

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31323
Docket No. MW-31568
96-3-93-3-568

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

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

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

- (1) The Agreement was violated when the Carrier assigned Car Shop employees to paint floors, walls, etc., on May 21, 22, 26, 27, 30 and 31, 1992 rather than assigning B&B Subdepartment employees [System File 10(12) (92)/12(92-1269 LNR)].
- (2) As a consequence of the violation referred to in Part (1) B&B Subdepartment employees J.D. Duncan, T.D. Sweeney and B.L. Keown shall each be allowed forty (40) hours' pay at their respective straight time rates of pay and twenty-four (24) hours' pay at their respective overtime rates 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.

As Third Parties in Interest, the Brotherhood of Railway Carmen - Division of TCIU and the International Brotherhood of Firemen & Oilers were advised of the pendency of this dispute. The latter filed a Submission.

The Organization contends that on May 21, 22, 26, 27, 30, and 31, 1992, Carrier violated the Agreement by utilizing "Car Shop employees" instead of B&B employees to perform painting work in the Car Shops in Howell Yard located in Evansville, Indiana.

The Carrier countered that no painting work was done on the dates claimed. The Organization then furnished a statement supposedly from a Carman who allegedly performed the work.

The "statement" reads as follows:

"The dates in question on B&B claims are correct, at the car shop. The shop people did the painting."

The above is inconclusive. If the author of the statement painted on the claim dates, he never stated that fact.

Under the circumstances this Board cannot begin to resolve the issue. The Carrier acknowledged that painting was done on May 12 by three employees outside the scope of the Maintenance of Way Agreement. The Organization contends the work was done on the dates specified in its claim.

The burden of proof rests solely upon the Petitioner. When the Carrier stated no painting work was performed on the dates claimed, the Organization had the obligation to prove that what it claimed was correct. The Organization has not sustained that burden.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of January 1996.

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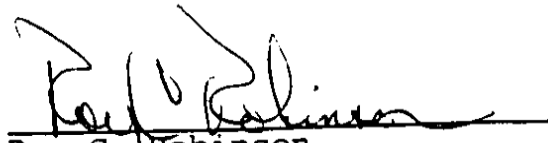
LABOR MEMBER'S DISSENT
TO
AWARD 31323, DOCKET MW-31568
(Referee Hicks)

The Organization is impelled to dissent to the Majority's findings because it is apparent that such findings are clearly erroneous which renders this award without precedential value. During the handling of this case on the property, the Carrier never denied that employees other than B&B employees performed painting work within the Car Shops at Evansville, Indiana. In this case, a dispute arose concerning how many days were consumed in the performance of the work. The Organization claimed six (6) days were involved and the Carrier alleged that only one (1) day was involved. At that point, there may have been a conflict in facts. The Organization thereafter presented a signed written statement from an employee who was named by the Organization as one of the shop employees who performed the work. At that point, the Organization had overcome the Carrier's affirmative defense concerning the number of days worked by the shop employees. Apparently, the referee was not impressed with the content of the written statement because said statement did not specifically state that the author performed the work. It appears that even if the author of the written statement had been more verbose, the referee would have found some reason to deny the claim in any event. Of course, it is not the referee's function to raise arguments for either side in these disputes. The referee's function is to read the record and decide the case based on the correspondence. A review of the correspondence exchanged between the parties reveals that the Carrier

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never took issue with the validity of the written statement submitted by the Organization in this case. Hence, inasmuch as the Carrier never disputed or took issue with the written statement, it is incredible that the referee would raise such a defense in the Carrier's stead. The outcome of this award was not based on the record developed during the handling of this dispute on the property, is of no probative value and therefore I dissent.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Roy C. Robinson", written over a horizontal line.

Roy C. Robinson
Labor Member