

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25973
Docket No. 45895
04-1-02-1-W-1476

The First Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE: (
(Canadian National Railway/Wisconsin Central Division

STATEMENT OF CLAIM:

“Claim of Engineer David Cook, dated May 18, 2002, for a Basic Day account Wisconsin Central Division/Canadian National diverted work covenanted to the BLE Collective Bargaining Agreement to an engineer not part of our collective bargaining unit when it used a Metra crew to move a train (used in Emergency Preparedness Training) from Antioch, IL to the JW Allen industry siding at Wheeling, IL.”

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Metra operates weekday commuter rail service from Antioch, Illinois, into Chicago. The portion of the line between Antioch and Forest Park, Illinois, over which Metra operates its commuter trains is owned and operated by the Carrier.

The Carrier asserts that Metra's operation over that portion of the line is achieved by a trackage rights Agreement between the Carrier and Metra that has been in effect since 1995 and Metra's commuter trains are staffed by Metra and not the Carrier's employees.

On May 18, 2002, Metra operated a non-scheduled service consisting of a Metra locomotive and coaches from the Antioch facility to an industry siding near Wheeling, Illinois, (on the Carrier's line) for the purpose of conducting emergency preparedness training. The train was crewed by a Metra Engineer. On that date, the Claimant was the Carrier's first out Engineer from the Extra Board at Schiller Park, Illinois. The claim was filed seeking one basic day's pay with the Organization asserting that the operation of the Metra train on that date was not scheduled Metra commuter service covered by the trackage rights Agreement, but was covered by the Carrier's agreement with the Organization and the Claimant should have been used to operate the train.

On the property, the Carrier maintained that the particular usage was covered by the trackage rights Agreement between the Carrier and Metra. As shown by the Organization's September 4, 2002 letter, the Organization argued:

"... the trackage rights agreement [between the Carrier and Metra] . . . permits only revenue passenger service. You never took exception to this, nor did you produce the trackage rights agreement...."

The Carrier responded by letter dated September 8, 2002:

"... It is our view that the claim of Mr. Cook relates to a movement performed by Metra's crews in order to assure emergency preparedness of their crews. They are required by law to do this under 49 CFR. As they are required by their contract with us to comply with all laws, their performance of this work is in accordance with their contract with us."

Although requested during the handling on the property, the Carrier did not provide the Organization a copy of its trackage rights Agreement with Metra. The Carrier did attach a copy of that Agreement to its Submission to the Board.

This record, therefore, shows that the Carrier relied upon an Agreement it had with Metra as a defense to the claim; although requested, the Carrier did not provide the Organization with a copy of that Agreement; and, in making its arguments to the Board, submitted a copy of that Agreement. Those facts require a sustaining of this particular claim.

The Carrier cannot rely upon an Agreement as a defense to a claim and decline to produce a requested copy of that agreement. See Third Division Award 28430 involving the failure of a carrier to produce on the property a lease Agreement it contended supported its position (and quoting Third Division Award 28229):

"Third Division Awards 20895 and 19623 are controlling. The Carrier's defense to the Claim was to rely upon the terms of the lease between it and Amtrak. However, although requested by the Organization, the Carrier failed to produce a copy of that lease. Under Awards 20895 and 19623, having failed to produce the lease in support of its defense, the Carrier's position cannot prevail.

* * *

The fact that the Carrier attached the Lease to its Submission does not change the result. Submitting the Lease in such a fashion is a request for this Board to consider new material not handled on the property. It is well established that we are unable to now consider that material. See Award 20895, *supra*:

"It is noted that Carrier with its rebuttal argument before this Board submitted a copy of a lease agreement with the Elevator Company dated April 13, 1973. Such evidence cannot be considered since it is well established doctrine that new evidence which was not presented during the handling of the dispute on the property may not be considered by this Board."

On that limited basis - the failure to produce the trackage rights Agreement as requested - the claim will therefore be sustained. Had the Carrier produced the trackage rights Agreement as requested, perhaps the Organization would have been

persuaded as to the validity of the Carrier's position and this dispute would not have been progressed to the Board.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 10th day of March 2004.