

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39297
Docket No. MW-38206
08-3-NRAB-00003-040091
(04-3-91)

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

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(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 Rio Grande Seniority Division Foreman A. Acosta to perform routine curve lubricator maintenance and refilling work between Mile Posts 616.20 and 737.00 on the Del Rio Seniority Division beginning on October 30, 2002 and continuing (System File MW-03-84/1351976 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Del Rio Seniority Division Foreman M. C. Malik shall now be compensated for three hundred and eight (308) hours' pay at his respective straight time rate of pay and for thirty-six (36) hours' pay at his respective time and one-half 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.

The Carrier argues that there is an irreconcilable dispute of fact here that requires the Board to refrain from ruling on the substance of the issue. A careful review of the record reveals that the Organization submitted on the property two signed statements from employees who witnessed the alleged work performed by a Foreman who did not have District seniority. These statements detailed the work performed, the mile posts, and the dates. The Carrier's email statement from Manager Track Maintenance S. W. McIntyre noted only that the Foreman in question was assigned to a particular gang. The Carrier did not, however, contradict or challenge the specific facts presented in the statements of the first-hand witnesses. Prior Third Division Awards have held that unchallenged statements stand as fact. See, for example, Award 20083. The Board concludes, therefore, that no irreconcilable dispute of facts exists that requires dismissal of this case.

The Carrier admits that Foreman A. Acosta did perform work on the Del Rio Seniority Division on two days in November, along with other employees from the Rio Grande Seniority Division, but contends that this was as a result of an emergency due to a derailment. Although the derailment is undisputed, this accounts for only two days in the claimed period of violation and the Board finds it is immaterial to the rest of the claim.

The Board further concludes that this assignment of work across seniority district lines cannot be justified by Rule 15, the temporary transfer provision, as asserted by the Carrier. Third Division Award 30408, citing similar Awards preceding it, e.g. Award 30076, held unequivocally that Rule 15 merely addresses the retention of seniority for employees who are temporarily transferred out of their seniority district; it does not vitiate the seniority provision by allowing the Carrier to transfer employees across seniority district lines at will and for its own convenience. See also Third Division Awards 28852, 29205, 32394, and 32500.

Finally, the Carrier argues that even if the Board finds that a violation occurred, the Claimant is not entitled to any compensation because he was fully

employed at the time in question. Additional compensation, according to the Carrier, would represent a windfall. This too is an issue that has been decided repeatedly by prior Awards, i.e., the improper assignment of work across seniority district lines represents a loss of work opportunity to employees on the Division where the work occurred and compensation, even for employees who were fully employed during the disputed period, is appropriate. Without such compensation, the Carrier would feel free to continue its violations of the Agreement without penalty. See Third Division Awards 29313, 30408, 31228, 31292, 31569, 31570, 32331, 32394, 32419, 32421, and 32500. Accordingly, the claim shall be allowed for all dates claimed except for the two days attributable to the emergency caused by the undisputed derailment.

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 29th day of September 2008.