

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32399
Docket No. MW-32105
97-3-94-3-506**

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
(CSX Transportation, Inc. (former Three Rivers
(Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned CSX Curve Patch Gang employees to perform track maintenance work on the Three Rivers East Seniority District, at CP 0 to CP 17 and CP 15M to CO 41M, which is on Three Rivers Railway Company property beginning July 6 through August 5, 1993.**
- (2) As a consequence of the violation referred to in Part (1) above, Foreman W. Mayfield, Class A Operators F. Hone, T. Mattie, L. Stillio, M. Gayiyas, M. Hixenbaugh, M. Stasik, L. Silvestre and Trackmen F. Kenny, J. Brown, E. Keffer, T. Pierce, R. Monsour, W. Davis, J. Orlando, T. Vansickle and D. Ingram shall each be allowed pay, at their respective straight time and time and one-half rates, for an equal proportionate share of the total man-hours expended by the CSX Curve Patch Gang forces in the performance of the work 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 were given due notice of hearing thereon.

Beginning July 6 and continuing through August 5, 1993, the Organization alleges that CSX employees from a System Production Gang (Curve Patch Gang) were utilized on the Three Rivers East District in violation of the September 1992 Three Rivers Agreement and the System Production Gang (SPG) Agreement. The Organization maintains that under the various provisions and Agreements, the work performed on Three Rivers East property by CSX and Three Rivers West employees was improper, never advertized to the Three Rivers employees, and therefore violated their seniority rights.

The Carrier argues that it operated with full Agreement support. It did not advertise the positions to the Three Rivers employees as Agreements permitted its action. The Carrier points to Paragraph 7(e) of the August 28, 1992 Agreement allowing the use of CSXT System Production Gangs on Three Rivers Property beginning in 1993.

As in many disputes argued to the Board, there are layers of issues brought before us for consideration. The Board notes that whatever procedural issues may exist, neither party sought to argue them on the property, but raised them in their Submissions and argument. Herein, after consideration of procedure and with particular reference to the fact that the claim was filed on August 30, 1993 and the evidence indicating that the proper Carrier officer to file claims "effective immediately" is September 3, 1993, the Board finds no procedural error.

However, on the merits the Board finds again that in studying the on-property record in comparison to the Submissions and strong argument of the advocates before us, we can find little correlation. On-property arguments were confined to arguments over the rights of CSXT System Production Gangs during the 1993 production season to work on the Three Rivers East District. Before the Board the issues in the

Submissions and argument center on the validity of Agreements. We find absolutely nothing on the property to even implicitly center the dispute, put the parties on notice, or join such issues as signatures or Agreement validity in an unadjusted dispute.

The Board has fully reviewed the evidence and notes particularly the Carrier's letter of July 20, 1994. The Carrier made numerous assertions which the Organization never refuted. The Board finds particularly disconcerting that at no time while this dispute was on the property did the Organization ever raise the central issues it now wishes this Board to adopt as the focus of its ruling. Even though the Carrier provided numerous opportunities for a direct joining of the issue, the Organization made no assertions that raised this dispute to a level of the validity of Agreements. As example, the Carrier in its July letter stated:

"As previously pointed out, the Paragraph 7.e. of the August 28, 1992 Agreement, specifically provided for the utilization of CSXT System Production Gangs on Three Rivers Commencing with the 1993 production season."

The Board finds nowhere on the property where the Organization refutes that statement. Section 7(e) states that the Organization agreed "to participate in the CSXT System Production Gang Arbitrated Agreement ... subject to the Agreement of the other involved BMW General Chairman." Nowhere on the property did the Organization ever deny applicability or state it was subject to agreement and they did not agree. The Board finds no statement referencing Paragraph 7(a) as indicated in the Organization's Submission. The Carrier also stated in that July letter in pertinent part:

"As you will also recall, this provision [alluding to 7.e.] was agreed to by all of the other involved BMW General Chairmen before July 1993, when the first System Production Gang was used on Three Rivers."

Nowhere did the Organization state in any manner whatsoever, that the point of the dispute is that this General Chairman did not sign the Agreement. There is nothing on the property to suggest that the dispute centers on the fact that the employees were not governed by or included therein. The Organization never stated that the dispute is clear; that we have seniority rights under the only Agreement that covers our employees; that the Carrier erred in believing it has Agreement rights by written signature to come onto the Three Rivers East District.

The Carrier further stated that this position had been negotiated and agreed in both Implementing Agreements and side letters. It responded in part:

"... no violation occurred as alleged because for System Production Gangs, prior to the 1994 production season and the December 1993 Implementing Agreement merging Three Rivers into CSX Transportation, Inc., the former Three Rivers employees seniority dates (1992), would not have entitled them to hold any position on a System Production Gang. In addition, enclosed is a copy of a letter confirming an agreement reached... further clarifying this matter and upholding our position that no violation of the agreements involved occurred."

The Board studied the on-property record and finds the Organization charging the Carrier with attempting to "muddy the waters with nebulous responses." There is no rebuttal to the above. We studied the dates of the Implementing Agreement and the side letters. They are subsequent to the dates of dispute. The Organization never stated or ever argued that the Carrier negotiated no agreement with the employees prior to the dates of dispute to permit such occurrences. Nor does it deny that prior to these Agreements, the Claimants' seniority "would not have entitled them" to hold the position disputed on the SPG.

The Board has not found in the record as handled on the property the proof needed to support the claim. The Organization asserted that the Carrier violated Rule 39 to advertise such positions. The Carrier argued that it did not need to because of existing Agreements and further that the Organization has not demonstrated proof of its position. By letter confirming conference the Carrier states "that the August 1992 Agreement provided for use of gangs such as the "curve patch gang" to be used as that gang was...." We have studied many Awards cited by the parties, including the undated *Dennis Award over SPG rosters*, but cannot find foundation in the Organization's handling of this dispute on the property to conclude that by the weight of evidence the elements of proof exist. While they might have been built, they were not constructed from practice, clear presentation of record or sufficient reference to avoid the Board attempting to surmise after the fact at the appellate level what might have actually been occurring on the property. This we will not do. If this was, as the Organization claims, a seniority case to which everything the Carrier pointed to was off the mark, then the Organization needed to state that, refute the Carrier and make its case. It had the burden to do so and did not meet that burden in this record.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 30th day of December 1997.