

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Soo Line Railroad Company

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

(1) The Agreement was violated when the Carrier failed to permit Section Laborer M. M. Gottschall to displace junior Section Laborer G. Jorgenson on Crew 346 at Warren, Minnesota beginning April 1, 1987 (System File R412 #1481G/800-46-B-276).

(2) As a consequence of the aforesaid violation, Claimant M. M. Gottschall shall be reimbursed for all straight time and overtime lost beginning April 1, 1987 and continuing until April 23, 1987 and he shall have all vacation, fringe benefits and other rights restored."

FINDINGS:

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

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employees 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 waived right of appearance at hearing thereon.

Claimant holds seniority as a sectionman on Sub-district 4-B. On the date this dispute arose, he was a "free agent," i.e. he had been laid off because of a force reduction approximately four months earlier and he was unable to place himself because no junior employees were working on Sub-district 4-B. As a result, he was unemployed during this four month period, according to the Organization.

It is further alleged by the Organization that Claimant regularly sent electronic mail messages (ELMA's) to the Roadmaster on Sub-district 4-B. Attached to the Organization's Submission before the Board are two (2) ELMA's from the Claimant dated February 27 and March 16, 1987, stating that he was available for work.

On April 20, 1987, Claimant was advised that a junior employee had been recalled to Crew 348 at Fordville. Claimant displaced that employee on April 23, 1987. At that time, the Organization alleges, Claimant learned that another junior employee, had been recalled and had been working since April 1, 1987 on Crew 346 at Warren, Minnesota.

It is the Organization's position that Claimant was available, willing and qualified to perform the work in question had Carrier permitted him to displace the junior sectionman beginning April 1, 1987. Claimant exerted a reasonable effort to maintain his "free agent" status, the employees maintain, and Carrier's failure to notify the Claimant of the junior employee at Warren restricted Claimant's right to freely exercise his seniority under the schedule rules.

Carrier contends that the junior man who worked, has his home section seniority in Crew 346 at Warren, and for that reason, he was called back when forces were increased. However, Carrier submits that the ELMA is not a proper form of notification when requesting work opportunities due to the fact that many locations cannot receive ELMA messages. During the handling of the dispute on the property, Carrier specifically maintained that there was no ELMA facility at Devils Lake and that any such messages had to be forwarded by Company mail. In addition, Carrier asserted that a "determination as to whether Mr. Schmitgall and Mr. Blonigen had received copies of the ELMA messages could not be made" and that "a review of the record did not reveal that the roadmasters had ever received those messages."

After careful consideration of the record in its entirety, it is our finding that the instant claim is meritorious and must be sustained. At the outset, we find unpersuasive Carrier's contention that its decision to recall and assign the junior sectionman to Crew 346 at Warren, Minnesota was proper because Crew 346 was his "home" section. A review of the applicable Rules clearly shows that Carrier must permit "free agents," such as the Claimant, to exercise their seniority on their respective sub-districts under the circumstances present here. Sub-district seniority contractually prevails over gang seniority, as set forth in Rule 8(1), which states as follows:

"RULE 8 - Force Reduction and Increase

* * *

- (1) A sectionman exercising his seniority in case of force reduction, displacing a junior sectionman on another section, must, when general force increase is made and he is so notified, return to his home section.

A sectionman laid off by force reduction and exercising his seniority to displace a junior employee, who is again laid off by a further reduction, or an employee who is unable to place himself because no junior men are working on the sub-district, will be considered a free agent. In order to be eligible to acquire a free agent's status, an employee must have been continuously employed for a period of 30 calendar days prior to force reduction. Time lost in exercising displacement rights or absences of up to 2 days for sickness or other unavoidable causes, would not be considered as breaking the continuity of the 30 calendar days. A free agent who fails to exercise his right to displace a junior employee within 10 days of his first opportunity to do so will forfeit his free agent's status and will be considered furloughed. He will continue to retain his free agent's status until he has returned to his home section and has been continuously employed thereon for 30 calendar days or more.

A free agent may exercise his seniority to place himself when forces are increased on the sub-district, whether on his home section or not, and may continue to displace junior employees on other sections as forces are further increased permitting him to work closer to his home section so long as he exercises such right within 10 days of a particular force increase. It is understood that free agents and furloughed employees must return to their home sections when called." (emphasis added)

Claimant had the right to exercise his seniority to displace junior employees throughout the sub-district. He made an effort in this direction by sending ELMA's to the three Roadmasters within the sub-district, advising them of his availability for work. Although Carrier claims that its system is not set up so as to receive ELMA's at every location, the fact remains that ELMA messages can be received at Thief River Falls, Minnesota, the location where the junior sectionman at Warren was recalled. Moreover, Carrier never offered any probative evidence to refute the fact that ELMA messages were sent. Carrier generally denied that the appropriate Supervisor received any messages, but never substantiated that assertion. Given that state of the record, we must conclude that the Organization's concrete proof must prevail over the Carrier's bald assertions. The records of the ELMA messages are much like telegrams in the sense that written copies of the messages are kept. For Carrier to deny receipt of the messages in the face of this documentary evidence, much more convincing proof was necessary.

With respect to the monetary aspect of this claim, it must be remembered that we can consider only those arguments and evidence which were presented during the handling of this dispute on the property. The only ELMA's which can properly be considered, therefore, are those dated April 3 and April 17, 1987, since those were submitted by the Organization in its correspondence with Carrier prior to this appeal. Claimant shall be ordered reimbursed from April 3, 1987 until April 23, 1987 in accordance with the Organization's requested remedy in its Statement of Claim. Furthermore, the junior employee's time rolls for this period will be made available to determine how much overtime pay, if any, should be included. Finally, since Carrier did not raise any questions as to the remedy prior to its submission before this Board, any new arguments on that subject are deemed waived.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois, this 25th day of June 1991.