

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 36855  
Docket No. MW-36310  
04-3-00-3-499

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to allow Claimant W. D. Glenn to exercise his seniority over either Messrs. K. G. York, D. G. Zabokrtsky, S. Sandoval, J. T. Creek, L. D. Prine, P. J. Toledo or A. B. Young on System Gang 9063 working in the vicinity of Duncan, Nebraska beginning on April 21 and continuing through April 28, 1999 (System File UPSGRM-9047T/1196038).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant must now be ‘\*\*\* compensated for fifty-five (55) hours of straight time pay, at the applicable rate, eleven days of per diem at \$48 per day and a weekend travel allowance for a round trip of 506 miles, \$125.’”

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 Claimant worked System Gang 9063 until informed of his displacement to be effective April 21, 1999. He tried to exercise his seniority to another position within Gang 9063 and was denied. By letter dated May 13, 1999, the Organization alleged violation of the August 1, 1998 System Gang Agreement, Sections 4(B) and (A), which read as follows:

**"Section 4. (B) The exercise of seniority displacement rights by these employees will be controlled by the same principles explained in Section 4 (A).**

**Section 4. (A) When employees with home road designations and seniority dates of June 1, 1998 or earlier apply for bulletined Group 20, 26, and 27 positions, assignments will be handled as follows:**

**(1) When bids are received from only C, S, W, and/or D designated employees, the employee listed on the applicable seniority roster with the superior seniority date/ranking will be assigned.**

**(2) When bids are received from only U designated employees, the employee listed on the applicable seniority roster with the superior seniority date/ranking will be assigned.**

**(3) When bids are received from U designated employees, as well as C, S, W, and/or D designated employees, the senior U designated applicant and the senior employee among the C, S, W, and D designated applicants will be identified, and the employee with the senior hire date will be assigned."**

The facts at bar are that the BMW Committees utilized the above Agreement to implement displacement rights between the UP, C&NW and SP employees. The Claimant was a C&NW employee and, therefore, designated "C" in the above language. The facts are that all seven of the remaining employees on System Gang 9063 were junior to the Claimant, but held a "U" designation. The Organization argues that the failure of the Carrier to allow displacement was both "a direct violation of Section 4(B)" and also, "a discriminatory practice against a 'C' designated employee versus a 'U' designated employee."

The applicable language above is clearly Section 4(B)(3). The Carrier responded on the property that it was confronted with a dilemma. As it applied this provision in the application and utilization of both service dates and seniority dates, a "cycle" was created. It presented a case where three employees could continuously exercise seniority displacement without resolution. The Carrier, therefore, attempted to resolve the situation and work out an agreement. In its letter of June 4, 1999, the Carrier states:

"In our discussion, BMW Vice President Rick Wehrli stated the following understanding is the BMW interpretation of the method to be utilized in determining who was the employee to be displaced under the above circumstances.

1. In accordance with the guidelines set forth in Section 4(B), the Carrier will identify the senior employee of those involved as if all were applying for one (1) position of the same class. That employee will then choose the position of his/her choice involved in the displacement.
2. The process specified in (1) above will be repeated among the other employees in connection with each of the remaining positions involved until all of the positions have been filled.
3. The last employee not holding one of the positions involved after completion of (1) and (2) above, may exercise seniority to any other position not included in the above displacements. . . .

As you are aware the above interpretation of Section 4(B) was first implemented in determining displacements. When the Carrier

started receiving claims over the above application, a meeting was held to discuss the situation. Subsequent to that meeting the Carrier began applying the resolution of displacements based upon the discussions in those meetings. Since BMW Vice President Wehrli has stated the initial application is to be the correct understanding in applying Section 4(B) the previous claims submitted to the Carrier will be considered moot."

The Carrier maintains throughout this claim that two different General Chairmen are disagreeing with the correct interpretation and, therefore, it cannot move forward. The claim at bar was the opposite of the claim of another General Chairman. The Carrier stated that it had acted in good faith, but that "What the BMW General Chairmen signatory to the Consolidated System Gang Agreement are doing is effectively 'whipsawing' the Carrier. In essence what you and General Chairman Tanner are saying is that the Carrier is wrong if we apply the June 4 (or December 14, 1998) understanding or we are wrong if we don't apply that understanding."

The Board considered the entire and extensive chain of discussions attempted on the property to resolve the "cycle" issue. Certainly, the Carrier has a problem with the exercise of seniority displacement rights under the Consolidated System Gang Agreement. However, the Board does not. We are empowered only to resolve disputes between the Carrier and the Organization over the application and interpretation of Agreements.

The initial question in any contract interpretation dispute is the applicability of the contract before us. The entire history of the "cycle" involves the Carrier's attempt to develop a uniform certification Letter of Agreement over the application of the language of Section 4(B). There is no Letter of Agreement before the Board. The contract language the Carrier applied "based upon good faith actions" was language applied without concurrence of the Organization.

The Board must consider next whether the language is clear and supports the claim. The language is clear in this record. The Claimant was the only person applying for displacement and held a 'C' designation. He had seniority over the other seven 'U' designated employees and seniority was governed by Section 4(A)3. The Claimant had the senior hire date and should have been assigned.

The Board must hold that in all contract interpretation cases, we are obligated to determine if the dispute comes down to clear contract language. Here, the language is very clear and has no ambiguity. There is no Agreement between the parties to this dispute as to the "cycle" issue and no signed Agreement herein disputed. We find nothing presented by the Carrier on property that was negotiated by the parties and supports its decision.

The Board is constrained by this record to find that the Organization presented proof that the Claimant was entitled to exercise his seniority over junior employees and was denied his contractual rights under the Consolidated System Gang Agreement. We concur with Part (2) of the claim.

**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 28th day of January 2004.**