

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 29743  
Docket No. MW-29657  
93-3-90-3-662

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman 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 effective September 18, 1989, the Carrier recalled and assigned Trackman L. W. Weis to District Tie Gang No. 9162 instead of allowing him to remain on Division Gang No. 4137 (Carrier's File 900075 MPR).
- (2) As a consequence of the aforesaid violation, Mr. L. W. Weis shall be allowed:

'\*\*\* travel time at the punitive rate of pay and mileage twice a week for traveling between Gang #4137, and Gang #9162. Also, actual and necessary expenses. This claim is to begin on September 18, 1989 and continue until the Claimant is allowed to return to his proper assignment as Trackman on Gang #4137 without loss of District Seniority.'"

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 employe within the meaning of the Railway Labor Act 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.

Claimant has established and holds seniority as a Trackman. Prior to the time this dispute arose, the Claimant's position on the District Tie Gang was abolished. Subsequent to depleting his seniority on the Trackman roster for District Tie Gang employees, Claimant filled a Division Trackman's position. At the time of this dispute, the Claimant was regularly assigned to Division Crossing Gang 4137.

On August 22, 1989, Carrier's office of Personnel Services notified Claimant as follows:

"IN ACCORDANCE WITH THE PROVISIONS OF THE SCHEDULE AGREEMENT BETWEEN THE UNION PACIFIC RAILROAD AND YOUR RESPECTIVE ORGANIZATION, YOU ARE HEREBY RECALLED TO SERVICE AS TRACKMAN HEADQUARTERS: O/L ST. LOUIS, MO, GANG 9162, EFFECTIVE: 08-21-89. THE STARTING TIME IS 0730A.M.

AS PER YOUR AGREEMENT, YOU HAVE 007 CALENDAR/WORKING) DAYS TO REPORT UPON RECEIPT OF THIS LETTER, AND YOUR FAILURE TO DO SO WILL RESULT IN THE LOSS OF YOUR SENIORITY.

YOU SHOULD QUICKLY CONTACT MY OFFICE TO ADVISE OF YOUR INTENTIONS AT TELEPHONE NUMBER 1-800-877-1010. ANY QUESTIONS CONCERNING YOUR RECALL SHOULD LIKEWISE BE DIRECTED TO THE ABOVE NUMBER.

YOU SHOULD ALSO CONTACT THIS OFFICE, IN ORDER TO DETERMINE IF YOU WILL REQUIRE A PHYSICAL EXAMINATION, IN ACCORDANCE WITH SECTION III, 1(D) OF THE GENERAL RULES, CONTAINED IN FORM 2501, 'PHYSICAL EXAMINATION RULES'.

B. A. YORK - DIRECTOR OF NPS  
1416 DODGE STREET - BB BLDG  
OMAHA, NEBRASKA 68179"

On August 29, 1989, Claimant informed the Carrier that he would report to Gang 9162 on September 18, 1989, which he subsequently did.

On October 18, 1989, Claimant submitted the following Request for Time Claim or Grievance:

"I was permanently assigned to Gang 4137, a Crossing Gang working around Lee's Summit at

the time, when I received a certified letter on the 28th of August. This letter force assigned me to District Tie Gang 9162. On August 29th I called Sharon Young and informed her I would report to Gang 9162 in 20 days. I contend since I was assigned permanently as a Trackman on Gang 4137 I should not have been forced assigned as a Trackman to another job.

Had it not been for the threat of losing my district rights I would have stayed on Gang 4137 because of it being closer to my residence. I am therefor claiming for mileage and for the clarification between the Carrier and Union on the Agreement concerning the classification of a Trackman, if District Trackman is higher than Division Trackman and System Trackman is higher than both District and division Trackman. Or, if in fact as I believe, a Trackman is just a Trackman without any degree of difference."

The Organization filed a claim on behalf of Claimant on October 24, 1989, in which it stated:

"We are hereby filing Claim and grievance on behalf of L. W. WEIS, Trackman SS#514 72 2468, currently assigned to Western District Tie Gang #9162. This claim for travel time at the punitive rate of pay and mileage twice a week for traveling between Gang #4137, and Gang #9162. Also, actual and necessary expenses. This claim is to begin on September 18, 1989 and continue until the Claimant is allowed to return to his proper assignment as Trackman on Gang #4137 without loss of District Seniority.

