

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31320
Docket No. MW-31914
96-3-94-3-248

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(St. Louis Southwestern Railway Company

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

- (1) The Agreement was violated when the Carrier assigned Bridgeman J. M. Turman to work with B&B Gang 4102 (operating Tie Handler No. 12300304) installing ties on the Sabine River Bridge at Mile Post 527.54 beginning January 11, 1993 and continuing, instead of assigning furloughed Machine Operator R. L. Johnson thereto (System File MW-93-9CB/MW 93-57).
- (2) As a consequence of the violation referred to in Part (1) above, furloughed Machine Operator R. L. Johnson shall be allowed compensation for '... 230 hours at Tie Handler straight time rate of pay and any overtime at rate and one half pay on a continuing basis ...' beginning January 11, 1993."

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.

Beginning January 11, 1993, Carrier assigned an employee who did not hold seniority in the Roadway Machine Sub-department to work with B&B Gang 4102 operating a Tie Handler No. 12300304 installing bridge ties on the Sabine River Bridge at Mile Post 527.54. Claimant, a furloughed Machine Operator holding seniority in the Roadway Machine Sub-department, was qualified and available to operate the machine, but was not recalled for the work. A claim was filed on his behalf seeking compensation equal to the time the employee without seniority in the Roadway Machine Sub-department worked on the project.

Carrier defended its use of an employee not holding seniority in the Roadway Machine Sub-department on a variety of grounds. It disputed the evidence and argument of the Organization that by historical past practice employees with Roadway Machine Sub-department seniority had always done such work. For the first time in its Submission it also argued that the dispute is frivolous, and interjected an exclusivity argument under the application of the parties' Scope Rule.

Each of these arguments, as well as others advanced on the property, are found not to be persuasive. The Organization's evidence on past practice (characterized by Carrier only as self-serving, but otherwise not really rebutted in adequate detail) is sufficient to demonstrate that an historical practice existed, under which employees holding seniority in the Roadway Machine Sub-department had been used to operate Tie Handlers to do the work of the type involved in this claim.

The Board need not address the new "frivolous" argument of Carrier, except to note that "frivolous" is subjective, and surely the Claimant who could have performed over one month's work on the project did not consider the lost work opportunity as frivolous.

With regard to Carrier's exclusivity argument, it should be noted that the dispute was not argued on the property as an application of the Scope Rule. Rather it was argued as one involving the application of the Seniority Rules. Article 2 (c) of the Agreement provides:

"(c) Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service as hereinafter provided."

Under the application of this Rule, Claimant possessed entitlement to do the work, in preference to an employee that did not hold seniority in the Roadway Machine Sub-department. The claim is supported by the Agreement.

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 25th day of January 1996.