Award No. 7
Docket No. 7

PUBLIC LAW BOARD NO. 76

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

Roy R. Ray, Referee

STATEMENT OF CLAIM:

1. The Carrier violated the effective Agreement by permitting Bridge and Building Foreman, Mr. C. C. Smith and the Assistant Superintendent Mr. Turner, without compensation, to erect a partition and install a door opening in the Trainmaster's Office in the Smithville Yard Office, at Smithville, Texas, on October 11 and 12, 1966.

2. Bridge and Building employes, J. H. Moore, J. D. Hewatt, L. J. Jennings and L. M. Drake, each be now compensated 12 hours' pay at their respective pro rata rates account of the work opportunity lost to them by this referred to violation of the Agreement.

OPINION OF THE BOARD: On October 11 and 12, 1966, B & B Foreman C. C. Smith and Trainmaster Turner constructed a wooden partition with door opening in the Trainmaster's office in Smithville, Texas. Smith was a personal friend of Turner and assisted him in the performance of the work as an accommodation to Turner. The work was not authorized by any officer of the Company's Engineering Department, and no materials belonging to the railroad were used in its performance. The work was performed by Messrs. Smith and Turner after regular working hours on their own time.

The Organization contends that the work involved here was overtime work which should have been assigned to the four B & B mechanics in a gang normally supervised by Smith; that these men were available for the work and that the failure to assign it to them was a violation of the seniority provisions of the Agreement.

Carrier takes the position that the Seniority rules do not of themselves contract to any employee an exclusive right to the performance of any work; and says that the Organization has failed to point to any one of the seniority rules which was violated. Furthermore, Carrier asserts that the work in question was not Company work; that the men who performed it had nothing to do with the assignment of work in Carrier's Engineering Department; that they did the work without any authority and without the knowledge of Carrier that it had been performed.

The burden of proof is upon the Organization to show that work belonging to the employes was performed by others. This it has failed to do. A careful reading of all the seniority provisions fails to reveal any rule which was violated by the Company. None of these rules purports to cover work or to grant to employes holding seniority an exclusive right to the performance of work. The Organization has not shown that the employes have any exclusive right to the work in question. Furthermore, there is no evidence that any one of the claimants here has been damaged by the performance of the work involved. There is nothing to show that this work would have been performed on overtime hours had the Company authorized it.

Perhaps the strongest reason against the present claim is that the Carrier did not assign the present work to Messrs. Smith and Turner. It was not directed or permitted by the Company but was in fact performed without Carrier's knowledge. Under these circumstances it was not Company work and the Company cannot be held to have violated the Agreement merely because two employees did it on their own time. Award 13803 of the Third Division is in point here. Referee Weston said:

> The claim is Carrier 'allowed or directed' an electrician to remove and attempt to repair a light fixture in the Wildwood (New Jersey) Station. Carrier rejected the claim on the grounds that the work complained of was performed without it knowledge or authorization.

There is no evidence that the disputed work was assigned to the electrician or expressly or impliedly authorized by Carrier or performed by him under such conditions that Carrier knew, or should have known, that he was doing it. Under the circumstances, and since we have been referred to no awards that hold to the contrary, we will follow the principle laid down in Awards 9847, 10549 and 12907 and deny the claim.

For the reasons expressed we hold that the claim is without merit.

AWARD

The claim is denied.

Public Law Board No. 76

Roy R. Ray
Neutral Member and Chairman

A. J. Cunningham
Employe Member

A. F. Winkel
Carrier Member

Dallas, Texas
June 19, 1968