Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31292
Docket No. MW-31752
95-3-94-3-13

The Third Division consisted of the regular members and in addition Referee Robert L. Hicks 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 employees from the Missouri-Kansas-Texas Railroad Company to perform undercutting work between the bowl and crest at the Centennial Yard beginning October 12, 1992 and continuing (Carrier's File 930105 MPR).

(2) As a consequence of the violation referred to in Part (1) above, furloughed Red River Division and Texas District Tie Gang employees, M.T. Mueller, R.L. Gilyard, G. Bolyard, D.H. Slovak, D.A. Slovak, J.G. Milton and R.E. Minter shall each be allowed pay, at their appropriate rates of pay, for all time expended by the Missouri-Kansas-Texas Railroad Company employees in the performance of work accruing to Missouri Pacific Railroad Company forces during the period in question."

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.

The Organization's claim is that the Carrier assigned three gangs (off the old Katy) who had no seniority rights on the "*** Red River Division and Texas District tie gang territory to perform work thereon. ***"

The Carrier never denied the above facts, but rather argues each Claimant was already working and thus was unavailable to do the work done by the Katy gangs and that there exists no basis for awarding monetary damages under these circumstances.

This alleged violation occurred on the old Missouri Pacific property. Overlooked by the Carrier are Third Division Awards 10125, 24576, 28852, 29205, 29313, 30076. Each involved the Organization and the Missouri Pacific Railroad Company either when it was a separate entity or after it had been taken over by Carrier. Each Award involved using employees across seniority district lines. Each claim was sustained either in total or in part, and the in part was in reference to the monetary portion.

In Third Division Award 10125, the Board awarded only straight time compensation to the Claimant's. In Award 24576, the Board awarded time and one-half payments, but excluded what was argued as duplicate payments. In Award 28852, although the claim was for straight time and overtime hours, the Board eliminated only what would have been duplicate claims. In Awards 29205 and 29313, Claimants were furloughed and each was kept whole, which included straight time and overtime pay. In Award 30076, two of the three Claimants were on duty and under pay yet their claims were sustained in full.

In this dispute there is no argument raised by the Carrier of duplicate payments, nor is there an argument raised on the property as to Carrier's right pursuant to Rule 6 to temporarily transfer employees across seniority district lines until the Submission to the Board, which is too late.

Under the circumstances described and argued on the property, the claim is sustained.

AWARD

Claim sustained.

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 19th day of January 1996.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 31292, DOCKET MW-31752
(Referee Hicks)

The Board correctly found that the Agreement was violated when the Carrier assigned employes from the MKT to perform work on the Red River Division of the Missouri Pacific. This finding was not difficult to make inasmuch as the Carrier freely admitted that it had assigned employes from the MKT to perform work on the Red River Division of the Missouri Pacific. Moreover, this referee was aided by the authority of this Board in Awards 10125, 24576, 28852, 29205, 29313 and 30076, cited within the Organization's submission, which consistently held that this Carrier cannot unilaterally move employes across seniority district boundaries. With that said, the Organization must take issue with the Majority's comments in the penultimate paragraph of the award, which reads:

> "In this dispute there is no argument raised by the Carrier of duplicate payments, nor is there an argument raised on the property ***as to Carrier's right pursuant to Rule 6 to temporarily transfer employees across seniority district lines until the Submission to the Board, which is too late.***" (Emphasis added)

There are two (2) errors in the referee's statement cited above. First, the issue of whether the Carrier can ***unilaterally*** assign employes across seniority district boundaries under Rule 6 has been decided on this property. In each case which resulted in the findings of Awards 10125, 24576, 28852, 29205, 29313 and 30076, the Carrier attempted to convince this Board that Rule 6 allowed it

the unilateral right to move employes across seniority district boundaries. In each case, the Board has determined that Rule 6 cannot be used to abrogate Rule 2 which reserves work within seniority districts to employes holding seniority therein. Moreover, within the Organization's submission to the Board in this case, the pertinent provisions of Award 28852 were quoted and read:

> "There is no dispute in this record that the Carrier utilized Kansas Division employees for work between June 22 and June 26, 1987, on the Central Division. The Organization argues that the work accrued to the Central Division employees under Rules 1 and 2 of the Agreement. ***
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> * * *
>
> Therefore the Organization argues that Kansas Division employees should not have been used. Opportunities for overtime or the recall of furloughed Central Division employees should have occurred.
>
> The Carrier defends its action under authority of Rule 6(a). That Rule states:
>
> > 'Employes or gangs temporarily transferred by direction of management, from one seniority district to another will retain their seniority rights on the district from which transferred.'
>
> The record demonstrates that this was the Carrier's position discussed in correspondence and confirmed in conference.
>
> Rule 2(a) clearly confines seniority to seniority districts. The record supports that Central and Kansas are two separate districts. In response to the Carrier's October 12, 1987, defense that the employees were working in accordance with Rule 6(a), the Organization stated:

> "'Inasmuch as this work was on the Central Division, employes off the Kansas Division should not have been allowed to perform same. If employees can move back and forth from one division to another, what purpose does a seniority roster serve? This was apparently not an emergency situation, therefore, furloughed employes should have been recalled or at least the Central employees should have been given the opportunity to work any overtime.'

This is a response to the Carrier's Rule 6(a) defense. ***While not explicitly stating Rule 6(a), it is clear that the Organization was denying the right of the Carrier to transfer employees under Rule 6(a) and supersede Rule 2(a) on seniority.*** The Carrier never indicated it was an emergency at any point, including the claims conference where the parties discussed and the Organization rejected the Carrier's argument of a temporary transfer. Further study of the record finds no probative evidence that the employees were temporarily transferred, but only that 'the men of the Kansas Division have been working behind the undercutter for five working days which is in accordance with Rule 6(a) Transfer and Temporary Service.'

We have given serious study to the record and find that the seniority rights are 'confined' to the seniority districts (Third Division Awards 24576, 25964). Kansas Division employees had no demonstrable rights in these instant circumstances to work on the Central Division. We are in agreement with Third Division Award 25964 which stated:

> 'The Carrier further cites Rule 6 and 7, involving transfers on a temporary or permanent basis from one Seniority District to another. Whatever the application of such Rules, there is no showing that such is intended to contravene Rule 2. In any event, the incident here under review was not shown to be a "transfer" in any sense.'

We find the Carrier violated Rule 2 of the Agreement. The Carrier has argued that the Claim is excessive and duplicated in another instance. Certainly, the Carrier is not required to pay duplicative claims. We sustain this instant Claim upon the facts herein presented."

A review of the above-cited award reveals that the Carrier's attempted citation of Rule 6 as authority to unilaterally assign employes across seniority district boundaries has been conclusively and decidedly addressed by this Board. Hence, the Carrier's Rule 6 argument, whether or not it was raised on the property, has been found by this Board to be lacking.

Second, even if Rule 6 had any application to this dispute, which the Board has consistently held that it does not, it would only apply to situations where Missouri Pacific employes were moved from one seniority district to another. In the case decided by this award, the Carrier assigned MKT employes to work on the Missouri Pacific property. The MKT employes are covered by a different collective bargaining agreement than the Missouri Pacific employes. Hence, Rule 6 would not apply in any event.

In conclusion, it is clear that this Board has determined that the Carrier's attempt to use Rule 6 as authority to move employes across seniority district boundaries has been consistently eschewed by this Board. We concur with the Majority's findings insofar as the bottom line is concerned; however, we are troubled by the referee's wandering onto ground that has already been sown with

prior decisions of this Board concerning the application of Rule 6.

To that end, I respectfully dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member