

Award No. 29  
Case No. 29

Public Law Board No. 2203

PARTIES  
TO  
DISPUTE:

Brotherhood of Maintenance of Way Employees  
and  
Consolidated Rail Corporation

STATEMENT  
OF  
CLAIM:

(a) The Carrier violated the Rules Agreement effective April 15, 1944, as modified September 1, 1949, January 22, 1974 and March 4, 1976, particularly Rules 1- Scope, 2- Seniority, 2-d-3 - Seniority District, 2-e-1, and others, when four (4) former Penn Central and three (3) former CRR of NJ unprotected trackmen were used on the former Lehigh Valley Railroad between Aldene and Newark, N. J. laying ribbon rail between 7:00 a.m. and 5:30 p.m. each day April 4, 5, 6, 7 and 8, 1977.

(b) As the result of such violation, Claimants R. Casey, Trackman; R. Eorio, Welder Helper, and Trackman J. Crane, J. Loughlin, J. J. Torman, G. Klein and L. Rivera be compensated in the applicable rate, for each day the violation occurred.

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FINDINGS: This claim rests on the contention that Carrier violated the Agreement of April 15, 1944, as amended, by using former Penn Central and Central Railroad of New Jersey employees to lay ribbon rail along a portion of the track between Aldene and Newark, New Jersey. In Petitioner's view, the claimants were entitled to perform the work; they were on furlough at the time.

The burden of proof rests with Petitioner to establish all essential elements of its claim. While the claim was still under discussion on the property, J. R. Walsh, Carrier's Senior Director of Labor Relations, raised the objection in writing that "no former Penn Central or Central Railroad of New Jersey M. W. employees performed work" in the territory in question on the claim dates. This objection raised an issue as to a critical point and, while it was not voiced at an earlier stage in the grievance procedure, it was not untimely since Petitioner still had a fair opportunity to explain away the point and present persuasive evidence.

However, no evidence has been introduced to support the allegations that the work in controversy was actually performed at the locations in question by ineligible employees. The fact that Mr. Walsh erroneously stated that Carrier's objection had previously been made at the initial grievance step does not

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constitute prejudicial error. Contrary to Petitioner's contention, we do not find it to be of such magnitude and so prejudicial as to require this Board to ignore Carrier's defense that there is no evidence that Pennsylvania and Central of New Jersey men performed the work. The error does not relieve Petitioner from establishing by proof, not assertion, the essential elements of the claim.

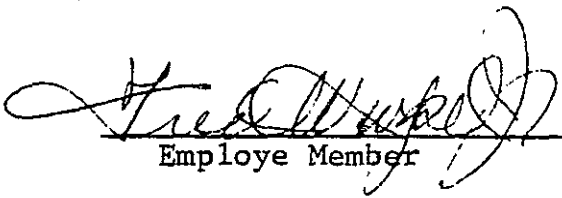
In this posture of the record, the claim must be denied.

AWARD: Claim denied.

Adopted at Philadelphia, Pa., *Sept-17,* 1979.

  
Harold M. Weston, Chairman

  
Carrier Member

  
Employee Member