight time rate for the actual hours worked.

AWARD

Claim sustained.

O R D E R

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 31st day of January 1995.