On August 28, 1989 the Claimant received a certified letter of recall from B. A. YORK, Director of NPS, (see enclosed copy), directing him to report to District Tie Gang #9162 as Trackman. As you an see it also explains that failure to report would result in the loss of District Seniority.

The Claimant was assigned as Trackman on Division Gang #4137 when he received the letter of recall. Rather than jeopardize his

District Seniority the Claimant notified GMS that he would report to the District gang on September 18, 1989, which he did.

Please be referred to paragraph 4. of the Memorandum of Agreement dated March 19, 1981, which outlines the procedure to follow when filling vacancies on the District Tie Gang. Please note the final sentence:

IF, AFTER FOLLOWING THE PROCEDURE PROVIDED IN THIS ARTICLE 4 NO BIDS ARE RECEIVED FROM QUALIFIED EMPLOYEES, THE BULLETIN ADVERTISING THE VACANCY OR NEW POSITION WILL BE EITHER CANCELLED OR FILLED PURSUANT TO THE PROVISIONS OF RULE 11, PARAGRAPH (B) OF THE BASIC AGREEMENT BETWEEN THE PARTIES.

There is nothing vague and ambiguous contained in Rule 11 paragraph (b). It quite explicitly describes the process by which jobs are to be filled by reason of no bids from qualified employees. Basically the three steps are as follows:

1. Appointment of the senior UNASSIGNED EMPLOYE in that classification.
2. Appointment of the senior qualified employe, from the next lower classification.
3. The hiring of a new employe, in that order.

Therefore we contend that inasmuch as the Claimant was properly assigned as Trackman on Gang #4137, and not furloughed or unassigned, that the Carrier was in violation of our Working Agreement. Especially Rule 11 BULLETIN paragraph (b)."

The March 19, 1981 Memorandum of Agreement reads in pertinent part as follows:

"The purpose of this Agreement is to establish District Tie Gangs on the Carrier's Western, Southern-Texas, and Eastern Districts.

IT IS AGREED \* \* \*

2. The gangs will be established by advertisement bulletins to all classifications listed above having seniority on the district where the gangs are to be established. Successful applicants will retain all seniority rights established in other classes, and will, effective on the date of their assignment, established District Tie Gang Seniority.
3. If the gang complement is not filled pursuant to Article 2, then newly employed men will be assigned and they will acquire a seniority date on the District Tie Gang on the day their pay starts in the class for which hired. It is understood that men newly hired for a higher classification will acquire the same seniority date for all lower ranking positions on the District Tie Gang of the same classification. They also will establish seniority in the same classification on the Division designated by the employee at the time of employment.
4. After the initial establishment of the District Tie Gangs pursuant to Articles 2 and 3, a separate seniority roster will be compiled for each District and thereafter all new positions and/or vacancies will be first bulletined to employees on the respective gangs of that District. If not filled, then the position(s) will be bulletined to the District pursuant to Article 2 above. If, after following the procedure provided in this Article 4 no bids are received from qualified employees, the bulletin advertising the vacancy or new position will be either cancelled or filled pursuant to the provisions of Rule 11, paragraph (b) of the Basic Agreement between the parties.
5. It is understood that employees will be required to exhaust all seniority in their classification on the District Tie Gangs before being permitted to return to a position on their division.

Employees holding District seniority prior to the effective date of this agreement will retain that seniority separate and apart from this agreement and will not forfeit that seniority as a result of the operation of section 5 of this agreement.

6. (a) It is recognized by MoPac that costs of travelling from home to the work site have increased. In order to defray that cost, MoPac will pay each employee assigned to the gang a travel allowance of Two Dollars (2.00) for each day that he fulfills his assignment during the month. Employees who are worked ten (10) hours per day pursuant to Memorandum of Agreement of August 1, 1974 will be paid the travel allowance on the basis of five eight-hour days per week. If an employee does not work on a ten (10) hour day, he will not be paid travel allowance for one and one-fourth (1-1/4) basic days."

In addition, the Organization maintained that the Carrier had violated the following Agreement provisions:

"SENIORITY RIGHTS:

Rule 2. (a) Except as otherwise provided in these rules, seniority rights of employees to new positions or vacancies (sic), or in the exercise of their seniority, 'will be confined to the seniority district as they are constituted on the effective date of this Agreement.'

