

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award No. 30181
Docket No. MW-29542
94-3-90-3-486

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
(Consolidated Rail Corp.

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

1. The Agreement was violated when the Carrier assigned Youngstown Seniority District employees instead of Pittsburgh Seniority District employees to perform track work on the Pittsburgh Division Seniority District at Mile Post 94 on the Youngstown Secondary and Mile Post 29 on the Pittsburgh Main Line on October 20, 1988 (System Docket MW-240).
2. As a consequence of the aforesaid violation, Foreman C.L. Everly and Trackmen W.E. Brookens, Jr., J. Goosby, D.C. Massaro, C.H. Nowack and J.J. Stoneberg shall each be allowed eight (8) hours of pay at their respective straight rate and be compensated for all overtime wage loss suffered."

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.

There is no dispute as to the facts under review in this Claim. As stated by the Carrier in its Submission:

"On October 20, 1988, the Carrier assigned a Foreman and five Trackmen from the Youngstown Seniority District to perform track work on the Pittsburgh Seniority District."

Youngstown and Pittsburgh are established as separate seniority districts, and it is acknowledged that work within each District belongs to employees holding seniority therein. The Claimants hold Pittsburgh District seniority. On the date in question, the Claimants were under pay, four on duty, one on a personal day, and one on vacation.

The record shows no unusual or mitigating circumstances as to the use of employees in other than their own seniority district. Absent such circumstances, it is clear that the Agreement's seniority provisions were not followed.

What remains is one basic consideration as to the standing of the Claim itself, and two matters concerning the remedy sought by the Organization (eight hours' pay for each Claimant).

The Carrier argues that the Claim cites violation solely of Rule 17, which concerns preferences for overtime work in seniority order. The Carrier notes that the Organization relies on Rules 3, 4, 5, and 6 in its Submission, but did not refer thereto in its on-property handling of the Claim. On this basis, the Carrier argues that the Claim must be dismissed because of the Organization's untimely reliance on Rules not raised in the Claim.

The Board is not persuaded that the Claim is improperly before it. Review of the record shows that both the Carrier and the Organization were aware that the dispute concerned seniority rights within the two Districts. The issue was discussed in a straightforward manner, and the principal discussion concerned remedy (see below), rather than merits of the Claim. Further, Rule 17 (as to overtime) is arguably involved.

As to remedy, the Carrier raises the argument that no payment is appropriate for the Claimants, since they experienced no loss of pay and since there is no specific contractual provision for assessing a penalty. The argument is, of course, a familiar one, and it has been reviewed innumerable times. The Board is well aware that a Claimant's pay status may, in many circumstances, determine whether additional pay is owing as a result of a Rule violation. Here, however, the Board has no hesitancy in concluding that the remedy sought by the Organization is appropriate.

The work involved has Pittsburgh District work. Under what circumstances Pittsburgh District employees could or could not have been available to perform the work is not discussed. The work was

assigned to others holding no Pittsburgh District seniority and lost to Pittsburgh District employees. The requested remedy is thus appropriate.

In support of this is a closely similar recent case involving the same parties and the question of pay to an employee on duty at the time of the Rule violation. In that matter, Special Board of Adjustment No. 1016, Award 41, stated as follows:

"Important seniority rights are in question in this case, because an Employee whose name is on a seniority roster in an Agreement designated seniority district, owns a vested right to perform work in that seniority district that accrues to his standing and status on the district seniority roster. The Seniority District boundaries established by the parties' Agreement to protect and enforce that right, have been improperly crossed by the Carrier action, resulting in the Claimant's loss of work opportunities,...."

Beyond this aspect, the Carrier argues that the two Claimants who were respectively on personal leave and on vacation are not appropriate Claimants, even if the Board otherwise sustains the Claim. The Claim concerns the work performed by six employees not holding Pittsburgh District seniority. It is not beyond practical consideration that these two employees, like the four others, might have been benefitted had the work been properly assigned to Pittsburgh District employees. There is no basis to disqualify the Claimants as designated by the Claim.

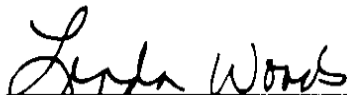
In reaching these conclusions, the Board gave no consideration whatsoever to settlement discussions which occurred during the Claim handling procedure.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 26th day of April 1994.