

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31065
Docket No. SG-31268
95-3-93-3-329

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(The Atchison, Topeka and Santa Fe
(Railway Company

STATEMENT OF CLAIM:

"Claims on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Atchison, Topeka & Santa Fe Railway (ATSF):

Case No. 1

Claim on behalf of C.B. Davis and G.M. Gamboa for payment of 16 hours each at the straight time rate, account Carrier violated the current Signalmen's Agreement, particularly Rules 31 and 34(b), when it utilized employees from another seniority district to perform work in the Claimants' seniority district on February 4 and 5, 1992, and deprived the Claimants of the opportunity to perform the work. Carrier's File No. 92-14-26. General Chairman's File No. 34-1054. BRS File Case No. 9130-ATSF.

Case No. 2

Claim on behalf of G.M. Gamboa for payment of 72 hours at the straight time rate and 9 hours at the time and one-half rate, account Carrier violated the current Signalmen's Agreement, particularly Rules 31 and 34(b), when it utilized an employee from another seniority district to perform work in the Claimant's seniority district between February 18 and 28, 1992, and deprived the Claimant of the opportunity to perform the work. Carrier's File No. 92-14-27. General Chairman's File No. 34-1055. BRS File Case No. 9130-ATSF.

Case No. 3

Claim on behalf of R.E. Thornton for payment of 32 hours at the straight time rate, account Carrier violated the current Signalmen's Agreement, particularly Rules 31 and 34(b), when it utilized an employee from another seniority district to perform work in the Claimant's seniority district between February 6 and 14, 1992, and deprived the Claimant of the opportunity to perform the work. Carrier's File No. 92-14-28. General Chairman's File No. 34-1058. BRS File Case No. 9130-ATSF.

Case No. 4

Claim on behalf of D.E. Reif for payment of 96 hours at the straight time rate and 20.5 hours at the time and one-half rate, account Carrier violated the current Signalmen's Agreement, particularly Rules 31 and 34(b), when it utilized an employee from another seniority district to perform work in the Claimant's seniority district between April 13 and May 1, 1992, and deprived the Claimant of the opportunity to perform the work. Carrier's File No. 92-14-32. General Chairman's File No. 34-1073. BRS File Case No. 9129-ATSF.

Case No. 5

Claim on behalf of G.M. Gamboa for payment of 32 hours at the straight time rate, account Carrier violated the current Signalmen's Agreement, particularly Rules 31 and 34(b), when it utilized an employee from another seniority district to perform work in the Claimant's seniority district between April 6 and April 10, 1992, and deprived the Claimant of the opportunity to perform the work. Carrier's File No. 92-14-33. General Chairman's File Nos. 34-1071. BRS File Case No. 9129-ATSF."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

This case involves five separate claims from Signalmen each of whom was regularly assigned and fully employed on the New Mexico seniority district. Each claim is a result of Carrier's use of one, or in one instance two, Signalmen from the Kansas seniority district to perform routine signalman's work on the New Mexico seniority district. The five claims were separately presented and separately handled through the on-property grievance procedures. Because of the sameness of these claims, they are properly grouped in the parties' presentation to the Board and the Board's decision will dispose of all five claims.

The position of the Organization is succinctly set forth in its Ex-Parte Submission as follows:

"It is the position of the Brotherhood that the Carrier violated the Agreement between the parties, particularly Rules 31 and 34(b), when it utilized employees from the Kansas Division to perform work in the New Mexico Division on various dates during 1992."

This position was set forth by the Organization during the on-property handling of the separate claims and remained constant throughout all of the subsequent claim handling.

The Carrier, throughout the on-property handling of the separate claims, argued that:

". . . under the provisions of Rule 34(b) of the current Signalmen's Agreement, as amended, employees can be temporarily transferred from one seniority district to another seniority district."

Before the Board, for the first time in its argument, Carrier urged as follows:

"Rule 34 clearly provides that individual employees may be transferred [34(a)] or entire gangs [34(b)] may be temporarily transferred from one seniority district to another. Rule 34(c) limits the transfer to 60 days."

The two Agreement Rules here involved read, in pertinent part, as follows:

"RULE 31 - SENIORITY DISTRICTS

(a) Seniority rights of employees to new positions or vacancies will, unless otherwise agreed, be restricted to the following seniority districts:

1. Illinois Division
2. Kansas Division
3. Texas Division
4. New Mexico Division
5. Arizona Division
6. California Division"

"RULE 34 - TEMPORARY TRANSFER TO ANOTHER LOCATION

(a) Employees temporarily transferred by direction of the Management, from one seniority district to another, will retain their seniority rights on the district from which transferred. Except for temporary service, employees will not be transferred to another seniority district unless they so desire.

