

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30076
Docket No. MW-29598
94-3-90-3-568

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (former
(Missouri Pacific Railroad Company)

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

- (1) The Agreement was violated when the Carrier assigned Old Omaha Division Gang No. 5026 instead of Kansas/Central Division employes to perform bridge work (installing handrails and routine maintenance) on bridges between Hoisington and Boyd, Kansas and at Marquette, Kansas on the Kansas/Central Division on July 31 and August 1, 2, 3, 7, 8, 9 and 10, 1989 (Carrier's File 890642 MPR).
- (2) As a consequence of the aforesaid violation, Kansas/Central Division B&B Foreman J. A. Landers, Motor Car Operator L. R. Van Scyoc and B&B Mechanic R. L. Landers shall each be allowed eighty (80) 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 employe 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.

Claimants have established and hold seniority on the Kansas/Central Division. At the time this dispute arose, Claimant J. A. Landers was observing vacation.

On July 31, and August 1, 2, 3, 7, 8, 9, 10, 1989, the Carrier instructed the Foreman of Gang #5026, Old Omaha Division, to take his gang to the Kansas Central Division to work on the Hoisington and Council Grove Subdivisions. The project in-volved installing temporary handrails on bridges between Hoisington and Boyd, Kansas, as well as routine maintenance on a bridge just west of Marquette, Kansas. Two tie gangs were working on this project during the claim period. Gang 4304 worked between MP 820.40 and MP 798.50 while Gang 5026 worked from MP 560 to MP 607. Each of the employees belonging to Old Omaha Division Gang 5026 expended a total of eighty (80) hours performing the subject bridge work.

On September 12, 1989, the Organization filed a claim asserting that the Carrier had violated Rules 1 and 2 (Seniority Datum and Seniority Rights) of the Agreement. The Organization further argued that "no agreement exists that would allow a Manager to integrate employees from two (2) entirely separate rosters for the convenience of the Carrier in carrying out its day to day maintenance." The Organization further asserted that there was a "lack of managerial foresight" and requested that each Claimant be allowed eighty (80) hours of pay at their respective straight time rates.

Carrier denied the claim stating that it had relied on Rule 6 which involves transfers on a temporary or permanent basis from one seniority district to another. Carrier argued that the Bridge Gang from the Omaha Seniority Division was transferred on a "temporary basis to install temporary handrails and footwalks on bridges in order to protect the safety and well being of the tie gang employees and train crews. This temporary transfer of force was a result of all Kansas Seniority Division Bridge forces being fully employed on other projects." Carrier further submitted that one gang began work at MP 560 working West, and the second gang began work at MP 806 working East. "These gangs were approximately 246 miles apart. Due to the distance between the two gangs it would not be feasible for one bridge gang to handle both areas, even on overtime." Finally, Carrier stated that a review of the Claimant's payroll documents "revealed that Claimant J. A. Landers was observing vacation throughout the claim dates, while the other two Claimants were "fully employed during the claim period in the B&B classification and did not suffer any wage loss."

In subsequent correspondence of September 20, 1990, the Organization asserted that Rule 6 "is applicable only in emergency situations" and that if Rule 6 had been applied previously in other than emergencies, "it was without the knowledge and acquiescence of the Organization." In addition to the aforementioned Rules, the Organization cited Rules 4 (Seniority Rosters) and 7 (Change of District) of the Agreement as pertinent to the instant dispute.

Carrier continued to deny the claim which is now before this Board for adjudication.

The record persuasively demonstrates that the work at issue was performed within the Claimants' seniority district and was work normally performed by them. The limited reach of Rule 6 to overcome the Claimants' right to such work is well established by previous arbitral Awards involving the same issue with the same Parties. See Third Division Awards 28852, 29205. We find nothing in this record that would substantially distinguish it from either of these Awards.

There is an interrelationship between Rules 2 and 6 in which the Seniority rule usually has supremacy, as laid down in Awards 29025 and 28852. No more than Carrier can we escape the authoritative effect of the previous Awards which have, through arbitral gloss, established a burden upon the Carrier to demonstrate the existence of an "emergency" and/or a bona fide "transfer" of a gang from one seniority district to another. In our considered judgement, Carrier has failed in this case, as in Awards 29205 and 28852, to meet that burden of persuasion. We cannot conclude that these prior decisions are palpably erroneous, nor can we find any compelling distinction which would produce a different result.

This Board cannot authorize the Carrier to "bootstrap" itself by using Rule 6 to ignore seniority. Carrier's contention that Gang 4304 was unavailable due to working at the other end of its seniority district rings hollow and smacks of "bootstrapping" into a Rule 6 scenario. Carrier made a conscious decision to utilize its manpower in a fashion it deemed appropriate, but that does not constitute an "emergency", nor do the circumstances presented adhere to the definition of a "temporary transfer" as stipulated in Rule 6 of the Agreement between the Parties.

Based upon all of the foregoing, we must sustain this claim. In doing so, however, we note that it was unrefuted that J. A. Landers was observing vacation on the claim dates, and thus, would have been unavailable to perform the disputed work in any event. Accordingly, the claim is sustained only for the remaining named Claimants.

A W A R D

Claim sustained in accordance with the Findings.

Form 1
Page 4

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 15th day of March 1994.