\* \* \*

- (f) Employees entitled to exercise seniority rights over junior regular assigned employees must designate exercise of such rights within twenty (20) calendar days following their displacement, or their return to service, \*\*\* employees who fail to exercise displacement rights within the twenty (20) calendar days specified herein, shall forfeit their right to displace a regular assigned employee and shall take their place on the furloughed list with preference to work over junior employees thereon, and will be subject to assignment to bulletined positions in line with their seniority.

- (g) Foremen, mechanics, helpers, and employees of like rank in other departments who are subject to the provisions of this agreement, after having exhausted their rights in the class in which employed, shall have the right to drop back to the next lower classification in line with their seniority in that classification. To be entitled to drop back to the next lower classification and retain seniority in the higher classification the employee must have exhausted displacement rights over junior employees in the higher classification if qualified for the position held by the junior employee (an employee may not disqualify himself), otherwise if he exercises seniority in a lower classification he will forfeit seniority in the higher classification. Employees who regain seniority in a higher classification under this rule and who are occupying a position in a lower classification will be subject to assignment by bulletin per Rule 11 to positions in the highest classification available in line with their seniority, and failing to respond to notice of assignment within seven calendar days will forfeit seniority in the higher classification.
- (h) An employee who returns to a lower classification and retains seniority in a higher classification as provided in paragraph (g) of this rule may if he so desires waive right to work extra or temporary vacancies other than assignment by bulletin per Rule 11 to temporary vacancies bulletined as such by filing written notice with the carrier officers authorized to issue bulletins and assignments in all seniority districts where seniority rights are held with copies to the local chairman. However, they may after an elapse of 30 days after such waiver countermand this waiver with another letter stating they desire to be used for such extra or temporary work. Employees who do not waive their right to 'such extra or temporary work' or who countermand such waiver must report when called and the same shall be considered an exercise of seniority. Employees called for extra work as required

herin must report promptly, due consideration to be given to the time necessary to travel if not at the work location. If unavoidably detained he will be required to notify his employing officer by phone or wire with advice as to the day he will report.

\* \* \*

BULLETIN

Rule 11. \*\*\*

\* \* \*

- (b) When vacancies bulletined under this rule are not filled by reason of no bids from qualified employees, the position will be filled by ((1) appointment of the senior unassigned employee in that classification, (2) appointment of the senior qualified employee, from the next lower classification or (3) the hiring of a new employee, in that order. When a position is thus filled it will be done by assignment bulletin in the same manner as is done when it is filled with an employee bidding on same in response to a bulletin. The assignment bulletin will show that such assignment is being made by reason of no bids having been received and the employee so assigned if he does not already have seniority in that seniority district will establish seniority in the classification embracing the position to which he is assigned dating from the date his pay starts on such position. This in no way affects the rights of the carrier or the employees insofar as filling temporary vacancies and filling vacancies pending expiration of bulletin as provided in these rules.'

LEAVE OF ABSENCE; RETURN FROM LEAVE  
OF ABSENCE OR ABSENCE ACCOUNT  
SICKNESS:

Rule 5. \*\*\*

- (d) Employees who are granted formal leaves as provided herein and who do not report on or before the first work day following the termination of their leave of absence will lose their seniority, except in case the employee furnishes satisfactory evidence that he was un avoidably delayed. When returning absence from any cause such employee will be to notify his employing officer not later than the end of the work day prior to the day he expects to go to work."

By letter of December 8, 1989, the Carrier denied the Claim. In its denial, the Carrier cited Rule 8 (Expenses) of June 3, 1982 Memorandum of Agreement between the Parties. That Rule reads as follows:

"Rule 8. Employees accepting a position, in the exercise of their seniority rights will do so without causing extra expense to the railroad."

Subsequent correspondence and a conference between the parties held on May 2, 1990, failed to resolve the dispute. It is now properly before this Board for resolution.

The Carrier has defined its position as three (3) issues:

- "(1) Does the employee holding seniority in a like classification on another seniority roster (Tie Gang) have to protect these seniority rights or forfeit same?
- (2) Does the employee accepting the position voluntarily now entitle him to some sort of compensation?
- (3) Has the Organization satisfied their burden of proof in showing that the Agreement was somehow violated?"

The Carrier asserts that the March 19, 1981 Memorandum of Agreement, as quoted above, states "unambiguously" that if an employee bids into or is displaced back to a Division seniority

position when his seniority is still "usable" on the District, that employee would forfeit his seniority on the District Tie Gang Rosters. Therefore, according to the Carrier, the Claimant was not "forced" to change gangs but rather was "exercising his options" in accordance with Agreement rules.

