

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 31499  
Docket No. MW-31022  
96-3-92-3-838

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 Agreement was violated when the Carrier assigned members of the TCU to cut weeds along the right of way from Harding Place Bridge to the Bowl Crossing at Radnor Yard on the Nashville Terminal Seniority District on August 15, 1991 [System File 10(118)(91)/12(91-1426) LNR.
- (2) The Agreement was further violated when, on September 10, 1991, the Carrier assigned members of the TCU to cut weeds in and around the tracks between Kayne Avenue and the 4th Avenue Crossing and on September 11, 1991, the Carrier assigned Carmen to cut weeds in and around the tracks at the south end of C Yard at Radnor Yard, Nashville, Tennessee [System File 10(130)(91)/12(91-1593)].
- (3) As a consequence of the violation referred to in Part (1) above, Track Repairmen B. A. McBroom, A. H. Shelton, J. Gentry and J. M. Clark shall each be compensated nine (9) hours' pay at the track repairman's overtime rate or pay.
- (4) As a consequence of the violation referred to in Part (2) above, Track Repairmen J. P. Bradley, R. T. Simmons, Jr. and M. Bell, Jr. shall each be compensated sixteen (16) hours' pay at their respective overtime rate of pay and Track Repairmen C. W. Vinson and M. D. Johnson shall each be compensated eight (8) hours' pay at their respective overtime 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.

As Third Parties in Interest the Transportation Communications International Union representing Clerks, as well as the Brotherhood of Railway Carmen Division of TCU were advised of the pendency of this dispute, but chose not to file a Submission with the Board.

This dispute involves the alleged performance of weed cutting work by Clerks and Carmen on the dates noted in Parts (1) and (2) of the claim, rather than by Claimants, Track Repairmen.

The Organization contends that the work of cutting brush and weeds is reserved to its forces by virtue of clear Agreement Rules and established practice, relying upon Third Division Awards 16629, 19418, 19419, and 19873, and that the assignment of Clerks and Carmen who hold no seniority within this Agreement, violates the Agreement. The Organization argues that Carrier cannot raise the unavailability defense in this case, because it made no good faith effort to contact Claimants, and monetary relief is appropriate. The Carrier contests the truth of the allegations that Clerks and Carmen cut the weeds in issue, and argues that an irreconcilable conflict in evidence exists, which is beyond the Board's jurisdiction to resolve. The Carrier contends that the Organization failed to meet its burden of proof, similar to the claim in Third Division Award 30782.

A review of the record on the property reveals that, in support of its contest of the claim, Carrier proffered two handwritten statements from Roadmaster Reese, indicating that he neither assigned any Clerks to cut weeds, nor loaned them any tools, and knew nothing of weeds being cut by Clerks on August 15, 1991; nor had Clerks or Carmen cut weeds in any track area on September 11, 1991, but at most they cut some weeds around some buildings in their work area which could not have taken more than 30 minutes. Approximately one month before the Notice of Intent was filed with the Board, the Organization submitted copies of statements signed by six employees attesting to the fact that the September work in issue was performed by Clerks and Carmen, and a

statement signed by ten employees verifying that they personally witnessed the August 15, 1991 grass cutting by Clerks.

There appears to be no real contest in this case to the fact that brush cutting along the right-of-way is Track Department work, as alluded to in Third Division Awards 16629, 19418, 19419 and 19873. While the Carrier did contest the essential facts alleged in the claim, we are of the opinion that the Organization rebutted Roadmaster Reese's statements concerning his knowledge of what occurred on the dates in question by submission of sufficient first-hand evidence of what was seen by employees represented by the Organization. The fact that this evidence was timely submitted on the property, even if long after the conference, differentiates this case from Third Division Award 30782, which found such failure to timely submit evidence fatal to the Organization's claim, but noted that a different result may well have occurred if such evidence had been timely submitted.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that 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 23rd day of May 1996.