(b) Subject to the provisions of section (h) of this Rule, for the purpose of providing gangs for construction and heavy repair projects, gangs may be temporarily transferred intact from one seniority district to another without loss of seniority on their home district or establishment of seniority on the district to which transferred. Gang transfers will not be made from a General Manager's territory except by agreement between Management and the General Chairman.

(c) A gang transferred under this Rule will not be used away from its home seniority district to exceed 60 days, except that such limit may be extended for the period necessary to complete the work, for all or part of the gang by written mutual agreement between Management and the General Chairman. Unless it is decided by Management to return the entire gang, the names of employees desiring to return to their home district after the expiration of the 60-day period shall be specified in the agreement between Management and the General Chairman and such employees will return to, and exercise seniority on, their home district in the same manner as if cut off in force reduction.

(d) Employees in transferred signal gangs may bid on and be assigned to positions on their home seniority district, and shall be subject to displacement as the junior employee on the home district, by an employee exercising displacement rights on that seniority district.

(revised by MEMORANDUM OF AGREEMENT dated 10-28-82)

(e) Except by mutual written agreement between Management and the General Chairman a signal gang will not be used away from its home seniority district while a gang from another seniority district is working thereon.

(f) Vacancies or new positions in a gang while working away from its home seniority district shall first be bulletined to employees of the seniority district where the gang is located at the time. If no bids are received and position is not filled under the provisions of section (h) of Rule 33 from employees of the district where the gang is located, the vacancy or new position shall be bulletined to the employees of the home seniority district of the gang and filled from that district under the rules governing. When the gang is returned to its home seniority district, employees holding seniority on other districts shall not be transferred but will be considered and handled as if cut off in force reduction.

(g) If signal gangs are laid off or force in a gang is reduced while away from their home district, employees affected will be allowed travel time returning to their home seniority district.

(h) If, when a gang is to be transferred to another seniority district, any employees on the latter are off in force reduction, positions equivalent to the number off in force reduction will be advertised on the district to which the gang is to be transferred, and the size of the gang adjusted, if necessary, by reducing force in the gang prior to the transfer.

(revised by MEMORANDUM OF AGREEMENT dated 10-28-82)

(i) If a reduction in force is made on a seniority district at a time when a transferred gang is working thereon, the force in the gang will be reduced equivalent to the number of men left unplaced after the exercise of home district seniority, and that number of positions will be bulletined to the employees of that seniority district.

(revised by MEMORANDUM OF AGREEMENT dated 10-28-82)"

In its presentation of the disputes to the Board, the Organization cited with favor several prior Third Division Awards which they say support its position that the New Mexico Division Signalmen were deprived of work opportunities and therefore were entitled to payments as claimed. The Board will first address these citations. While all of the Awards are interesting in their own right, we do not find any of them to be of benefit in our determination of this case.

Award 24480 involved the use of employees from another seniority district to the exclusion of furloughed employees in the district where the work was performed.

Award 25964 involved an Agreement Rule which was considerably different from Rule 31 as found in this case.

Award 29232 involved a dispute in which employees from another craft were used to the exclusion of the employees who normally performed the work in question.

Award 29381 does not give us the benefit of the language of the negotiated Rule, if, in fact, one existed, dealing with the use of employees from one seniority district to work in another seniority district.

Award 30721 involved the same craft as we have in this case and a somewhat similar rule. However, the claim which was initiated and paid covered only the period of time in excess of 60 days during which district 7 employees were used to work in district 9. There was no claim made for the initial 60-day period during which the district 7 employees were used in district 9.

Award 30022 involved a seniority district Rule whose language is not the same as is found in this case. Additionally, that Award made no ruling on the Temporary Transfer Rule of the parties.

Award 30245 gives absolutely no reason for its conclusion.

Award 28928 involved the temporary transfer of an entire gang without prior agreement of the parties. Also involved was Carrier's failure to cite the proper Rule during the on-property handling of the dispute.

Award 29703 involved the use of an employee who was not covered by the basic Rules Agreement.

As previously noted, none of these awards give any insight into or assistance in our determinations relative to the fact situation and Agreement Rules as found in these cases.

It is basic that the petitioning party in a dispute must prove a violation of a specific Agreement Rule in order to have its claim sustained. The burden is not upon the Carrier to prove that its actions are authorized by the Agreement. Rather, the burden is upon the Organization to show that the action taken somehow violated a part of the Agreement.

In this case, the facts are clear and uncontroverted. Carrier temporarily transferred single (in one case two) employees from their home seniority district to an adjacent seniority district to perform routine work which normally accrues to the craft and which possibly could have been performed by the Claimants but for their full employment in their work area of their seniority district.

