

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36962
Docket No. MW-36121
04-3-00-3-295

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 V. E. O'Toole to exercise his seniority over either Messrs. Berning, Ross, Lowman, Erbe or Tom on System Gang 9031, working in the vicinity of Fairbury, Nebraska, on January 4, 1999 and continuing (System File W-9921-160/1184849).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be allowed “. . . compensation equal to the amount he would have received absent the violation of the Agreement. That is Mr. O'Toole must be allowed an as of yet undetermined amount of hours at his respective overtime rate of pay and also the Per-Diem and Article XIV Travel Allowance he would have been entitled to for this violation of the Agreement when Mr. O'Toole was not allowed to displace junior Chicago Northwestern and Southern Pacific System Gang laborers on system gang 9031. . . .”

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 has a hire date of May 25, 1970 on the Union Pacific and holds seniority in various classes of the Maintenance of Way Department. As a result of mergers, employees involved in this dispute carried designations on the relevant seniority lists as "U" (Union Pacific), "C" (CNW), "S" (Southern Pacific), "W" (Western Pacific) and "D" (Denver and Rio Grande).

At the time this dispute arose, the Claimant was working as a System Gang Group 26 Laborer on System Gang 9031 in the vicinity of Fairbury, Nebraska. On January 4, 1999, the Claimant, who maintains a "U" designation, was not allowed to displace employees holding "C", "W", and "S" designations who had lesser hire dates than the Claimant so that the Claimant could continue working on System Gang 9031. This claim followed.

Section 4 provides:

"(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.

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

The language of Section 4 is clear. See Third Division Award 36855 addressing the language in Section 4 ("... the language is very clear and has no ambiguity"). Section 4(B) adopts the principles in Section 4(A) for employees exercising displacement rights. Section 4(A)(3) states in no uncertain terms that "[w]hen bids [here, attempts to displace] 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 Claimant, who held a "U" designation had the senior hire date over the other gang members holding "C", "W", and "S" designations. The Claimant therefore should have been allowed to displace a junior employee on System Gang 9031. By not allowing the Claimant to do so, the Carrier violated Section 4.

The Carrier's argument that its actions were permissible because the Claimant was in a "cycle bump," does not change the result. See Third Division Award 36855, *supra*:

"... 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."

As a remedy, the Claimant shall be made whole for actual losses, if any, resulting from the Carrier's failure to allow him to displace a junior employee on System Gang 9031. This matter is remanded to the parties to determine the extent of that relief.

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 21st day of April 2004.