

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39303
Docket No. MW-37645
NRAB-00003-020774
(02-3-774)

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(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 DeQuincy Division Gang 2244 employes to perform work on a bridge at Mile Post 51.60 in the vicinity of Navasota, Texas on the Palestine Seniority Division beginning September 10, 2001 through October 1, 2001 instead of Palestine Division B&B Forman D. J. Zhanel and Carpenter D. G. Weaver (System File MW-02-12/1293760 MPR).
2. As a consequence of the violation referred to in Part (1) above, Claimant D. J. Zhanel and D. G. Weaver shall now each be compensated for two hundred eighty (280) hours' pay at their respective straight time rates of pay and for ten (10) hours' pay at their respective time and one-half rates 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 Claimants established and hold seniority as a Bridge and Building ("B&B") Foreman and Bridgeman, respectively on the Palestine Seniority Division, B&B South Palestine Subdivision Seniority Roster. At all relevant times associated with this dispute, the Claimants were assigned to Palestine Division B&B Gang 3599.

On or about September 10 through and including October 1, 2000, the Carrier assigned employees from the DeQuincy Seniority Division to perform bridge work on the Palestine Seniority Division. Specifically, employees assigned to DeQuincy Division B&B Gang 2244 crossed seniority division lines in order to replace stringers on a main line bridge located in the Palestine Division's territory. It is undisputed that DeQuincy Division Gang 2244 employees hold no seniority on the Palestine Division. DeQuincy Division Gang 2244 employees worked ten hours per day throughout the claim period for a total of 280 hours of straight time. It is the Organization's position that the Carrier's action in this regard violates, among other Rules, Rule 2(a) "Seniority Rights," which reads, in relevant part, as follows:

"Except as otherwise provided in these rules, seniority rights of employees to new positions or vacancies, or in the exercise of their seniority, will be confined to the seniority district as they are constituted on the effective date of this Agreement."

The Carrier defends its action by noting that the crossing of seniority districts was necessary for "safety reasons" as well as a shortage of manpower. In addition, the Carrier asserts that the clear language of Rule 15 contemplates the temporary utilization of employees from other seniority divisions in the circumstances at hand. More specifically, the Carrier denial of March 21, 2002 noted:

“Gang 2244 and steel gang 9330 were assisting gang 2402 at bridge 51.6 on the Navasota Sub. For safety reasons. Gang 2402 is a five man gang and one man was on vacation the second half of September. Previous Palestine headquartered jobs have gone no bid or no bids received and there is no one to call back. The stringers have gone bad enough to slow order the bridge, without help from gangs 2244 and 9330 the next step would have been to take the bridge out of service. Gang 2402 needs help and instead of contracting this work, I used Union Pacific Railroad forces. This bridge has been out of service in the past and plugs installed because of stringer condition. The people time claiming were busy on other projects and could not assist 2402. Claimants were employed at the time and did not lose any work. There is no basis for this claim and it should be denied.”

Rule 15, Transfer and Temporary Service, provides, in relevant part:

- “(a) Employees or gangs temporarily transferred by direction of management, from one seniority district to another will retain their seniority rights on the district from which they were transferred.
- (b) Employees assigned to temporary service will, when released, return to the position from which taken without loss of seniority.”

The issue before the Board is not a matter of first impression. Indeed, over the past 38 years, 21 Awards have been rendered involving the same parties to this dispute, each holding that the Carrier’s decision to cross seniority division lines violated Rule 2. In addition and relevant to the specific issue before the Board, numerous Awards determined that Rule 6 does not negate the mandate set forth in Rule 2 nor provide the Carrier with the unfettered right to transfer employees across seniority districts. However, a number of these same Awards recognize the Carrier’s right under Rule 6 to temporarily transfer employees pursuant to Rule 2 in cases of a “bona fide emergency.” However, it becomes the Carrier’s burden of proof to demonstrate, by substantial evidence, that an “emergency” actually existed at the time it made its determination to transfer employees across seniority lines. (See, e.g., Third Division Awards 28852, 30076 and 32504 together with cases cited therein.)

The Carrier has not demonstrated the existence of a bona fide emergency in the instant matter. In this regard, it is well accepted that any claimed emergency must be bona fide where time is of the essence. While the Carrier implied the existence of an emergency, it was unable to conclusively establish that one existed at the relevant time period.

Finally, Awards issued by the Third Division emphasize the necessity to comply with Rule 2 (except in those cases where a true emergency exists) making it clear that "full employment" is an insufficient criterion for the Board to decline the award of monetary damages. (See, e.g., Third Division Award 32504.)

Given the foregoing, we find and conclude that the Carrier violated Rule 2. In the on-property handling of this case, the Carrier asserted that the instant claim is duplicative of another filed over the same fact pattern. We agree that the Carrier is not required to pay duplicative claims. (See Third Division Award 28852). Accordingly, the Award will reflect this holding.

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.