

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36597

Docket No. 35509

03-3-99-3-411

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 Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned employe L. Simmons from Gang 2223 of the ‘GWS’ seniority territory to perform routine Maintenance of Way work on the Choctaw and Dallas Subdivisions in the vicinity of Forth Worth, Texas on February 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 17, 18, 19, 22, 23, 24, 25 and 26, 1998 instead of assigning Trackman M. E. Brooks (System File Y98381/1134794 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. E. Brooks shall now be compensated for one hundred fifty-two (152) hours of pay at his respective straight time rate of pay.”

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.

By letter dated March 17, 1998, the Organization alleged the Carrier violation of the Agreement in assignment of an employee without seniority to cross over into the Claimant's Red River MP territory to perform work. The Organization argued that the improper employee assigned to do routine maintenance of way work may have held rights on the Great Southwestern territory, under the GWS Agreement, but holds no seniority rights under the current applicable Agreement on the MP territory. Because the employee was assigned to work on territory where he held no seniority, the Claimant was denied work opportunity his seniority protected.

We carefully reviewed the Carrier's position. What is most important, the Carrier pointed to the historical practice on this property to permit the work performed in this manner. The Carrier argued that for years, Trackmen performing maintenance on the territory of the former GWS were used on the MP Red River territory. The Carrier stated:

"... MP BMW forces have historically been utilized to perform track maintenance on the former GWS since at least 1990, that GWS Section Gang 2223 (to which Mr. Simmons was assigned) has been utilized on MP Red River 'B' territory on numerous instances since at least 1995, without claim or protest from the MP BMW Organization. Finally... this claim is the first which has ever been filed concerning the use of former GWS maintenance forces on MP territory. Obviously, in view of the longstanding and acquiesced past practice, this claim is barred from progression under the doctrine of laches alone."

While there are numerous other arguments presented by the Carrier, the above issue is of paramount importance.

The Board finds no rebuttal and it therefore accepts the Carrier's statement, supra, as fact. We reviewed the full record and find that the claim cannot be barred from consideration. There is no denial that the foreign employee did work across the GWS territory into the MP Red River territory for which he held no seniority. This is

a violation of the Agreement. The Carrier's assertion that this has some Agreement legitimacy is rejected. However, when, as here, we find that the Carrier relied upon a practice for years and years without protest, it is inappropriate to now find that compensation is due.

The Board finds that the Carrier violated the Agreement and from this point on may not engage in the practice without a penalty. As for Part 2 of the Claim, the Board will not award compensation because the Organization slept on its rights and cannot now hold the Carrier responsible for a relied upon and acquiesced practice (see Third Division Awards 25853, 28849, Second Division Awards 11458 and 11468).

AWARD

Claim sustained in accordance with the Findings.

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 16th day of June 2003.