PUBLIC LAW BOARD NO. 5335

AWARD NO. 3
Case No. 3

PARTIES) United Transportation Union
TO )
DISPUTE) Duluth Missabe & Iron Range Railway Company

STATEMENT OF CLAIM:

Allow 108 miles as penalty payment for the trainmen listed, account of being required to set and/or remove the End of Train Device (EOTD) when carmen were on duty and available to perform this service.
(From Organization's Submission)

FINDINGS:

Upon the whole record, after hearing, the Board finds the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law No. 89-456 and has jurisdiction of the parties and the subject matter.

This claim involves an Award of Arbitration Board No. 419, dated October 2, 1984, on this property.

Pursuant to Article X of the October 15, 1982 National Agreement between the National Carriers Conference Committee and the United Transportation Union, the Carrier sought permission to remove cabooses from certain through freight trains. Since the parties were unable to resolve this issue, Arbitrator Leverett Edwards was appointed by the National Mediation Board to serve as an arbitrator for Arbitration Board No. 419 to hear and decide the unresolved questions regarding the elimination of cabooses. The October 2, 1984 Award resolved a number of issues, including Issue 8:

"Issue 8: Who should be required to place the rear-end device?

Decision: At locations where carmen are not employed or on duty and available in the train yard, ground crew members may be required to place, move, attach or handle the rear end device to or from their own train.
Regarding the Organization's request for additional compensation for such ground crew members handling rear end devices, the authority of the Arbitrator under Article X does not include the right to grant an arbitrary or additional allowance."

The instant claims arose when Claimants, who were working on a Geneva All-Rail job, were required to set and/or remove the rear end device from their train, which is received or delivered in interchange to the Chicago & North Western in the C&NW yard at South Itasca, Wisconsin.

Petitioner, in filing its initial claim, asserted that:

"For the claims listed below, carmen were employed, on duty and available in the train yard."

The Carrier, in the August 28, 1992 letter of Director of Personnel and Labor Relations R. E. Adams, did not concur with the Organization's statement that carmen were employed, on duty and available in the train yard, when, in denying the Organization's appeal, he stated:

> "We first note that the above language doesn't prohibit ground crew members from handling the devices when Carmen are not on duty and available.
>
> However and without prejudice to the foregoing, there has been no showing that the conditions of the first paragraph were present in the case at issue. It is well established that the Petitioner is responsible to cite the relevant provision of the agreement alleged to have been violated and must prove that the Carrier's action was contrary thereto. There is no proof whatsoever in the record."

The Carrier, in denying the appeal, went on to advise of its availability to further discuss the case if the Organization so desired. However, the record does not disclose any further handling on the property by the parties.

OPINION OF THE BOARD:

The Petitioner bears the burden of proving the essential elements of its case. In the instant case, the merit of the claims hinges upon whether carmen were employed or on duty and available in the train yard at the time and place of the alleged rule violation.

The Organization, in its claim, asserted that carmen were employed or on duty and available at the time. In its submission to this Board, the Organization put forth the argument that carmen were available because ". . . the EOTD should be affixed at the time the CNW carmen perform their inspection." Carrier, during the hearing, argued that throughout the handling of this

case on the property, only DM&IR carmen were considered in determining whether carmen were employed, on-duty and available. Carrier contends that the Organization did not raise the issue of using CNW carmen to set or remove EOTD's during the handling on the property and may not raise it for the first time in its submission to this Board.

A review of all of the attachments to both the Organization's and the Carrier's submissions to this Board, involving the documentation of the handling of this case on the property, reveals no references whatsoever to Chicago & North Western employees. In addition, Carrier's submission also includes nothing regarding the use of CNW carmen to perform the disputed work.

On the basis of this record, we must conclude that the issue of whether employees of another carrier may be considered available for the handling of end-of-train devices was not properly raised and handled on the property and therefore, this Board is precluded from considering such arguments.

All essential elements of a claim, including facts, alleged rule violations, evidence and arguments supporting or disputing the validity of a claim must be presented by the parties during the handling on the property. If one party or the other withholds relevant information during the handling on the property, it serves only to thwart the dispute resolution process in contravention of the Railway Labor Act, Section 2, First and Second (General Duties).

The Organization also relies upon Public Law Board No. 4061, Award No. 24 (Criswell) and Public Law Board No. 4488, Award No. 18 (Moore), in support of its contention that train crews (as opposed to yard crews) have been relieved from the duty or responsibility to handle rear-end markers. Both of the above referenced awards involve interpretation of Award No. 1 of Arbitration Board 419 (Norfolk and Western Railway Company and United Transportation Union). It should be noted that the designation of Arbitration Board No. 419 was given to numerous separate boards established to arbitrate issues involving the elimination of cabooses from some assignments. The pertinent provision of the N&W-UTU award of Arbitration Board No. 419 reads, as follows:

> "The placement or movement of rear end devices should not be the duty or responsibility of a train crew. However, from a practical standpoint, there may be locations and times when there are no other personnel reasonably available to handle the device.
>
> * * *

"There will be occasions when a train crew member must handle the device as he would handle knuckles or any other equipment necessary to facilitate and expedite the general movement of the train."
(excerpted from Award 18 of Public Law Board No. 4488)

The Board notes that the above language is materially different from the language included in the award of Arbitration Board 419 on this property. Under the circumstances, the Organization's reliance upon the above-referred-to awards is mis-placed.

While the Organization has asserted that carmen were employed or on-duty and available at the time of the alleged rule violation, Carrier, on the other hand, has disputed such assertion. It is well established that a mere assertion does not constitute proof, particularly when the assertion has been disputed by the other party. In such cases, it is incumbent upon the moving party to bring forth and present evidence to support its assertion during the handling on the property. The record presented to this Board is void of any evidence which shows that carmen were, in fact, employed, on-duty and available in the yard at South Itasca, Wisconsin at the time claimants were required to place their own end-of-train device on their own train at that location prior to their departure.

In Award No. 1 of Public Law Board No. 5206 (Referee Melberg), involving the same parties, it was held:

"Accordingly, we find the Organization has failed to sustain its burden of proving the claim has merit."

In Award No. 3 of the same board, it was held:

"During the handling of the claim on the property, the Carrier's Superintendent advised the Organization as follows:

'The Company's position is that the claimant did not perform work on Dock #5. The Claimant performed service on the lead to Dock #5. Currently, Hill Ore and Proctor Yard crews operate in this area with restrictions on the Dock proper only. Please advise if you concur.'

"The Organization did not respond to the Superintendent's statement, and there has been no clarification of the matter before this Board.

"The Organization has the burden of proof, and it has

failed to establish all essential elements of its case."

Also, in Award No. 4 of that Board it was held:

> "The burden of proof rests with the Organization, not the Carrier. In the face of the Carrier's defenses, it is up to the Organization to overcome those defenses with competent evidence. The Organization's allegations are not the equivalent of proof . . . ."

Finally, in Case No. 489 of Special Board of Adjustment No. 910 (UTU v. Conrail), the Board, in considering a claim of train crew members for handling their Rear End Marker Device, held:

> "The claim will be denied. This award underlines the importance of presenting essential evidence, a not unreasonable or over technical requirement where such evidence could be readily available and is not exclusively within the knowledge and expertise of Carrier."

Based upon all of the above, the Board finds that the Organization has not met its burden of proof in this case, and the claims will be denied.

AWARD: Claims denied.

R. E. Adams, Carrier Member

Bruce Wigent, Organization Member

John F. Hennecke, Chairman and Neutral

Dated: July 19, 1993