

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24138
Docket Number MW-23895

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employees
{ Denver and Rio Grande Western Railroad Company

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

(1) The Agreement was violated when section laborers from Seniority District No. 3 were used to perform work on Seniority District No. 2 July 2 through July 20, 1979 (System File D-40-79/MW-3-80).

(2) The Agreement was further violated when section laborers from Seniority District No. 2 were used to perform work on Seniority District No. 3 July 30 through August 3, 1979.

(3) Because of the violation referred to in Part (1) above, furloughed Section Laborers J. M. Clark, F. E. Meyer, J. C. Cook and K. L. Berrett each be compensated for all wage loss suffered during the period July 2 through July 20, 1979.

(4) Because of the violation referred to in Part (2) above, furloughed Section Laborer R. E. Ellison be compensated for all wage loss suffered during the period July 30 through August 3, 1979."

OPINION OF BOARD: From July 2, 1979 through July 20, 1979, Employees from Seniority District No. 3 were used to perform work on Seniority District No. 2 and from July 30 through August 3, 1979 Employees from Seniority District No. 2 were used to perform work on Seniority District No. 3.

The Organization invites our attention to Rule 6(c) which confines seniority to Seniority Districts and sub-departments "where employed".

In addition to citing various Awards concerning removal of work from one Seniority District to another, the Employees point to Rule 14 and assert that it contains the only condition where work may be transferred. It is undisputed, according to the Organization, that no emergency existed in this instance and there was no agreement concerning program work.

In regard the Carrier's assertion of a controlling practice, the Organization points out that practice can have no force or effect in relation to a clear and unambiguous rule. Carrier conceded, on the property, that certain Employees worked as specified by the Organization but asserts that the transfers involved have been taking place as a matter of practice for "at least fifteen (15) or twenty (20) years". Moreover the Carrier denies the Employees' assertion that they had not been aware that the vacation practice had been going on for fifteen (15) or twenty (20) years since the Foreman and all of the Section men involved were members of the Organization.

The Board does not find a procedural deficiency sufficient to deprive us of the opportunity to review the case on its merits. However, on the merits of the case, the Board has significant problem with the contentions of the Organization under the facts presented here. To be sure, a practice may not alter a clear and unambiguous provision of an agreement. But here, we question that such an agreement provision exists. We do not find that there has been a placing of Employees on different Seniority Districts but rather it appears that there has been a practice of permitting certain individuals to work temporarily on adjoining Sections during vacation periods. That vacation practice has been in existence for a number of years assumedly with full acquiescence by the Employees, and to permit them to make a successful claim against such a practice - after all of those years - would be unjust indeed in the absence of a specific and clear agreement provision which precluded the particular action in question. Accordingly we will deny the claim.

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 Employees involved in this dispute are respectively Carrier and Employees 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 not violated.

A W A R D

Claim denied.



NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of January 1983.