NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21678
THIRD DIVISION Docket Number MW-21299

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated April 8, 9, 10, 11, 16, 17, 18 and 19, 1974 when track forces from Seniority District No. 14 were used to perform work on Seniority District No. 11 /System File T-M-137C/ MW-84(i) 7/19/74/.

(2) Foreman L. Burditt, Machine Operator G. Sutton, Truck Driver R. K. Crooks and Laborers R. Erickson, L. Nelson, S. A. Wadsworth, G. Vossen, L. A. Stoeser, T. Osborn and C. L. Bakland each be allowed sixty-four (64) hours of pay at their respective straight-time rates because of the aforesaid violation.

OPINION OF BOARD: This dispute involves the assignment of track work consisting of moving tracks in a gravel pit at Appleton, Minnesota. Claimants herein are members of a Twin Cities Seniority District (No. 11) maintenance gang who allege a violation of Rule 6(A) and other Rules of the Agreement when Carrier on April 8, 9, 10, 11, 16, 17, 18, and 19, 1974 assigned a gang from Fargo Seniority District (No. 14) to do the work in the gravel pit. It is not contested on this record that the gravel pit at Appleton, Minnesota is located within the geographical territory embraced by Twin Cities Seniority District as defined in Rule 6(A) and does not lie within the territory covered by the Fargo Seniority District. Carrier has not in our judgment made out a persuasive case that emergency conditions prevailed which would warrant a relaxation of the general principles respecting seniority rights in seniority districts. Mere allegations of emergency are not sufficient to carry the burden of proof on that point. Awards 19840, 20310, 20223.

In the absence of proven emergency or specific rules to the contrary we have ordinarily found violations of general Seniority Rules where Carrier turns over work of employes holding seniority on one District and/or Group Seniority Roster to those holding seniority on another, even though the employes are covered by the same Agreement. Awards 1306, 2585, 3582, 4385, 4543, 5091, 5413, 6021, 6938, 20891.

As noted supra Carrier has failed to show persuasive evidence of emergency. But Carrier also contends that by express and specific language Rule 11 permits deviation in this case from the general terms and interpretive gloss of Rule 6(A). Rule 11 reads in pertinent part as follows:

> "RULE 11. TRANSFERS
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> A. An employe may be temporarily transferred by the direction of the Company for a period not to exceed six (6) months, from one seniority district or division to another, and he shall retain his seniority on the district or division from which transferred. Such employe shall have the right to work temporarily in his respective rank on the district or division to which transferred, if there are no qualified available employes on the district or division. The six (6) month period may be extended by agreement between the Company and the General Chairman. When released from such service the employe shall return to his former position."
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There is no question that the Fargo District employes were used by Carrier "temporarily" i.e. less than six months in the Twin Cities District. In the absence of argument or proof to the contrary we will assume arguendo that the word "transfer" is used in its ordinary sense and that the deployment of the Fargo District employes constitutes a transfer: the only remaining issue joined on the property and the controlling question in this case thus is whether the condition precedent to Carrier's utilization of these transferred Fargo District employes has been met i.e. "if there are no qualified available employes on the (Twin Cities) district or division." It is not disputed that Claimants were "qualified" to do the Appleton gravel pit work. Thus the sole focus of our analysis is whether Claimants were "available" on claim dates or not, as that term is used in Rule 11.

It is not contested that Claimants were working elsewhere in Seniority District No. 11 on the dates and at the times that the Fargo District gang was brought into Seniority District 11 to construct the pit track at Appleton. For our purposes herein it is not important to note the nature of the work they were doing because, as noted supra, it was not of an emergency nature. Carrier propounds the tautology that Claimants could not be in two places at one time and contends therefore that they were not "available" under Rule 11. Although

Carrier's logic is sound its contract interpretation and application in these particular facts is not. In prior Awards, which we find persuasive herein, we have rejected similar bootstrapping theories and stated that since Claimants were working where Carrier had assigned them they not only were "available" but Carrier was then availing itself of them. If they were not "available" at the time and place where the disputed work was performed it was because Carrier chose not to assign them there. See Award 13832 and 15497. In the particular facts and circumstances of this case we find that Rule 11 is of no comfort to Carrier because there were qualified available employes (Claimants) on the Twin Cities District to perform the Appleton gravel pit work. Carrier did violate the Seniority provisions of the Agreement by using District 14 track forces to perform said work in District 11. Award 12197 upon which Carrier relies is not pertinent herein because it turned essentially upon a determination that emergency conditions both excused deviations from seniority principles and caused the unavailability of employes on the District therein involved. There is no similar showing of emergency on this record.

The only question remaining is relative to appropriate remedy. Claimants seek compensation for 64 hours of straight time, the amount of time which the Fargo District gang consumed in performing the disputed work. Carrier resisted payment of damages even if arguendo the Agreement was violated on the grounds that Claimants suffered no loss of earnings and the Board has no authority to award damages. We have dealt authoritatively with similar contentions in prior Awards involving these same parties and concluded that where, as here, Claimants by Carrier's violation lost their rightful opportunity to perform the work then they are entitled to a monetary claim. Nothing on this record persuades us to deviate from those precedents in this case. See Awards 19899, 19924, 20042, 20338, 20412, 20754, 20892.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of August 1977.