Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 29054
THIRD DIVISION Docket No. MW-28473
91-3-88-3-273

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company
(Former Missouri-Kansas-Texas Railroad Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned District No. 3 employe H. Gandy instead of furloughed District No. 4 employe S. Shelton to work on District No. 4 from February 2 to March 2, 1987 (System File 300-28).

(2) As a consequence of the aforesaid violation, Mr. S. Shelton shall be compensated for all wage loss suffered beginning February 2, 1987 up to but not including March 2, 1987."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

The facts are as follows. Commencing January 19, 1987, the Carrier recalled six employees in Seniority District No. 4. Two of the six senior furloughed Maintenance of Way employees--M. W. Heard and C. R. Pennington--were given return-to-service physicals on January 27, 1987, and February 2, 1987, respectively. Subsequently, on February 17, 1987, the Carrier's Medical Director disapproved Mr. Heard and on February 27, 1987, Mr. Pennington was disapproved for return-to-service. At about this same time the Carrier assigned employees from Seniority District No. 3 to work on Seniority District No. 4. One of those employees was Mr. Harris Gandy. Because of the failure of Heard and Pennington to pass their physicals, the Claimant was notified to return to service, by first taking a physical examination for return to service. He did this on February 23, 1987. The Medical Director approved Claimant for return to service on February 28, 1987; Claimant was notified that he had passed the physical and returned to work on March 2, 1987.

The Organization's basic argument is that Rule 3 (which sets forth that seniority is restricted to the districts enumerated in the Rule) in combination with the recall rule prohibited the Carrier from assigning work to a District No. 3 employee. They should have recalled the Claimant. They also contend that there was no operational requirement which justifies assigning District 4 work to a District No. 3 employee. The Carrier knew that there were vacancies to be filled as early as January 19, 1987. Moreover, they maintain that no past practice existed which permitted the Carrier to disregard Agreement Rules.

The Carrier at the outset raises a time limit issue. Regarding the merits, the Carrier notes that had Heard and Pennington successfully passed the return-to-service physicals, Claimant Shelton would not have been recalled. Thus, the Claimant had no recall rights over those senior to him prior to February 17, 1987. He was recalled on February 23 and approved for service on February 28, 1987. In this regard, the Carrier notes that the Organization claimed that it shouldn't have taken so long to disapprove Heard and Pennington. However, the Carrier argues that there is no Rule governing the timing of this process. Moreover, there was a reasonable explanation for the delay. In any event, the Carrier alleges that there is a past practice of using off-district employees pending recall of on-district employees.

First, the Board must discuss the Carrier's time limit contention. We note that it was not handled on the property and cannot be considered. Regarding the merits, their claim of past practice is not sufficiently supported in the record to justify ignoring the clear and unambiguous seniority Rules. Indeed the concept of district seniority rights has been at the center of this Organization's contention from the beginning, regardless of whether the particular rule was cited. Clearly an employee is restricted to their own seniority district and should not work on another employee's seniority district unless justified by emergency or unusual circumstances. These circumstances do not exist in this case.

The other aspect of the Carrier's case is its arguments that the Grievant had no recall rights over Heard and Pennington until they failed their physicals. The Board takes this as an argument which, in effect, states that Mr. Shelton is not a proper claimant since he was not in line for recall and subsequent return to service until the point in time that he did.

The Board views this as a misplaced argument. The issue isn't the seniority standing of the Claimant relative to Pennington or Heard. The issue is the relative seniority rights between the Claimant and Gandy. Gandy had no seniority rights to work on District No. 4 and the Claimant did. The timing of the recall is even irrelevant. Plainly, the Claimant was ultimately recalled and when he returned to service, there was less work available because Gandy was used off his seniority district. The use of Gandy clearly damaged the Claimant and caused him to lose earnings.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of November 1991.