

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31757
Docket No. MW-30699
96-3-92-3-484**

The Third Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier used Track Supervisor W. Dorbish to direct the operation of the tie unloading work train on October 11, 1990 (System Docket MW-1915).**
- (2) The Agreement was violated when Carrier used Cleveland Seniority District Employee S. Wilk instead of Youngstown Seniority District Class 2 Machine Operator J. P. Agnew to operate the tie unloading backhoe on October 11, 1990 on the Youngstown Line between mile post 4.6 and 6.2.**
- (3) As a consequence of the violation referred to in Part (1) above, Track Foreman D. J. Tredent shall be compensated for ten (10) hours at his applicable Foreman's punitive rate of pay.**
- (4) As a consequence of the violation referred to in Part (2) above, Class 2 Machine Operator J. P. Agnew shall be compensated for ten (10) hours at his applicable Class 2 Machine Operator's punitive 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 were given due notice of hearing thereon.

On October 11, 1990, the Carrier assigned the Claimants duties other than performing work on the tie unloading gang.

On October 15, 1990, four days following the alleged violation giving rise to this claim, the Carrier assigned Claimant Agnew to fill the Gang's Machine Operator position while Claimant Tredent was assigned as the Gang's Foreman who directs the operation of the work train.

On November 12, 1990, the District Chairman submitted a time claim alleging that the Carrier improperly assigned the work of Foreman supervising the Tie Crane Unloading Gang to Supervisor Dorbish. The Organization also alleged on the claim date that the Carrier impermissibly assigned Cleveland Seniority District Class 2 Operator Wilk to operate the Tie Unloading Backhoe.

The Organization argues that the Carrier impermissibly assigned Scope Rule work to non-Agreement employee Dorbish. The Organization also argues that it need not prove exclusivity when a non-Agreement supervisor has allegedly performed bargaining unit work. The Organization also contends that the Carrier violated the Agreement when it assigned an employee from the Cleveland Seniority District to perform work in the Youngstown Seniority District. Furthermore, the Organization states that Claimant Agnew was fully qualified to operate the backhoe on the date in question since he had performed this type of work prior to his permanent assignment four days after the alleged violation date.

Finally, the Organization argues that even if the Claimants were fully employed on the claim dates, the Third Division has established a penalty payment policy wherein this Division awards damages when it can be established that a particular carrier is a repeated contract violator.

The Carrier argues that the Organization failed its burden of proving that an actual violation occurred on the claim date. The Carrier notes that the record is totally devoid of any evidence supporting the Organization's claim that a Cleveland District Operator was improperly assigned on October 11, 1990, or that Supervisor Dorbish was performing any duties other than those regularly assigned to him.

The Carrier also notes that it challenged the Organization on the property to produce evidence in support of its claim which, according to the Carrier, the Organization utterly failed to supply. The Carrier also argues that damages are not warranted in this matter since neither Claimant suffered an actual monetary loss.

This Board has fully reviewed the record and we agree with the Carrier that the Organization failed to produce any evidence on the record to support its alleged claimed violations. While the Organization raised the issue of improper assignment of work and articulately argued the case law in favor of their claim, the record is devoid of any factual evidence indicating that the Carrier improperly assigned any work on October 11, 1990 to persons not authorized to perform such work under the Agreement.

Therefore, since the Organization bears the burden of proving its claim and failed to do so, we must deny this claim.

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 24th day of October 1996.