

PROCEEDINGS BEFORE PUBLIC LAW BOARD NO. 3781

AWARD NO. 37

Case No. 76

Referee Fred Blackwell

Carrier Member: R. O'Neill

Labor Member: W. E. LaRue

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

CONSOLIDATED RAIL CORPORATION

STATEMENT OF CLAIM:

Claim of the Brotherhood (CR-1983) that:

- (a) The Carrier has violated Rules 3, 4, and 11 of the Schedule Agreement, as amended, when it failed to assign Class 1 Operator K. R. Sindoni to operate the torsion beam tamper but instead assigned Track Foreman T. B. Adams to perform these services, commencing March 15 through 20, 1985, except relief days of March 16, 17, 23, and 24.
- (b) Claimant K. R. Sindoni shall be compensated at the Class 1 Machine Operator's straight-time rate of pay for 88 hours, plus 8 hours pay at the punitive rate of pay and one month of Traveler's insurance premium.

FINDINGS:

Upon the whole record and all the evidence, after September 23, 1988 hearing in Washington, D. C., the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter.

OPINION

This claim arises on the basis of allegations of Class 1 Machine Operator Sindoni that he should have been recalled from

furlough to operate the Torsion Beam Tamper No. 5057 between M.P. 290 - 257 on the Carrier's Southern Tier Division in the period March 15 - 30, 1985, and that instead, the Carrier assigned the regular Track Foreman headquartered at Elmira, New York, Mr. T. B. Adams, to operate the Torsion Beam Tamper. The Carrier's action is alleged to have violated Rules 3, 4, and 11 of the Schedule Agreement.

Compensation for lost wages is requested for each of the days on which Track Foreman Adams operated the Torsion Beam Tamper, together with one month's insurance premium.

The Carrier asserts that the assignment of Track Foreman Adams to operate the Torsion Beam Tamper was less than four (4) hours on each of the claim dates, which was permissible under Rule 19, and that on this basis the claim should be denied.

The Carrier's assertion about the operation of the Torsion Beam Tamper by Track Foreman Adams is reflected in the Division Engineer's April 22, 1985 letter which states in pertinent part:

"Mr. Adams, Track Foreman, (also a qualified Class 1 Operator) operated a torsion beam on a casual basis, less than four hours a day, on the dates mentioned in the foregoing. Our payroll records indicate that Mr. Adams was paid the Track Foreman's rate during the dates of the alleged violation."

Thereafter, by letter dated by January 8, 1986, the Organization requested verification of the Carrier's statement about

the disputed work:

"The Carrier has admitted that Mr. Adams performed work on the Torsion Beam on each of the dates claimed. The remaining issue is how long each day did Mr. Adams perform service on this machine? The Organization contends that such information is solely in the possession of the Carrier and it must establish by probative evidence that the claims as presented is without merit. Therefore, the Organization requests the following information from the Carrier: a copy of the dispatcher's log showing the amount of time the track between MP 290 and MP 257 was out of service due to the operation of MW equipment. The Organization contends that this information will prove that Mr. Adams operated the Torsion Beam over four (4) hours per day."

The Carrier did not provide information indicating the amount of Track Foreman Adams' operation of the Torsion Beam Tamper on each of the claim dates.

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After due study of the record as a whole, inclusive of the submissions presented by the parties in support of their positions in the case, the Board concludes and finds that the claim is meritorious and that a sustaining award for lost wages is in order.

The confronting Agreement does not afford discovery proceedings to the petitioning party, and normally there is no obligation on the Carrier to provide information which tends to prove a controverted claim. However, the Carrier's response to the in-

stant claim, namely that, Foreman Adams operated the Torsion Beam Tamper less than four (4) hours daily, constituted an affirmative defense to the claim. Such a defense, if not challenged by the adversary party, becomes the accepted fact of the case. Here, though, the Organization challenged the verity of the affirmative defense and demanded proof in the form of the Dispatcher's log showing the amount of time the track between Mile Posts 290 and 257 was out of service due to the operation of Maintenance of Way equipment.

The Carrier did not provide the demanded proof, and, under traditional principles of assessment of evidence concerning controverted facts, an adverse inference against the Carrier's position arises from such failure to produce the demanded proof. Therefore, the Carrier's affirmative defense is not established factually and the claim will be sustained.

In view of the foregoing, and based on the record as a whole, the claim will be sustained as previously indicated.

**AWARD:**

The Carrier shall within thirty (30) days pay the Claimant the compensation requested in his claim.

The claim for the amount of the Claimant's insurance premium during the claim period, is denied.

BY ORDER OF PUBLIC LAW BOARD NO. 3781.

Fred Blackwell

Fred Blackwell, Neutral Member

R. O'Neill

R. O'Neill, Carrier Member

W. E. LaRue

W. E. LaRue, Labor Member

Executed on July 10, 1989

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