

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 32331
Docket No. MW-31995
97-3-94-3-242

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Union Pacific Federation employees, who do not hold seniority on the former Missouri Pacific Railroad, to perform routine work which should flow to Missouri Pacific employees, beginning October 26, 1992 and continuing (Carrier's File 930212 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, the Kansas Division employees* listed below shall each be allowed pay at their respective straight time, time and one-half and double time rates for an equal proportionate share of the total number of man-hours expended by the Union Pacific Federation employees in the performance of the work claimed beginning October 26, 1992 and continuing until the violation ceases.

*J. L. Jasper
J. D. Brown
R. W. Higginbotham
L. R. Furman
R. L. Byerley
J. E. Bieker
R. Clinton
T. L. Jordan

W. Brockman, Jr.
D. E. Watson
T. G. Peters
M. Raigosa
O. L. Clinkscale
E. Davis, Jr.
J. C. Thompkins
O. E. Shaeffer

W. T. Everette
R. E. Rosbia
J. T. Martinez
R. F. Conrad

L. D. Scheideman
R. R. Charles
R. A. Herrman
C. W. Coons"

FINDINGS:

The Third 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.

This dispute concerns the Carrier's assignment of Union Pacific Organization members employed on System Gangs 9082 and 9092 to perform track maintenance work on the Missouri Pacific Kansas Division, rather than Claimants, who hold seniority on that Division. The record reflects that Carrier bulletined 13 vacancies for Gang 4103 on the Kansas Division (two drivers, two track foremen, nine machine operators) on October 2, 1992, with closing dates of October 12, 1992, and that it received an insufficient number of bids to fill the gang. Initially it claimed it received four bids, and later five bids, and ultimately in its Submission claimed that six bids were received. In any case, it determined that additional people were needed to perform the surfacing work on the western end of the Hoisington Subdivision. It contacted the Organization verbally and indicated that it intended to use UP Federation System Gang employees to perform this work, which was to be completed prior to the end of the program season.

It appears that the work commenced on around October 26, 1992. By letter dated November 13, 1992, Carrier confirmed its arrangement with the General Chairman as follows:

"This has reference to our previous conversations concerning the Carrier being desirous of utilizing Maintenance of Way employes currently assigned

to Systems Gangs 9082 and 9092 to perform surfacing work on the western end of the Hoisington Subdivision between MP 615.00 and MP 668.00. Positions had previously been bid to MP employees holding seniority on the territory and the Carrier only received five (5) bids. Additionally, the seniority roster has been exhausted, and therefore there should be no employee with Kansas Division seniority in a furloughed status who would incur a loss of work opportunity.

The Carrier is attempting to complete the work prior to the end of the program season. System Gangs 9082 and 9092 are represented by the BMW's UP Federation. In the event of furlough, employees holding seniority on the Missouri Pacific's Kansas Division will be allowed to displace onto the gang on position to which qualified.

Any questions, please contact me."

The instant claim was filed on December 22 and was amended to include additional Claimants on December 28, 1992. The Organization argues that this is a seniority district case, and a long line of cases on this property indicates that Carrier cannot assign employees from another district to perform work routinely done by employees with seniority on the district without violating the seniority provisions of the Agreement, mandating monetary relief regardless of whether Claimants were fully employed. See Third Division Awards 10125, 24576, 28852, 29205, 29313, 30076, 30408, 30409, 31228, 31292, 31569, 31570.

The Organization notes that it never agreed with Carrier's position expressed to it in writing some three weeks after it commenced the work assignment in issue, and contends that the fact that the job was bulletined does not justify permitted foreign Federation employees to trespass into another's territory. The Organization states that Carrier has failed to show that it could not reschedule this work, Claimants' regular assignment or perform the work in question on an overtime basis. It objects to consideration of arguments made for the first time in Carrier's Submission concerning the reasons why this work was performed at that time and Carrier's contention that this was a contracting out case and a temporary transfer.

Carrier initially contends that the filing of the amendment to the claim was untimely, since it was past the 60 day deadline, and that the claim is not a continuing one, citing Second Division Awards 7843 and 8891. It next argues that the Organization failed

to meet its burden of specifying the elements of the alleged violation as well as failing to meet its burden of proving that a violation of the seniority rules took place, asserting that mere allegations are insufficient. See Third Division Awards 26033, 27851, 27895; Second Division Award 9895.

For the first time in its Submission, Carrier urges the Board to consider this as a contracting out case, rather than a seniority district case, since two different railroads are involved, rather than employees from two different seniority districts on the same railroad. Carrier contends that it was within its rights to contract out this work, but chose instead to keep employees represented by the Organization employed by temporarily transferring them for less than 30 working days to perform this work which needed to be done before winter freeze only after establishing that no employee with seniority in the Division was interested in the work. Carrier also claims that it could not schedule the work earlier due to other projects, full employment and full utilization of its equipment prior to that time. These arguments were not made on the property. Aside from arguing the full employment defense, relying on Third Division Awards 29033, 29677, 31720, 31285, Carrier states that it would be unjust enrichment to provide monetary relief to employees who were given the opportunity to perform the work by bulletin but indicated an unwillingness to do so.

Initially we note that it would be inappropriate for us to consider facts and arguments not made by either side on the property, and we have declined to do so herein. The Board has considered all of the evidence properly presented on the property and concludes that the Organization has sustained its burden of proving that Carrier violated Rule 2 in assigning employees holding no seniority on the Missouri Pacific Kansas Division to perform surfacing work on the Hoisington Subdivision between October 26 and December 12, 1992 rather than utilizing Claimants who maintained seniority in that district. The fact that this case involves two different railroads rather than employees on two different districts of the same railroad cannot change this result. See Third Division Award 10125. There was no evidence presented by Carrier to demonstrate the existence of an "emergency" and/or a bona fide "transfer" of a gang from one seniority district to another, see Third Division Award 30076, nor to substantiate its belated claim that the work had to be performed at that time and that Claimants could not have otherwise been reassigned.

This Board is cognizant of the fact that arbitral precedent on this property establishes the payment of a monetary remedy for violations of Seniority District Rules despite the fact that Claimants may have been fully employed. See Third Division

Awards 30408, 31228, 31292, 31569, 31570. We find no reason to depart from that precedent in this case despite the fact that Carrier bulletined these positions prior to commencing work and Claimants failed to apply, and Carrier notified the Organization of its intentions in writing on November 13, 1992 and it failed to object until the instant claim was filed. Absent proof that the work in issue had to have been performed at the time designated by Carrier in this case or that the Organization agreed to the procedure adopted, these factors cannot deny relief to those suffering a loss of work opportunity as a result of a violation of district seniority.

In so finding, we do not negate Carrier's apparent good motives in choosing to act as it did in this case, but are bound by the lack of proof that the exigencies of the situation required it to do so. Due to the nature of the violation found herein, the December 28, 1992 amendment to the claim was proper without retroactivity beyond the 60 day time limit. Third Division Award 28524. Claimants in each classification (drivers, track foremen and machine operators) are to share equally in the proportionate number of hours worked by non-Kansas Division employees in such classifications on a straight time basis.

AWARD

Claim sustained in accordance with the Findings.

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 Third Division

Dated at Chicago, Illinois, this 13th day of November 1997.