

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32500
Docket No. MW-30726
98-3-92-3-522

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

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Red River Division Gangs 2265 and 1742 to install crossties and gauge track on the Trinity Subdivision of the Palestine Division beginning February 12 through March 8, 1991 (Carrier's File 910483 MPR).
- (2) As a consequence of the aforesaid violation, the Palestine Division employes listed below* shall each receive pay for an equal proportionate share of the total number of man-hours expended by the Red River Division Gangs beginning February 12 through March 8, 1991.

* R. D. Middleton
A. T. Austin
B. W. Deckard
J. D. Stephen
B. R. Scott
R. W. Silmon
D. R. Brown
R. L. Boyd
R. E. Fuller
N. Jordan, Jr.
A. Banks, Jr.

B. J. Clewis
G. R. Richardson
J. L. Dean
K. R. Charles
T. L. Quarles
E. Willis, Jr.
J. K. Lindley
J. K. Jones
A. K. Peel
R. McDonald, Jr.
J. Huerta

W. P. Davis
J. W. Patton
E. J. Amos
M. Mathews
W. Brown

B. J. Murray
M. B. Martin
G. R. Larson
V. P. Patton
J. R. Lake "

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 were given due notice of hearing thereon.

From February 12 through March 8, 1991, Carrier assigned approximately 18 members of Red River Division Gangs 1742 and 2265 to install crossties and gauge track on the Trinity Subdivision of the Palestine Division. None of those transferred to that work held seniority in the Palestine Division Seniority District. The Organization contends that in doing so, Carrier disregarded Claimants' seniority rights in violation of Rules 2 and 4 of the Agreement and in contradiction of prior Third Division Awards involving these parties and analogous facts.

Carrier concedes that while transfers across seniority districts normally are not allowed, they are permitted under Rule 6 in emergency situations. In this case, Carrier argues, no employees were transferred across district lines until all manpower resources on the Division were exhausted and Carrier had attempted to hire new employees. Given those circumstances, and faced with numerous track defects discovered by a Federal Railroad Administration (FRA) test car resulting in slow orders, Carrier was forced to make a hard decision: either entirely shut down its operation for safety reasons, or take the action it did.

The Organization objects to Carrier's reliance on emergency conditions to justify the transfers. Simply labeling an event an emergency does not necessarily make it so, it asserts, especially when nothing in this record reflects that the FRA ever issued any slow orders as Carrier implies. Rather, the problem in this instance was purely attributable to deferred maintenance. Defective ties and bad gauging do not occur overnight, and there is no showing here that their repair had to be accomplished overnight. Claimants were qualified, willing and available to perform the work in question, and Carrier's action resulted in the loss of work protected by Rule 2 (a) of the Schedule Agreement. That Rule states as follows:

"Except as otherwise provided in these rules, seniority rights of employees to new positions or vacancies, or in the exercise of their seniority, will be confined to the seniority district as they are constituted on the effective date of this Agreement."

In a nutshell, the Carrier argues that Rule 2 allows for exceptions to the general principle that employees have the right to work performed within their own seniority district, and that by providing for the temporary transfer of employees to another district, Rule 6 (a) of the Agreement represents an express modification of Rule 2 (a). Rule 6 (a) - "TRANSFER AND TEMPORARY SERVICE," reads in part:

"(a) Employees or gangs temporarily transferred by direction of the management, from one seniority district to another, will retain their seniority rights on the district from which transferred."

The Board has considered the evidence presented on the property in this matter, together with the able arguments of the advocates and the arbitral precedent provided by both sides. Based upon that review, we conclude that the Organization has established that Carrier's transfer of gangs across seniority districts under the circumstances violated the Agreement.

As an initial matter, we note that numerous Awards of this Division involving the same parties reflect deep skepticism of Carrier's contentions regarding the intended sweep of Rule 6 (a). See, e.g., Third Division Awards 30048, 30076 and 32331. To the extent there is tension between Rules 2 (a) and 6 (a), the strong weight of recent Third Division authority suggests that it has been resolved most often in favor of the former

in circumstances such as presented here. Third Division Award 30076 appears to represent the prevailing view on this subject:

"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 judgment, 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."

On this record, Carrier made an apparently good faith decision to deploy its manpower in an efficient manner, but in the face of what it has failed to prove was a genuine "emergency." The temporary transfer of Red River Division personnel was a result of all Palestine Division tie gangs being otherwise fully occupied at the time. There was nothing arbitrary about Carrier's decision, but neither does the record support the argument that Carrier was moved to take its action in the context of a dire or "last resort" situation as it contends. That said, we also find no support in this record or in the Agreement for the Organization's suggestion that a complete shutdown or threatened cessation of service is or should be the test for the finding of emergency conditions under Rule 6. By whatever micrometer is used, that formulation appears to be overly broad. Nor can we square with the Agreement the Organization's blanket assertion that "deferred maintenance" causes emergencies, and thus the "emergency" defense always gets trumped when violation of district seniority issues arise. Rather, in this case and in those addressed by prior Awards, the conundrum is usually more nuanced, requiring a case by case analysis.

On this record, we find there is inadequate proof that a true emergency existed so as to justify the importation of gangs from another district. In the absence of a showing that the work at issue had to be performed immediately, and could only be accomplished by Red River Division personnel, we conclude Claimants suffered a loss of work opportunity as claimed. The Board recognizes that they, or some of them, were fully employed during the period in question, but also notes that a monetary remedy appears to be commonly assessed on this property for violations of Seniority District Rules to discourage repetition even in the face of full employment. Given the frequency and seeming consistency of prior Awards on this property and on this issue, we likewise concluded that a monetary Award is appropriate.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 25th day of March 1998.