

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24480  
Docket Number MW-24410

Robert Silagi, 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 extra gang laborers from the Utah Division were used to perform track work on the Colorado Division beginning July 28, 1980 (System File D-22-80/MW-30-80).

(2) Because of the aforesaid violation, the furloughed extra gang laborers listed below and all other Track Sub-department employees furloughed during the claim period each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by Utah Division extra gang laborers in performing the work referred to in Part (1) hereof.

Rudy Sisneros	D. D. Hartshorn
R. A. Madrano	C. Beasley
T. Medina	F. L. Sanchez
J. Clark	M. C. Chavez
P. Ramirez	A. G. Garcia
C. A. Nelson	M. T. Kenick
K. D. Nelson	I. Martinez
R. B. Valdez	A. R. Lechuga
L. E. Orozco	G. P. Morales
S. W. Bobian	S. P. Schoening
V. A. Solano	J. Sanchez
J. G. Soto	M. Tamayo
S. Aldana	S. C. Hernandez
J. H. Amparan	A. P. Morales
A. A. Aragon	P. Arana
B. E. Arana	F. A. Sanchez
E. Arias	O. H. Tarrange
R. Arias	V. E. Esquibel
J. Bustanante	A. J. Kimmick
A. Gonzales	D. R. Acker
A. C. Long	B. M. Ochoa
J. R. Meastas	A. Rodriguez
J. G. Miranda	B. F. Balley"

OPINION OF BOARD: The record shows the following sequence of events, all of which occurred in 1980.

February 16th. Bulletin No. 5 was issued establishing Extra Gang 6351 with one foreman, an assistant foreman and 26 extra gang laborers on the Utah Division. Said gang was activated on or about March 3rd.

July 3rd. Bulletin No. 39 was issued establishing Extra Gang 6509 with a foreman and an assistant foreman on the Colorado Division. The bulletin neglected to state the number of extra gang laborer positions to be filled. Copies of the bulletin were sent to the General Chairman of the Organization and to all local chairmen. The gang was to be activated on July 28th.

August 1st. Gang 6351 was abolished. All machines and equipment used by said gang were taken to Colorado to be placed in service with Gang 6509. The foreman and assistant foreman on Gang 6351 returned to their regular positions.

Laborers cut off from Gang 6351 were informed that if they had no place to displace on a Utah section or gang, they could hire out on Gang 6509 until they were bumped or displaced by Colorado section men or laborers. Seven Colorado laborers and twenty-three Utah laborers were hired on gang 6509 to bring it to its full complement.

August 4th. Gang 6509 commenced operations and on September 12th the gang was abolished.

The Organization claims that the Carrier violated Rule 6 when it disregarded seniority rights in using extra gang laborers from the Utah Division Seniority District to perform track work on the Colorado Division Seniority District. The Organization asserts that the Claimants are furloughed extra gang laborers who hold seniority on the Colorado Division Seniority District and that at the time they were furloughed they protected their seniority rights in compliance with Rule 12(c) by filing their names and addresses as indicating their desire for recall.

The basic issue to be decided is whether Rule 11(c) was violated. The rule reads, in pertinent part:

"When extra gangs are to be organized on or transferred to a division the regularly assigned extra and section gangs laborer on such division shall be notified the approximate originating date, number of laborers to be employed, and as nearly as possible the location(s) or type(s) of work to be performed by the extra gang."

Carrier concedes that Bulletin 39 did not specify the number of laborers needed on the gang. It asserts that such omission was a harmless error cured by the fact that Claimants should have known that a foreman and an assistant foreman had to function with a "gang" and that 7 Colorado laborers did bid on and were placed on Gang 6509. Carrier argues that laborers about to be furloughed had a responsibility to inquire about the size of the gang and to attempt to place themselves on the gang. The Rule, however, is clear and unambiguous. The burden is upon the Carrier to comply with the Rule in the first instance. Nothing in the Rule suggests that when the Carrier fails to comply with the Rule, by oversight or neglect, the burden then shifts to employees to supply the missing element and that by failing to do so the employees are guilty of contributory negligence.

This Division has consistently held that positions or work within specific seniority district must be reserved for employees holding seniority rights therein. (See Awards 4667 and many others, e.g., Award 4987-Boyd: "It has long been settled that seniority is a valuable property right.") Award 18785 involves the same parties and a fact pattern the reverse of the instant case. In that case

a section gang from Colorado was used to work in Utah when furloughed track employes of the Utah Division were available. The Board held that the Utah employes should have been used to perform the work in preference to employes who did not hold seniority rights on the Utah Division.

Under the facts as shown in the record in this case, the claim must be sustained.

There remains for disposition an assertion by the Carrier that Claimants were not off in force reduction until September 2nd the date of their claim. Without prejudice to its earlier position that the claim should be denied, Carrier infers that pay, if any, may not commence until said date. The record lacks data with regard to the date(s) of furlough of the Claimants. Such information is undoubtedly in the personal file of each Claimant and thus readily available. We therefore direct that each of the Claimants be allowed pay at his respective rate for an equal proportionate share of the total number of man-hours expended by the 23 Utah Division extra gang laborers in performing work on Extra Gang 6509. The share of each Claimant shall be measured at the beginning by the date on which said Claimant was furloughed, but no earlier than August 4th, the date on which Gang 6509 commenced operations, and at the end by September 12th, the date on which the gang was abolished.

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 violated.

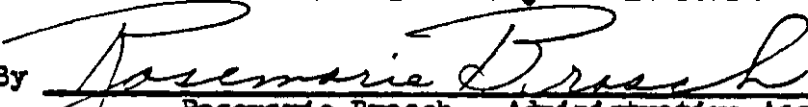
A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest: Acting Executive Secretary  
National Railroad Adjustment Board

By

  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of July 1983.