Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33451
Docket No. MW-32187
99-3-94-3-612

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(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 employes with seniority on other than the Three Rivers East Seniority District to perform track maintenance work on the Three Rivers East Seniority District on various dates beginning September 14, 1993 through January 31, 1994 (System Files 3RR194, 3RR394, 3RR494, 3RR594 and 3RR694 TRC)

(2) As a consequence of the violation referred to in Part (1) above, Mr. R. Brumley shall be allowed 315.84 hours' pay at his applicable straight time rate and 25.38 hours' pay at his applicable time and one-half rate, Messrs. E. Lemley, D. Bowser, P. Burns, A. Colecchi, L. Brumley, F. Hone, T. Mattie, H. Korn, W. Finnegan, T. Koon, A. Mordecki and L. Silvestre shall each be allowed 287.84 hours' pay at their respective straight time rates and 24.38 hours' pay at their respective time and one-half rates and Messrs. W. Mayfield, L. Stillio, M. Galiyas, M. Hixenbaugh, M. Stasik, F. Kenny, J. Brown, E. Keffer, T. Pierce, W. Davis, J. Orlando and T. Vansickle shall each be allowed 323.77 hours' pay at their respective straight time and 29.28 hours' pay at their respective time and one-half rates."

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.

This case involves the consolidation of five claims challenging Carrier's failure to assign numerous Three Rivers East Seniority District employees to perform work on various dates within that territory, and the utilization of either CSX or Three Rivers West Seniority District employees to perform such work.

The Organization contends that Claimants had the right to the disputed work under Rule 11 of the controlling Agreement (Seniority Districts) and Article 1(a) and (b) of the Memorandum of Agreement dated September 2, 1992 involving the sale of Pittsburgh and Lake Erie Railroad Company assets to the Three Rivers Railway Company.

Carrier initially argues before the Board that these cases were improperly consolidated as they involve different work assignments with dissimilar fact situations, and that the Organization's procedural error in combining dissimilar disputes requires their dismissal, citing Second Division Awards 12551 and 12929; Fourth Division Award 5009. On its merits, Carrier contends that Third Division Award 32399 involving the same parties and an essentially identical dispute, is determinative of this case under the doctrine of res judicata.

With respect to the procedural issue, it is clear that the Organization argued in each of the five claims that Carrier improperly assigned Three Rivers East Seniority District work to employees holding no seniority on that district. What is also clear is that, with the exception of Carrier's argument that there was no loss of earnings by any

of the Claimants during the claim period, the reasons for the claim denials were different in each case. For example, Carrier specifically disputed the accuracy of certain facts concerning the work performed in System File 3RR194, noted that training of Three Rivers East Seniority District employees was necessary in System File 3RR194 and 394 and that the work involved was tightly scheduled, could not be completed in the allotted time with existing employees and was done in conjunction with T&S gang work, asserted that the work was performed on a CSX right-of-way for which Claimants had no entitlement in System File 3RR596, and relied upon the emergency nature of the situation caused by extreme weather conditions and the lack of qualifications of named Claimants to perform the snow removal work in issue there in System File 3RR694. While these claims, as well as others, were conferenced together and covered by one confirmation letter, it is clear that separate arguments were advanced by Carrier in denying these claims.

While the Board encourages the parties to consolidate identical claims, it has discouraged consolidation of claims which are not substantially identical. See Second Division Awards 12926 and 12551. The reason is apparent in the record before us. Certain assertions made by Carrier in denying these claims have not been disputed by the Organization, and others have. A careful review of the record reveals that Carrier's asserted reasons for making the assignments it did in each of the cases were never factually disputed, but rather, the Organization stated its disagreement with some of the statements made. The Organization chose to rely upon a characterization of Carrier's contentions as "irrelevant" and not justifying a crossing of seniority lines, rather than presenting evidence to dispute the accuracy of them, with the exception of the presentation of a statement signed by 21 employees attesting to the fact that work was performed by Three Rivers West District employees on the East Seniority District (a fact not really in dispute), and that the work in issue in 3RR594 was performed on Three Rivers East trackage itself.

Because the correspondence concerning each of the five claims is contained in the record, we hesitate to dismiss these claims on a procedural basis alone. However we do note the difficulty the Board had in attempting to resolve the entitlements of Claimants to the work involved in each case on the basis of one general Agreement principle applicable to all five cases. Had we not come to the conclusion that the Organization failed to meet its burden of proving a violation in each case, we would have been tempted to dismiss this claim as improperly consolidated.

Carrier argued that Third Division Award 32399 is a proper basis, in and of itself, for denying each of these claims. That case dealt with the rights of CSXT System Production Gangs to work on the Three Rivers East District during the 1993 production season under the September 1992 Three Rivers Agreement and the SPG Agreement. While the record in this case makes some passing mention of the SPG Agreement and the December 1993 Implementing Agreement, they do not form the basis of the parties' on-property discussion and the reasons set forth for denial of the claims. It may very well be that the underlying support for Carrier's action herein was its right to use CSX employees on this District under Implementing Agreements, but that argument was not set forth clearly in any on-property correspondence and did not appear to gel until this dispute was argued before the Board and Third Division Award 32399 issued in December 1997. In this circumstance, the Board does not deem it appropriate to apply the doctrine of res judicata, because we cannot be assured that the issues and arguments asserted are identical.

However, as noted above, the Board finds that the Organization failed to sustain its burden of proving that the work assignments in issue in this claim were examples of improper track maintenance assignments across seniority districts rather than assignments permitted by asserted exigencies or existing Implementing Agreements. Under such circumstances, we must deny the claim. In so doing, we do not intend to negate or minimize the importance of an employee's right to preference of work assignments within his/her seniority district.

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 23rd day of August 1999.