

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31173
Docket No. MW-30796
95-3-92-3-605

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(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 Missouri-Kansas-Texas (MKT) B&B employe J. D. Sager to load and haul B&B material from Coffeyville, Kansas and deliver same to Missouri Pacific Gang No. 4313 located near Hartman, Arkansas on April 22 and 23, 1991, rather than assigning Missouri Pacific B&B employe W. C. Grover thereto (Carrier's File 910552 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be allowed eighteen (18) hours' pay at his respective straight time rate of pay."

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 dispute involves the loading, hauling and distribution of material from the Coffeyville, Kansas storeroom to MP Gang 4313 in Hartman, Arkansas, on which the Claimant worked, by an MKT employee on the dates cited. The Organization contends that by utilizing an MKT employee to perform this work within the MP seniority district, the Carrier violated seniority Rules 1, 2 and 4 of the Agreement, for which the Claimant, an MP motor car operator who routinely performed this function, should be compensated.

The Carrier argues that the work of distributing material to a job site is not, and never has been, an exclusive duty of any one craft, nor limited to or bound by seniority districts. It notes that with the merger of the MKT and MP, the Coffeyville storeroom became a common MP/MKT facility, from which materials are routinely delivered to both MP and MKT gangs by the vehicle and individual used herein. The Carrier contends that the Agreement's general Scope Rule does not reserve this work to the Claimant's class or craft, and the evidence reveals that the Carrier utilizes several means of getting material to job sites, including rolling stock, outside vendors and truck lines.

A review of the record convinces us that this dispute is governed by established principles regarding the general nature of the Scope Rule in issue, and the absence of a work classification rule entitling MP motor car operators to perform the distribution of material work here involved. Special Board of Adjustment No. 279, Awards 72 and 299, Third Division Awards 10027, 10028, 4889, 5120, 10522, 16459, 17538. In a case of this sort, the burden of proof is on the Organization to demonstrate that the work in dispute is reserved to its craft members by either specific scope rule provisions or by exclusive systemwide practice. Third Division Awards 25608, 24974, 24853. The Organization has failed to submit evidence sufficient to meet its burden of establishing an exclusive systemwide practice of having MP employees in Claimant's class delivering materials to MP job sites. The record reveals to the contrary. Since seniority rights can only be considered when the right to the work is established, Third Division Awards 21091, 18243, the instant claim must be denied. Third Division Award 29203.

AWARD

Claim denied.

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ORDER

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

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of September 1995.

LABOR MEMBER'S DISSENT
TO
AWARD 31173, DOCKET MW-30796
(Referee Newman)

In this case, the Carrier assigned a Maintenance of Way employe covered under the Maintenance of Way Agreement with the M-K-T Railroad to perform work in an area covered by the Maintenance of Way Agreement with the Missouri Pacific Railroad and not covered under the M-K-T Agreement. The Carrier never denied this fact. This should have been sufficient for the Carrier to simply pay the claim and be done with it because this Board has already decided that once the Carrier chooses to assign a Maintenance of Way employe to perform work, issues as to scope coverage of that work become irrelevant insofar as the application of seniority rules are concerned. This principle was explained to the Missouri Pacific Railroad by the Board in Third Division Award 10125, involving the Missouri Pacific Railroad and the BMW under conceptually identical circumstances. In Award 10125, the Board held:

"Due to a derailment near Oberlin, Louisiana on May 20, 1955, the Carrier assigned a welder and helper to the work of cutting up derailed cars to assist in clearing up the wreckage. A few track rails were cut in connection with the operation which was carried out beginning May 20 and continuing through May 26.

The locale of the derailment and cleaning up operation was on the Lake Charles sub-division of the Little Rock-Louisiana Division of the Missouri Pacific Railroad. This claim is made by the System Committee of the Brotherhood on behalf of a welder and helper holding seniority as such in the Maintenance of Way Department on said Division. The Carrier used a welder and helper from the Maintenance of Way forces of the Gulf Coast Lines

"Railroad, neither of whom held seniority on the Division involved.

The employees maintain that the Carrier's action violated the seniority rights of the claimants contrary to the provisions of the effective agreement between the Missouri Pacific Railroad Company and its employees represented by the Brotherhood of Maintenance of Way Employees. In support of its position the Brotherhood relies on our Award No. 6306.

The Carrier maintains that the work of cutting cars did not belong to Maintenance of Way employees under the Agreement, and consequently was not on the claimant's seniority district. Work of the nature involved is normally performed by Maintenance of Equipment forces.

In the execution of the work involved, the Carrier was not required to call welders of the Maintenance of Way Department. However, when it elected to use Maintenance of Way Welders it was under a contractual obligation to respect the seniority rights of the claimants in this case. This sound principle was clearly stated and applied in Award 6306 to which doctrine we adhere. The claimants held seniority as Maintenance of Way welders on the Division in question, and the welders from the Gulf Coast Lines Railroad who were used did not. We are therefore required to hold that the claimant's seniority rights were violated.

* * *

Claim sustained. **** (Underscoring added)

The Board has often held that prior awards, especially those between the parties involving similar issues, should be followed unless they are shown to be palpably erroneous. A copy of precedent Award 10125 was supplied during panel discussion for the Board's consideration in deciding this dispute. Inasmuch as the Majority here failed to address Award 10125, much less show it to

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be erroneous in any way, but simply chose to ignore it and chose instead to plough new ground in this decision, Award 10125 continues to stand as controlling precedent in like circumstances.

Inasmuch as Award 31173 is clearly a maverick decision which ignores established precedent and defies logic, it is anomalous, certainly erroneous and it can be given no consideration as precedent.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "G. L. Hart", written over a horizontal line.

G. L. Hart
Labor Member