

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Kansas City Southern Railway Company

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

(1) The Agreement was violated when the Carrier assigned KCS Seniority District B&B employes instead of L&A Seniority District B&B employes to perform B&B work on the L&A Seniority District on December 15, 1987 and January 5, 6, 7, 8, 12, 13, 14 and 15, 1988 (Carrier's Files 013.31-345(5) and 013.31-345(4)).

(2) As a consequence of the aforesaid violations, L&A Seniority District B&B employes H. Hoose, C. Love, G. Adams, Jr., H. Williams, A. Woods, L. Willis, M. Kelly and J. Goodman shall each be allowed eighty-eight (88) hours of pay at their respective straight time rates."

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 employes involved in this dispute are respectively carrier and employes 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.

At the outset, the Carrier contends that the Claim should be dismissed because of the Organization's alleged failure to meet the time limit requirements of Rule 14-1, which states in pertinent part as follows:

"(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed,"

In this instance, the Organization received the Division Engineer's denial letters (to two Claims, combined here) on July 18, 1988. The Organization responded under date of September 14, 1988, and the Carrier received the appeal on September 16, 1988.

Not counting the first day, July 18 (the accepted procedure), September 16 would have been the sixtieth day thereafter. In addition, the Organization convincingly states that the appeal was "taken" on September 14, proven by the reasonable assumption that delivery by mail was made two days later. The Carrier's contention is without support.

Involved here is work performed on December 15, 1987, and on various dates in January 1988, which the Organization claims was within the seniority district of the Claimants, members of the L&A B&B Gangs. The work was performed by members of KCS B&B Gang 692, whose seniority does not include the L&A seniority district.

The record demonstrates that the work was performed within the Claimants' seniority district and was of a nature normally performed by them. The Claimants' right to such work is well established by rule.

For its actions, the Carrier presents a series of defenses, none of which is convincing to the Board. The Carrier argues that the Claimants (with two exceptions, to be discussed below) were otherwise working at the time and thus not available. This, however, is an insufficient basis to justify assignment of work to employees outside the seniority district. Nor is the failure to suffer loss of earnings on the days in question sufficient to defeat a Claim.

The Carrier also argues that the work was of an "emergency" nature in response to FRA reports of defects requiring immediate repair. As the Organization points out, however, the work was clearly performed on a non-emergency basis, with the employees involved doing so within normal hours of work.


The Board, therefore, finds that the Claims have merit, with specific exceptions. The Carrier stated without contradiction during the claim handling procedure that one of the Claimants was not available owing to illness and another Claimant, on one of the dates, was on vacation. The Carrier also stated that no work as claimed was performed on two of the dates (January 8 and 12, 1988). In the absence of contradiction to these assertions, the Claim will be denied as to the two Claimants for the dates indicated as well as for all Claimants on January 8 and 12.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Decker - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of November 1991.

CARRIER MEMBERS' DISSENT
TO
AWARD 29041, DOCKET MW-28867
(Referee Marx)

In Award 28923, the same neutral ruled that:

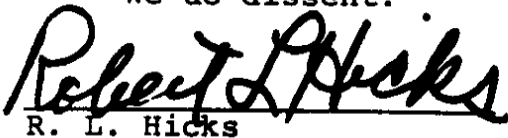
"...The Board is not empowered to assess punitive damages, even in the face of allegations as to past Carrier practice...."

Award 28923 was adopted August 29, 1991. Three months later Award 29041 was adopted, and in the instant Award the neutral reversed himself, forgetting, ignoring, or overlooking what he had said in Award 28923. Contradicting his own assessment, he sustained the claim on an hour for hour basis, despite the un rebutted fact that each claimant (with minor exceptions) was on duty and was paid for services rendered on each claim date. This clearly is the assessment of damages.

In Award 28923, even when the Employees established a pattern of Carrier's continued violation, damages were not assessed. In this dispute, there exists not one whisper of Carrier's continued violation; yet, damages were assessed.

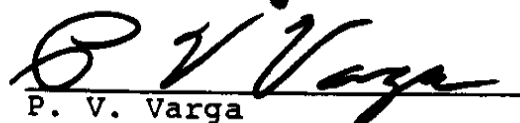
The phrase, consistently inconsistent, is most apt.

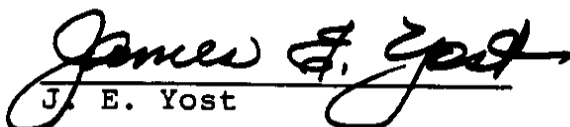
We do dissent.


R. L. Hicks


M. W. Fingerhut


M. C. Lesnik


P. V. Varga


J. E. Yost