

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32504
Docket No. MW-31116
98-3-93-3-102

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(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 Southern District Work Equipment Mechanic V.D. Stiles to perform routine maintenance on the ATS-215T at Mile Post 483.1 on the Eastern District near Nashville and Perkins, Arkansas on December 16, 17 and 26, 1991 (Carrier's File 920220 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Eastern District Work Equipment Mechanic D. R. Hill shall receive twenty (20) hours' pay at his time and one-half rate.”

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.

The following facts are not in dispute. Carrier had a production tamper working on the Eastern District, in the vicinity of MP 483.1, surfacing the track where ties which had been damaged in a derailment were being replaced. When an electrical problem rendered the tamper inoperable, Carrier assigned two Mechanics from the Eastern District to repair it. However, when they were unable to repair the machine, Carrier assigned an employee from the Texas Pacific seniority district to repair the tamper.

On January 13, 1992, the General Chairman filed a claim on behalf of D. Hill in which he asserted that:

“On December 16, 17 and 26, 1991, the Carrier had WEM V. Stiles, who retains seniority on the Southern District (Old T&P) performing work off his seniority district. Said WEM was brought across seniority lines, into the Eastern District, to perform routine maintenance to the to the ATS-215T, in the vicinity of Nashville and Perkins, Arkansas. Said WEM performed 20 hours service off his assigned territory.

Carrier continues to violate the Working Agreement, by moving employees across seniority lines to perform routine maintenance on other seniority districts. Management is under the assumption that since the operating jurisdiction of a superintendent overlaps seniority lines, that they can move employees assigned under them, regardless of seniority, across seniority lines. This is not in harmony with our current Working Agreement.

Claimant, as noted above, retains seniority on the Eastern District, and is presently assigned to Gang 1315. Claimant was available for said work, and retains the necessary skill, ability and merit to perform all duties associated with the WEM classification, but since the Carrier elected to bring an employee across seniority lines, and did not ask or give Claimant the opportunity to perform said work, as his seniority would allow, it created a ‘Loss of Work Opportunity’ for Claimant.

It is our contention that certain rules of our current Working Agreement have been violated, especially, Seniority Datum Rule (1), Seniority Rights Rule (2), Bulletin Rule (11), and Work Week Rule (14).

Therefore, time is being claimed by and in behalf of Claimant for payment of all hours noted above, at his time and one-half rate, as a result of violation listed above."

Carrier denied the claim, contending that:

"A review of the claim situation reveals that the ATS-215T was completely out of service due to an electrical problem and had to be immediately repaired. Eastern District Work Equipment Mechanics M. Hilliard and L. Sales were assigned to work on this machine, but were unable to correct the problem. There were no other available employees in the area on the Eastern District to perform the work in question, and therefore the closest Work Equipment Mechanic on the property, V. Stiles was utilized to perform or assist the two Eastern District Work Equipment Mechanics in the repairs to the equipment. Our actions were in accordance with Rule 6 of the Collective Bargaining Agreement.

As information, the tamper was a critical part of the Company's operation in replacing the ties damaged in a derailment and surfacing the track.

Review of the Claimant's work record indicated that on December 16 and 17, 1991 he was working approximately one hundred and fifty (150) miles away from the tamper (working in Little Rock). Likewise, a review of the Texas Pacific mechanic's work record reveals that he normally worked in the Texarkana Yards which was less than sixty (60) miles away.

The Claimant was fully compensated as a Work Equipment Mechanic December 16 and 17, the same as the Texas Pacific Mechanic. Therefore, there is no basis for additional compensation being accorded the Claimant."

The Organization premised this claim primarily upon Agreement Rule 2 "Seniority Rights", and Rule 4 "Seniority Rosters", which provide, in pertinent part:

"2. (a) Except as otherwise provided in these rules, seniority rights of employees to new positions or vacancies (sic), 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."

"4. (a) Seniority rosters of all employees, in each sub-department by seniority districts, will be separately compiled and will show the name, classification and date of entry of the employee into service, and date of promotion."

For its part, Carrier relied upon the language set forth in Rule 6 of the current Agreement which states, in part, that:

"Transfer and Temporary Service:

(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.

(b) Employees assigned to temporary service will, when released, return to the position from which taken without loss of seniority."

The issue before the Board is not a matter of first impression. Numerous Awards demonstrate that Rule 6 does not negate Rule 2 nor provide Carrier the unfettered right to transfer employees across seniority districts. However, these same Awards recognize Carrier's limited right to avoid liability for failing to comply strictly with Rule 2 in cases of "bona fide emergency." The burden of proof is upon Carrier to demonstrate by a preponderance of evidence that the "emergency" affirmative defense is applicable in a given case.

Carrier failed to carry that burden in this particular matter and the Organization has proven a violation of Rule 2. The "full employment" of Claimant on the first two claim dates has not been found sufficient for this Board to decline the award of monetary damages in a series of recent decisions which emphasize the necessity of compliance with Rule 2 except in true emergency situations. However, we decline to award Claimant

damages for December 26, 1991 because the record shows that he chose to be on vacation that day.

AWARD

Claim sustained in accordance with the Findings.

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.