The language of the pertinent rules here involved is clear and unambiguous. Rule 31 is clear in its provision that seniority rights are restricted to the specifically named district. Rule 31, however, contains a caveat to which the parties have mutually agreed, namely "unless otherwise agreed." The parties have acknowledged that there may be situations in which the restriction of seniority to a particular territory is not absolute. The "unless otherwise agreed" in this case is Rule 34 which, in considerable detail, outlines circumstances in which employees, both individually and collectively as gangs, may be temporarily transferred from one seniority district to another. This language in both Rule 31 and Rule 34 is clear and unambiguous. Each Rule must be interpreted by the Board as written.

In its presentation and progression of this dispute, the Organization has consistently argued that Carrier was in violation of Rule 34(b) by its actions of sending individual employees across seniority district lines. However, Rule 34(b) by its very language does not apply to the temporary transfer of individual employees. Rather, it specifically addresses itself to the temporary transfer across seniority district lines of "gangs for construction and heavy repair projects." The only

required agreement between the parties to effect such temporary transfers of intact gangs for the purpose of construction and heavy repair projects is when the gang transfer is being made "from a General Manager's territory." Clearly, from the fact situations which are not disputed in these five claims, there was nothing done which is subject to the agreed upon terms and conditions of Rule 34(b). It is interesting to note that the Organization relied on an alleged violation of Rule 34(b) as the basis of its dispute but then argued that Rule 34(b) has no application to the situation after Carrier relied on Rule 34(b) in support of its position.

The Board is constrained to point out to the Carrier that its sole and repeated reliance on Rule 34(b) in support of its position in this case is also misplaced. Neither Rule 34(b) nor Rule 34(c) apply to the circumstances which exist in this case. Carrier's gratuitous admission relative to payment of claims which involved transfers of gangs beyond a General Manager's territory is a new issue which is specious at best and of no consequence to the determination of this case. Neither is the Board impressed by Carrier's first-time argument relative to its reliance on Rule 34(a) as support for its actions. It is too well established to require citation that the raising of new issues and arguments by either party for the first time before the Board is not convincing or determinative.

The sanctity of seniority provisions and of the right of employees in a seniority district to perform the work of their craft in their seniority district is not in any way diminished by the Board's determination in this case. When the parties negotiate and memorialize in contract language exceptions to the seniority provisions, then the Rules so negotiated must be read in the light of their stated purpose. In Rule 34, it is apparent that the parties' intent was to permit under certain circumstances and with certain restrictions the temporary transfer of employees or groups of employees from one seniority district to another. The Board cannot ignore such agreed upon contract provisions.

The Organization, as the moving party in this dispute, has the burden of proving every essential element of the claim. It is the Board's conclusion in this instance that the Organization has not met that burden. Therefore, in the absence of necessary Agreement supported proof of a violation, the claims as presented must be denied.

AWARD

Claim denied.

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95-3-93-3-329

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of September 1995.

ORGANIZATION MEMBER'S DISSENT
TO
AWARD 31065, DOCKET SG-31268
(Referee Mason)

During the on-the-property handling, Carrier relied on Rule 34(b) and argued that the Rule only limits the transfer "of the group from one seniority district to another within a General Manager's territory for a maximum of 60 days." Carrier then raised for the first time in its submission to the Board that Rule 34(a) provided for individual employees to be transferred to other seniority districts. As evidenced, the Carrier is trying to use provisions specifically covering the transfer of a gang intact to cover the transfer of individual employees. If the parties intended that these rules would cover either entire gangs or individual employees, they would have said that in the rules.

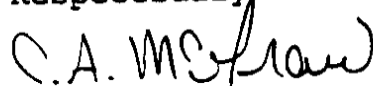
The majority held that Rule 34 provides in considerable detail the exception to the seniority rule. They indicated that Rule 34 outlines circumstances in which employees, both individually and collectively as gangs, may be temporarily transferred. The majority then acknowledges that Rule 34(b) does not apply to transfer of individual employees - in other words, they agreed with the position of the Organization and rejected Carrier's argument that such transfers were allowed under Rule 34(b).

As noted, the majority found it interesting that the Organization first relied on Rule 34(b) and then argued that Rule 34(b) had no application in this situation. The majority obviously misinterpreted the Organization's reliance on Rule 34(b). The Organization consistently argued that Carrier was not allowed to take this

action under Rule 34(b). The Organization never argued that Rule 34(b) provided for the transfer of individual employees, so the majority obviously misconstrued the arguments altogether.

Agreement Rule 34 does not mention the transfer of individual employees. Therefore, the majority is essentially creating another exception to the Seniority Rule. The entire rule pertains to gangs. The rule is replete with references to the transfer of gangs and how that situation is to be handled, but there is nothing in the rule referring to the transfer of individual employees. The exception suggested by the majority simply does not exist. The parties obviously did not mention the transfer of individual employees, which is a testament to the fact that they did not intend the rule to apply to individuals.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "C.A. McGraw". The signature is fluid and cursive, with the first and last names being clearly legible.

C.A. McGraw, Labor Member