

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32394
Docket No. MW-30725
97-3-92-3-515**

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Red River Division Welding Gang 2359 to perform welding work between Mile Posts 7 and 112 on the Palestine Division beginning March 1 through 26, 1991 (Carrier's File 910472 MPR).**
- (2) The Agreement was further violated when the Carrier assigned Red River Division Welding Gangs 2359 and 2361 to perform welding work between Mile Posts 13.75 and 127 (Gang 2359) and between Mile Posts 0 and 120 (Gang 2361) beginning February 8 through 28, 1991 (Carrier's File 910469).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Palestine Division Welders D. Finley, J. W. Sayon and Welder Helper J. A. Watson shall each be allowed pay for an equal proportionate share of the total number of man-hours expended by the Red River Division employees while they were working on the Palestine Division."**

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 were given due notice of hearing thereon.

The dispute at bar involves two consolidated claims. In both, the Organization alleges violation of the Agreement in that the Carrier permitted employees without district seniority to cross over and perform work on another district for which there was no provision permitting such intrusion. In the first case, the Organization submitted a claim dated April 30, 1991 for violation of Rules 1 and 2, in that the Red River Division Gang 2359 performed work on the Trinity Subdivision of the Palestine Division, March 1 through March 26, 1991. In the second case, the Organization filed claim on April 9, 1991 for all time worked by Red River Division Gangs 2359 and 2361 on the Palestine Division February 8 through 28, 1991. In both claims the Organization included the relevant information about the type of work, who performed it, where it was performed and the names of the Claimants it argued had lost work opportunity.

The Carrier denied this claim arguing both procedural issues and merits. The Carrier maintained in both cases that the Organization violated Rule 12 of the Agreement which states in pertinent part:

"All claims or grievances must be presented in writing ... within 60 days from the date of the occurrence on which the claim or grievance is based."

The Carrier asserts that these claims were brought long after the incidences occurred. On property, the Carrier noted that the April 30, 1991 claim "had begun prior to March 1, 1991" and in the April 9, 1991 claim, the Gangs had been working on the Claimant's territory since February 1, 1991. As both claims were filed past the 60 days allotted by Rule 12, they were procedurally defective. The Carrier also asserts that the Organization altered the original claim by changing the name of an employee who performed work, making that aspect procedurally defective.

On the merits, the Carrier argues that it properly bulletined Welder positions on the Trinity Subdivision. The Claimants could have and chose not to bid on those positions. In fact, no one bid on the bulletined positions. Therefore, in accordance with Rule 6 the Carrier transferred employees from one seniority district to another. The Carrier argues that its actions have Agreement and Award support. The Carrier maintains that the Organization has failed in its burden of proof and further that the monetary claim is clearly excessive and without support. The Claimants could have bid the job and done the work, but chose not to and now want a penalty payment for work they could have performed. The Carrier argues that the Claimants were fully assigned and lost no pay.

The parties have provided numerous Awards dealing with the above issues in this type of dispute. The Board is aware of the critical importance of the procedural issues, as well as the applicability of Rule 6 and the seniority rights of the employees. All the pertinent Rules and submitted Awards have been thoroughly considered before arriving at this Board's conclusion.

First, there is no procedural violation whatsoever. Rule 12 of the Agreement does not apply to a continuing claim. This is not a case where the Carrier was involved in a singular act with continuing liability. This is an alleged seniority district violation which is unmistakably an action which is repeated on more than one occasion. The Board finds Rule 12, Section 2(a) inapplicable and Section 2(d) permitting retroactive protection for 60 days prior to filing on point with this dispute. As for the arguments of "altered" claim and of improperly combining claims, they have no merit. The typographical error is not critical and these claims are nearly identical.

On the merits, the Board has spent some time reading Rule 6 and understanding its applicability. We find no evidence at bar to permit the use of Rule 6 in these instant circumstances to circumvent Rule 2 or any other Rule of the Agreement. Rule 2(a) confines seniority rights to seniority districts. Here, the Organization has provided definitive proof that the Carrier moved employees off their assigned territory, ignored district boundaries and utilized those employees to perform work on the Claimants' territory. This violates the Agreement. The Carrier's defenses fail. There is no evidence in this record that the Carrier attempted to utilize these Claimants or that it had any emergency reason for its action. It did not, and the claim must be sustained.

While the Carrier asserts that the remedy requested is excessive, the Board finds no support for such arguments. The fact that the position was bulletined on the district where the work took place and no one, including the Claimants bid, does not provide authority to violate the Claimants' seniority rights. The fact that the Claimants had permanent positions and lost no pay does not mean that they did not lose work opportunity. In fact, they did. Accordingly, this claim is sustained in full (Third Division Awards 30408, 31228, 31570).

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 30th day of December 1997.