

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32710
Docket No. MW-31265
98-3-93-3-136

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Grand Trunk Western Railroad Company (former
(Detroit, Toledo and Ironton Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Car Department forces to perform Bridge and Building Subdepartment work (paint walls and floor) in the Spot Shop, Flat Rock Yards, Flat Rock, Michigan on November 23 and 24, 1991 instead of assigning B&B Foreman R. Rudbal, B&B Helper R. Bass and furloughed B&B Helper W. Barnhart (Carrier's File 8365-1-373 DTI).
- (2) The Agreement was further violated when the Carrier assigned Car Department forces to perform Bridge and Building Subdepartment work (paint walls and floor) in the Spot Shop, Flat Rock Yards, Flat Rock, Michigan on November 25, 26 and 27, 1991 instead of assigning B&B Foremen R. Rudbal and M. Petty, B&B Assistant Foreman J. Elliott, B&B Helpers R. Bass, M. Cochenour, R. Hay and M. Chunko and furloughed B&B Helper W. Barnhart (Carrier's File 8365-1-372).
- (3) As a consequence of the violation referred to in Part (1) above, B&B Foreman R. Rudbal, B&B Helper R. Bass and furloughed B&B Helper W. Barnhart shall each be compensated for sixteen (16) hours' pay at their respective time and one-half rates.
- (4) As a consequence of the violation referred to in Part (2) above, B&B Foreman R. Rudbal, B&B Helper R. Bass and furloughed B&B Helper W. Barnhart shall each be compensated for twenty-four (24)

hours' pay at their respective straight time rates and B&B Foreman M. Petty, B&B Assistant Foreman J. Elliott and B&B Helpers M. Cochenour, R. Hay and M. Chunko shall each be compensated for sixteen (16) hours' pay at their respective straight time rates."

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.

As Third Party in Interest, the Brotherhood Railway Carmen, Division of Transportation Communications International Union was advised of the pendency of this dispute, but it chose not to file a Submission with the Board.

In November 1991, Carrier used Car Department employees to paint parts of the Spot Shop at Flat Rock, Michigan. Carrier concedes that it violated the Agreement by not using B&B Subdepartment employees to perform the work. The Organization concedes that Claimant W. Barnhart is an improper Claimant because he had been sent a notice of recall from furlough and failed to respond, thereby terminating his seniority. What is in dispute is the remedy for Carrier's violation, specifically the number of hours spent by Car Department personnel on the B&B work.

The Board is appalled by how the parties handled this dispute. Instead of engaging in good faith efforts to determine the number of hours due the Claimants, each party withheld details and cooperation and engaged in a game of "gotcha," maintaining that the other party failed to satisfy one burden or another.

Carrier responded to the claim by stating that inquiry with the Field Mechanical Officer-Car revealed that only 12 man-hours were spent on the disputed work.

Incredibly, Carrier did not provide any documentation in support of this assertion or indicate how this figure was calculated.

The Organization responded with a statement signed by seven Car Department employees attesting that they "performed B&B work on the date and hours provided in their [B&B employees'] earlier time claim." Incredibly, the statement did not specify what work was performed, on what dates, and for what duration. It did not even specify which earlier time claim the employees were referring to, as the Organization had filed two separate claims which have been consolidated in this case. Moreover, both claims claimed time for painting the Spot Shop walls, but in an accompanying statement, two of the Claimants conceded that shop walls were not painted (although they maintained that the washroom, locker room, lunchroom and floor between the time clock and shop area were painted).

Carrier responded that its review of the files revealed that "except for approximately 20 hours by two shop employees, the claims are excessive or without merit." Incredibly, Carrier provided no documentation from the files that it relied on in calculating the 20-hour figure or any detail as to how the estimate was derived, if that figure was an estimate rather than based on actual time records. Indeed, Carrier offered no statement from the Supervisors in charge of the job to support its assertions, even though it had revised its calculation upward by eight hours since its prior response.

The Organization's response was equally incredible. It contained a statement from the Local Chairman indicating that on November 22, 23, 24, 25 and 27, "the car department was observed painting the walls and floors at the Spot Shop building. . . ." The statement itemized the Car Department employees alleged to have worked on the painting job on each day and the number of hours allegedly worked by each employee. The itemization totaled 216 hours, in contrast with the original claims which totaled 200 hours. It was accompanied by a written statement signed by six of the seven Car Department employees who had signed the first statement referred to above, attesting that "we performed this work as specified dates and times, in this letter prepared by" the Local Chairman.

The Organization offered no explanation as to why it had withheld this documentation until this stage. Furthermore, it offered no explanation as to how six Car Department employees who had previously attested to working at most 200 hours subsequently attested to working 216 hours painting. Finally, it offered no explanation

as to how the newly proffered documentation could include painting the Spot Shop walls when previously two of the Claimants had conceded that the walls were not painted.

In a continuing game of legal chicken, Carrier offered to conduct a joint inspection of the area with the Organization to estimate the number of hours spent on the job. Incredibly, Carrier offered no explanation as to why such an inspection and estimate was necessary, i.e., as to why it was not proffering its time records as to how many hours were spent on the job. Equally incredibly, the Organization refused to conduct the joint inspection.

Before the Board, each party continues its game of "gotcha," with Carrier arguing that the Organization failed to prove the dates and number of hours spent on the work and the Organization arguing that Carrier failed to proffer any records to rebut the time claimed in the Organization's documentation. The Board will not be a party to these games. Carrier and the Organization shall conference this matter. Each party shall provide the other with all relevant documentation, including Carrier's time records. The parties shall jointly check the time records and shall jointly inspect the area in a good faith effort to determine the amount of compensation due the Claimants.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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 19th day of August 1998.