Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30408
Docket No. MW-29744
94-3-91-3-95

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(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 Eastern Division surfacing gang employes M. K. Schlesselman and C. A. Clinton instead of Kansas City Terminal employes to perform surface correction work in the Kansas City Terminal on November 15, 1989 (Carrier's Files 900177 and 900178 MPR)

(2) As a consequence of the aforesaid violation, Kansas City Terminal Machine Operators R. T. Kirby and J. E. Everette shall each be allowed eight (8) hours at their respective straight time rates and eight (8) hours at their respective time and one-half rates of pay."

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 waived right of appearance at hearing thereon.

On November 15, 1989, the Carrier assigned two employees holding seniority on the Eastern Division to perform track surfacing work within the boundaries of the Kansas City Terminal, which is outside the district in which they hold seniority. On December 11, 1989, a Claim was initiated on behalf of an employee holding Kansas City Terminal seniority for eight hours straight time pay and eight hours pay at the punitive rate, contending that the work was improperly assigned to employees not holding the appropriate seniority standing. On the same date, another Claim was initiated on behalf of another employee in identical fashion.

Both Claims were separately progressed through the claim handling procedure. When these matters were submitted to the Board for resolution, the Organization combined the two Claims as shown above in the Statement of Claim. There is no indication that concurrence of the Carrier was sought on this consolidation. On this basis, the Carrier argues that the claim as presented must be dismissed, since it is at variance with both Claims progressed on the property.

As a general rule, the unilateral consolidation of Claims is contrary to Board procedure. Here, however, the Board finds the Carrier's objection without substance or purpose. As clearly stated in both original Claims, a single incident is at issue. The Carrier was fully aware of this as the Claims were progressed. The Claims are otherwise timely and in proper form, and the Carrier is placed at no disadvantage in its presentation to the Board. If there were any distinction between the circumstances of the two Claimants, the Carrier was at liberty to so advise the Board. In this particular setting, the Board concludes the matter should be considered on its merits, although this does not serve as a precedent in any manner as to the propriety of unilaterally combining Claims for presentation to the Board.

Rule 2(a) states as follows:

> "Except as otherwise provided in these rules, seniority rights of employes to new positions or vacancies, 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."

As found in innumerable previous Awards, this Rule provides the right of employees to work performed within their own seniority district, except where other Rules provide to the contrary. It is the Carrier's position that Rule 6(a) is such an exception. Rule 6(a) states:

"Employes or gangs temporarily transferred by direction of the management, from one seniority district to another, will retain their seniority rights on the district from which transferred."

The Carrier contends that "[t]his language allows the Carrier to temporarily work employees off of their seniority district;" in other words, according to the Carrier, employees may be assigned temporarily outside their seniority district at the Carrier's discretion and, to this degree, Rule 2(a) is modified.

The Board does not agree with this interpretation. Rule 6(a) concerns primarily the retention of seniority by employees who are temporarily transferred. This implies, of course, that there are circumstances where the temporary transfer of employees to another seniority district may occur. It does not, however, provide the sweeping right of assigning work within a seniority district to those not holding seniority rights therein. This was confirmed in Third Division Award 30076, involving the same parties, which stated as follows:

"The record persuasively demonstrates that the work at issue was performed within the Claimants' seniority district and was work normally performed by them. The limited reach of Rule 6 to overcome the Claimants' right to such work is well established by previous arbitral Awards involving the same issue with the same Parties. See Third Division Awards 28852, 29205. We find nothing in this record that would substantially distinguish it from either of these Awards.

There is an interrelationship between Rules 2 and 6 in which the Seniority rule usually has supremacy, as laid down in Awards 29025 and 28852. 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. In our considered judgement, Carrier has failed in this case, as in Awards 29205 and 28852, to meet that burden of persuasion. We cannot conclude that these prior decisions are palpably erroneous, nor can we find any compelling distinction which would produce a different result."

In defense of its position, the Carrier cites Special Board of Adjustment 279, Award 228, which involved work by employees outside their seniority district. That Award, referencing Rule 6(a), stated:

> "The Carrier who denied the claim has stated and maintained:
>
> > '. . . Any work that was performed by these employes was of an emergency nature and in line with past practice.'
>
> Such contention remained uncontested. The Employees never attempted to present any evidence to dispute that."

The Board does not find this Award of as broad an application as the Carrier would contend. The Award dealt with an uncontested "emergency". As to past practice in general, none was cited in the referenced Award, and no support of such practice was set forth here.

The Claim is also not defeated by the fact that the Claimants were otherwise at work on the date in question. The Carrier's action represented a loss of work to employees in the Kansas City Terminal seniority district, and a monetary remedy is thus appropriate.

The Carrier also contends that the remedy of eight hours straight time pay and eight hours premium pay is excessive, but the Carrier does not indicate specifically in what manner it is excessive. If the Carrier can present documentation to the Organization that the two employees from the Eastern Division each worked less than the claimed hours, the remedy is appropriately reduced to such extent. If such documentation is not provided, the Claim is sustained as presented.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

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 8th day of August 1994.