

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33850
Docket No. MW-32396
99-3-95-3-254**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE:(
(CSX Transportation, Inc. (former Seaboard System
(Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement when it assigned Jacksonville/Tampa Seniority District B&B employees assigned to Force 6A74 beginning January 6, 1994 and continuing and Force 6T73 beginning January 31, 1994 and continuing to perform work on the Savannah/Florence Seniority District at Callahan and Fernandina, Florida [System File EMS-94-46/12 (94-0554) SSY].**
- 2. As a consequence of the violation referred to in Part (1) above, the members of Savannah/Florence Seniority District Force 6F67, Force 6F75 and Machine Operator E. L. White shall each be allowed an equal proportionate share of the number of man-hours expended by the Jacksonville/Tampa Seniority District Forces 6A74 and 6T73 to perform the work in question beginning January 6 and/or January 31, 1994 and continuing until the violation ceased.”**

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 claims in the instant dispute arise out of Carrier's assignment of work that fell within the Savannah/Florence Seniority District to employees in the Jacksonville/Tampa Seniority District. Carrier concedes that it assigned the work to the improper seniority district. However, Carrier maintains that no monetary remedy is appropriate for two reasons. First, it accuses the Organization of engaging in a sharp practice. Second, it urges that the Claimants were fully employed at the time of the violations.

Carriers' accusation of a sharp practice resulted from the fact that the initial claim arose on January 6, 1994, and the Organization did not file the claim until February 17, 1994. Carrier observes that a new manager made a mistake in assigning the work to the wrong seniority district and argues that the Organization should have promptly pointed out the mistake instead of running up the damages.

We note that the Awards on which the Carrier relies involved situations in which the sharp practice was apparent on the face of the record or in which there was evidence supporting the finding of a sharp practice. For example, in Public Law Board No. 2668, Award 89, the Claimant, who was displaced from her position as a Microfilm Camera Operator, sought to exercise her seniority to displace the most senior Key Punch Operator from a pool of 19 Operators. The Public Law Board found, among other things, that "Claimant did state that she intended to spread protection [under a January 8, 1979 Agreement] throughout the pool by bumping the most senior Key Punch Operator in the pool." Faced with this evidence of an intent to trigger a chain-reaction of bumps that would trigger protection for all employees within the pool, the Public law Board held that the Carrier properly required the Claimant to bump the least senior member of the pool.

In Third Division Award 22111, the General Chairman filed an otherwise timely appeal of discipline with the wrong Carrier Officer. That Officer waited 52 days, until just beyond the 60-day time limit for filing appeals, to respond that the appeal had been filed improperly. The General Chairman refiled the appeal with the appropriate Carrier Officer, but the appeal was outside the 60-day time limit. The Board,

condemned the sharp practice which was apparent from the face of the Carrier Officer's delay in responding and, in a finding "strictly limited to the narrow record of the instant case," rejected the Carrier's time limits objection to the claim.

Unlike the Awards discussed above and the other Awards cited by the Carrier in its Submission to the Board, the record in the instant case contains no specific evidence that the Organization deliberately waited 42 days before filing the claim in order to run up the damages. We also are unable to infer such intentional sharp practice from the passage of time between the initial act giving rise to the claim and the filing of the claim. There is no evidence as to when the Organization first became aware that there may have been a violation of the Agreement by the assignment of the work to the Jacksonville/Tampa Seniority District. There also is no evidence that the Organization, upon becoming aware of the possible violation, took a deliberately unreasonable amount of time in investigating the situation and in processing the claims. Rule 40 recognizes that it may take time for the Organization to learn of and investigate potential Agreement violations and allows claims to be filed within 60 days from the date of the occurrence on which the claim is based. Absent evidence of deliberate delay on the part of the Organization, we must reject the Carrier's accusation of a sharp practice.

The Carriers' argument that no monetary relief is due because the Claimants were fully employed at the time of the violation has been rejected by the Board in numerous cases involving seniority district violations, including several decided on this property. We find it sufficient for purposes of this Award to rely specifically on Third Division Award 29353 which, in turn, quoted as follows from Third Division Award 25964:

"... the Carrier disputes the propriety of the Claim on the basis that the Claimants were already under pay at the time the work was performed, one being employed elsewhere and one on vacation. The Board finds this an inadequate defense. Rule 2 specifically directs that seniority be 'confined.' To follow the Carrier's reasoning here would permit the indiscriminate use of employees in contradiction to the Rule. Where, as here, the seniority rights of employees are violated, a remedy is appropriate consonant with the violation involved, as established in a myriad of other Awards."

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 21st day of December 1999.