The Carrier further submits that the Claimant was "the senior unassigned employee in that classification" in that the claimant had seniority in the classification of a Trackman on the District Tie Gang and, therefore, was assigned in accordance with the terms of Rule 11 (b).

The Carrier cites Rule 8 as quoted above relative to the expenses the Claimant has incurred as a result of "voluntarily" accepting the position with Gang 9162.

Finally, the Carrier asserts that the Organization "never substantiated a violation of the Agreement and therefore did not meet their burden of proof."

The Organization asserts that there are seven circumstances under which an employee may forfeit his seniority besides action under the Discipline Rule. These controlling Rules are 2(d), (g), (j) and 5 (d) as quoted above. The Organization maintains that none of these circumstances is comparable to those in which the Claimant found himself upon receipt of Carrier's correspondence of August 22, 1989.

The Organization further points to Rule 11 (b) which "clearly and unambiguously" stipulates how positions are to be filled. According to the Organization, the "essence" of the Carrier's contention that the Claimant was "unassigned" because the Claimant was not assigned to a District Tie Gang is "erroneous." According to the Organization, the Carrier's interpretation would translate into the notion that the Claimant would be considered on furlough because his assignment to the Division Gang would not "count." The Organization maintains that if the Parties had intended this restriction, "we would have so stated."

The Organization further asserts that the Carrier's reliance on Article 5 of the March 19, 1981 Memorandum Agreement reflects a "strained and erroneous interpretation of the rule," According to the Organization, Article 5 does not imply that there is a requirement that an employee return to a District Tie Gang position in the event that one becomes available after he moves into a Division position.

Finally, the Organization contends that the Claimant was "forced to abandon" his regularly assigned position by the

Carrier's "threat" to his seniority, and that Claimant did not "voluntarily make such a choice." The Organization submits that Claimant was merely "obeying now and grieving later." Therefore, the Organization asserts that the Claimant is entitled to be reimbursed for the expense incurred to him as a result of this forced transfer from Gang 4137 to Gang 9162.

The basic dispute in this issue centers upon the term "unassigned" in Rule 11 (b). The Carrier has asserted that because a position became available in the Claimant's District and he was the senior unassigned employee, it properly recalled the Claimant and that he "voluntarily" exercised his option in accordance with the Agreement provisions. Having made his choice, and "voluntarily" switching gangs, the Carrier then relies on Rule 8 with relation to the Organization's demand for travel and expense reimbursement.

The Organization submits that the Claimant was not "unassigned" in that he was regularly assigned to Gang 4137 having previously exhausted his District options. Therefore, the Claimant was "forced" to accept the position on Gang 9162 or face the loss of his seniority. Because the Claimant was forced rather than volunteering for the position, the Organization asserts that Claimant should be reimbursed any expenses which were incurred by the Claimant.

A careful review of the Agreement provisions upon which the Parties relied, particularly Rule 11 (b), fails to support the premise that the Parties meant to use the term "unassigned" as the Carrier has construed it. Claimant was not unassigned or furloughed, but was, in fact, working regularly on a Division Gang position; having exhausted his District seniority options.

It is also apparent from the record before us, that Claimant followed the generally accepted labor/management maxim of "obeying now and grieving later." The Carrier's implication that Claimant "voluntarily" could have remained where he was and "taken his chances" is discredited by Carrier's own notice to Claimant of his reassignment. The coercive tone of Carrier's notice clearly removed any voluntarism from Claimant's decision to obey that notice.

Rule 8 clearly applies only to voluntary acceptance of a position, and not to a "forced" acceptance under the threat of loss of one's seniority rights. Notwithstanding, the Organization has failed to present a rationale for assessment of punitive damages.

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Accordingly, the Carrier is directed to pay Claimant travel time and mileage twice a week for traveling between Gang No. 4137 and Gang No. 9162 at the rate stipulated in the Agreement from September 18, 1989, until such time as Claimant is returned to Gang No. 4137, or until Claimant would have been furloughed from Gang No. 4137, or until he voluntarily bid into another position, or until Claimant's position on Gang 4137 was filled by an employee senior to the Claimant.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest: Nancy J. Dever  
Nancy J. Dever, Secretary to the Board

Dated at Chicago, Illinois, this 12th day of August 1993.