Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32421
Docket No. MW-32144
98-3-94-3-508

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

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned Louisiana Division employes (B&B Gang 1218) to perform bridge work (building forms, pouring and finishing concrete and routine maintenance) on the Saline River Bridge in the vicinity of Benton, Arkansas beginning July 27, 1993 and continuing (Carrier's File 930702 MPR).

(2) As a consequence of the violation referred to in Part (1) above, Arkansas Division B&B employes B. L. Davis, B. R. Crutcher, J. W. Wallace, C. J. Beasley, G. R. Jameson and F. P. McDougal shall each be allowed pay, at their respective time and one-half rates, for all hours worked by Louisiana Division B&B Gang 1218 on July 27, 1993 and continuing until this violation ceases."

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.

On the dates covered by the claim, the Carrier utilized Louisiana Division B&B employees to perform work on the Arkansas Division. The Organization asserts that the work consisted of repairing a walkway on the Saline River Bridge in the vicinity of Benton, Arkansas; concrete work within the North Little Rock Terminal; and replacing and shimming bridge ties on the Barring Cross Bridge. Examination of the correspondence exchanged on the property shows that the Carrier defended the work assignments asserting that repairs to a footwalk on the bridge in question were done under emergency conditions; no overtime was used; the work was not scope covered; Claimants were working during the time covered by the claim and suffered no monetary losses; and the claim was not sufficiently specific.

This claim will be sustained.

First, this Board can only consider arguments raised on the property.

Second, the work described is covered by the scope of the Agreement.

Third, the claim is sufficiently precise to put the Carrier on notice of the specifics of the dispute and the relief sought.

Fourth, between the parties, similar use of employees across seniority districts has been found violative of the seniority provisions of the Agreement. See Third Division Awards 10125 (". . . when it elected to use Maintenance of Way Welders [the Carrier] was under a contractual obligation to respect the seniority rights of the claimants. . . ."); 24576 (". . . the Carrier violated Rule 2 of the Agreement, which confines the Claimants' seniority rights to their assigned seniority district"); 28852 ("Rule 2(a) clearly confines seniority to seniority districts"); 29205 (". . . under Rule 2 of the Agreement, seniority rights are confined to assigned seniority districts"); 29313 (a ". . . mistake in the assignment in question: using employees from one Division to perform work on another Division when qualified employees were available"); 30076 (". . . the work at issue was performed within the Claimants' seniority district. . . .").

Fifth, it is well-established that in emergency situations the Carrier has latitude to use its discretion in the assignment of forces. Third Division Award 32420 and Awards cited therein. However, the Carrier has the burden of demonstrating the existence of the claimed emergency. See Third Division Award 30076, supra ("No more than Carrier can we escape the authoritative effect of the previous Awards which have, through arbitral gloss, established a burden upon the Carrier to demonstrate the existence of an 'emergency' and/or a bona fide 'transfer' of a gang from one seniority district to another"). Nothing developed on the property demonstrates sufficient with the Carrier's burden that the work in question (e.g., repair of a walkway, concrete work, replacing and shimming bridge ties) was performed as a result of an emergency.

Sixth, on the property, the Carrier asserted that even assuming a violation occurred, no monetary relief was in order because Claimants were working on the days in question and there was "no harm - no foul." In this case, we disagree. As a result of the Carrier's violation of the Agreement, Claimants lost work opportunities. To not compensate Claimants for those lost work opportunities would allow the Carrier to benefit from its violation of the Agreement. Under the Carrier's rationale, the Carrier could reduce the number of employees on the Arkansas Division to next to nothing; freely utilize employees from other divisions on the Arkansas Division in violation of the Agreement; and then assert that it is not required to pay for its violation because all of the employees on the Arkansas Division were working. The result would be an emasculation of the seniority provisions of the Agreement and the previously decided Awards. In this case, the "harm" from the Carrier's failure to adhere to the terms of the Agreement was the clear loss of work opportunities for the employees on the Arkansas Division. The function of a remedy for a demonstrated Agreement violation is to make adversely affected employees whole. Affirmative relief shall therefore be required in this case to remedy the loss of work opportunities. The number of hours worked by the Louisiana Division employees on the dates covered by the claim shall be apportioned to Claimants. Claimants shall be made whole at the appropriate Agreement rate (i.e., punitive or pro rata) commensurate with the resulting total number of hours demonstrated by their respective records for the time covered by the claim.

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 21st day of January 1998.