

Award No. 35  
Case No. 35

Public Law Board No. 2203

PARTIES  
TO  
DISPUTE:

Brotherhood of Maintenance of Way Employees  
and  
Consolidated Rail Corporation

STATEMENT  
OF  
CLAIM:

(a) Carrier violated the Rules Agreement effective April 15, 1944, as amended September 1, 1949, January 22, 1974 and March 4, 1976, particularly Rules 1-Scope, 2-Seniority, 2-d-3-Seniority Districts, 2-e-1 and others, as well as the conditions of Public Law 93-236, when, on March 30, 1977, former Penn Central Railroad Foreman Frank Martins was used to gauge track no. 12, Hays, East End, Oak Island, N. J., from 11 a.m. to 3:30 p.m.

(b) As the result of such violation Trackman John Blanding be compensated one day's pay at the applicable rate.

FINDINGS:

It is Petitioner's position that claimant should

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have been used instead of Frank Martins, a former Penn Central employe, to perform the work in question on the former Lehigh Valley Railroad. Claimant had been furloughed from his position on the Lehigh Valley Railroad and was in furlough status on the claim date.

The parties' March 4, 1976 Agreement permitted Carrier (pending the completion of a single collective bargaining agreement that would cover the employes of the recently acquired Penn Central and Lehigh Valley) "to assign any employee to perform work of his class and craft at any location on any other former railroad." However, Section 3 of that Agreement barred any such assignment that "would result in any protected employee being deprived of employment"; it stipulated that "No unprotected employee shall be assigned...if there are furloughed employes in the seniority district involved."

The critical question is whether claimant was a "protected" employe at the time the claim arose.

During the time the claim was discussed on the property, Carrier unambiguously insisted that claimant, unlike Martins, was not a protected employe. Nevertheless, Petitioner took no issue with that point before the claim was processed from the property and to this Board.

Although Petitioner's representatives quite rightly objected to the untimeliness of a number of Carrier's contentions made subsequent to the hearing of this case by our

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Board, it still remains that Carrier clearly mentioned on the property that claimant lacked "protected employee" status and Petitioner did not effectively refute or explain that point away. In accordance with elementary Adjustment Board principles, it was too late for Petitioner to raise the issue for the first time after the case had reached the Board.

There is no evidence that Carrier violated the Act of 1973, PLB 93-236.

AWARD: Claim denied.

Adopted at Philadelphia, Pa., *January 11,* 1980.



Harold M. Weston, Chairman



Carrier Member



Employee Member