

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38137
Docket No. MW-36776
07-3-01-3-309

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railway 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 Palestine Seniority Division Truck Operator A. V. Lopez to perform machine operator work on the Del Rio Seniority Division (System File MW-00-113/1230054) on February 28, 29 and on March 1, 2, 3, 6 and 7, 2000.**
- (2) As a consequence of the violation referred to in part (1) above, Del Rio Seniority Division Machine Operator A. A. Riojas shall now be compensated 56 hours of pay at his 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.

On February 26, 2000, a train containing rolling stock with a broken wheel derailed between Mile Post 220.70 and Mile Post 224.0 on the Del Rio Subdivision. The derailment caused the main line track to break in several places. This area is single track main line territory. The Carrier transported ribbon rail to the derailment site to restore the track to operation.

To restore the track to operation, the Carrier used a high-rail equipped Speed Swing SS1199 to travel by rail to the derailment site to lay rail on both sides of the main line. The work was performed on February 28 and 29 and on March 1, 2, 3, 6 and 7, 2000. The speed swing was operated by A. V. Lopez. Lopez does not hold seniority on the Del Rio Subdivision. He has seniority on the Palestine Seniority Division.

The Organization filed a claim on behalf of Machine Operator A. A. Riojas, an employee with 20 years of experience on the Del Rio Subdivision. The Organization contends that Machine Operator Riojas should have been assigned to lay the rail and clean the area of material inasmuch as Lopez had no seniority on the Del Rio Subdivision.

The Carrier denied the claim insisting that the derailment on the single track main line created an "emergency" because the main line had to be placed back in operation as soon as possible. The Carrier contends that Lopez was qualified to operate the high-rail equipped speed swing whereas the Claimant was not high-rail qualified.

It is unnecessary for the Board to decide whether the Carrier faced a bona fide emergency as a result of the derailment on the main line because there is no evidence in the record before the Board that the Claimant was qualified to operate the high-rail equipped speed swing that was dispatched to lay rail on the Del Rio Subdivision. It was the Organization's burden to establish that the Claimant was qualified to operate this equipment.

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Notwithstanding the Claimant's 20 years of experience as a Machine Operator, there is no evidence in the record that he was qualified to operate high-rail equipment. Lacking this requisite qualification, he would not have been assigned to lay rail at the derailment site on his seniority district regardless whether this work involved an emergency. The claim must be denied as a result.

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 April 2007.

LABOR MEMBER'S DISSENT
TO
AWARD 38137, DOCKET MW-36776
(Referee O'Brien)

This case was in a long list of cases brought before this Board in connection with the Carrier assigning employees to work across seniority district boundary lines. Over the years this Board has decided more than twenty-one (21) cases in favor of the Organization when this particular violation of the Agreement had occurred. This Carrier has tried every conceivable scheme in an attempt to get away with violating the seniority district boundary lines over the years. A review of those schemes are found in Awards 10125, 24576, 29313, 29350, 30076, 30408, 30409, 31228, 31290, 31292, 31569, 31570, 32331, 32394, 32419, 32421, 32500, 32504, 32993, 34049 and 35082 involving these parties and seniority district violations. The Board has often held that prior awards, especially those between the parties involving similar issues, should be followed unless they are shown to be palpably erroneous. Copies of the precedent awards, cited supra, were supplied during panel discussion for the Board's consideration in deciding this dispute. A review of the awards, cited supra, reveals that over the past forty-six (46) years, **FIFTEEN (15)** different arbitrators have rendered **TWENTY-ONE (21)** awards involving *this Carrier, this property* and *this Agreement*. Significantly, **EIGHTEEN (18)** of the twenty-one (21) sustaining awards involving seniority district claims were rendered in the **SEVEN (7)** years preceding the instant dispute. Moreover, this very neutral participated in the findings of Award 34049. Those awards clearly indicate that this Carrier has *flagrantly, repeatedly and with increasing frequency* violated its Agreement with the BMW in the same manner. Significantly, each of the above-

Labor Member's Dissent

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listed *on-property* awards plainly/tacitly *rejected* the "fully employed claimant" theory uniformly proffered to escape monetary liability after the Carrier violates the seniority district boundaries of the Agreement and the instant record contains nothing to indicate that the bottom line in this case should differ therefrom. In view of the undisputed factual circumstances and the cited Agreement provisions, together with the ample on-property precedents concerning assignments across seniority district boundaries, the Carrier's violation of the Agreement in this instance is inescapable. Inasmuch as the Majority here failed to address the findings of the precedent awards presented to it, much less show they could be erroneous in any way, but simply chose to ignore them and chose instead to plough new ground in this decision, renders this award an anomaly.

Inasmuch as Award 38137 is clearly a maverick decision which ignores established precedent and defies logic, it is anomalous, certainly erroneous and it can be given no consideration as precedent.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Roy C. Robinson", is written over a horizontal line.

Roy C. Robinson
Labor Member