

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35635
Docket No. MW-35272
01-3-99-3-57**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(Grand Trunk Western Railroad Inc. (former Detroit
(and Toledo Shore Line Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned DT&I Seniority District Foreman R. Bass, Truck Operator R. Hay and Laborer J. Kline to perform excavation work on the DTSL Seniority District at Mileage 12.9 on the Shoreline Subdivision on September 16, 1997 (System File DTSL 013/8365-1-626 DTS).**
- (2) As a consequence of the violation referred to in Part (1) above, Foreman J. Comage, Truck Operator D. Bock and Laborer E. Abercrombie, Jr. shall ‘*** be paid eight (8) hours straight time and two (2) hours at time and one-half rate at their respective rates 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 were given due notice of hearing thereon.

The facts that precipitated the instant claim are undisputed. The Carrier is the Grand Trunk Western (GTW) Railroad. It is made up of the former GTW, the former Detroit, Toledo and Ironton (DT&I) and the former Detroit and Toledo Shore Line (D&TSL) Railroads. The operation of the three former railroads has been consolidated under the single GTW corporate identity since 1982. However, employees represented by the Organization continue to work under the three separate Agreements of the former railroads.

On September 16, 1997, three former DT&I Bridge and Building Sub-Department employees performed bridge repair work at Milepost 12.9 on the former D&TSL Railroad. During the course of the work, the three former DT&I Bridge and Building employees performed excavating work to restrain lateral movement of a bridge retaining wall.

The instant claim, filed on November 7, 1997, alleged that the Carrier violated various provisions of the D&TSL Agreement when the former DT&I employees performed the excavation work on the territory of the former D&TSL Railroad. The three Claimants, former D&TSL Track Subdepartment employees, were fully employed and compensated on the claim date.

The Carrier denied the claim on the basis that the work at issue was within the jurisdiction of the Bridge and Building Subdepartment. The Carrier contended that such work was not customarily and exclusively performed by employees of the Track Subdepartment. Therefore, in the Carrier's view, the three named Claimants of the Track Subdepartment classification were "inappropriate" and warranted the declination of the claim.

The Board thoroughly reviewed the record in this case and finds that the Organization's claim has merit. Even though the former GTW, DT&I and D&TSL merged and are now the Grand Trunk Western Railroad, separate Agreements continue to control on the territories comprising the three formerly separate railroads. It is undisputed that employees with seniority on the D&TSL are covered by a different Agreement than the one covering employees of the DT&I. The DT&I employees assigned to perform the work on September 16, 1997 do not hold seniority on the district on which the work was performed and, therefore, they were not entitled to it.

The Carrier did not contest that fundamental proposition during the on-property handling of the claim. Instead, the Carrier argued that the Claimants are not the employees who are properly aggrieved in this matter. The Carrier maintained that the Claimants are Track Sub-Department employees who do not customarily or exclusively perform the B&B work that is in dispute. We reject the Carrier's exclusivity argument. The Carrier cited no provision of the Agreement that reserves the excavation work that is the subject of this dispute exclusively to employees in the B&B Sub-Department. While those employees might have preference to the work over Track Sub-Department employees because the work was done on a bridge retaining wall, the Claimants were not excluded from performing that work. On the contrary, Article 20-1, Agreed Interpretations, provides as follows:

- “Q. For what work can Trackmen be used in the Bridge and Building Department and what rate will they be paid?**
- A. Excavating without forms when necessary in connection with the Bridge and Building, or signal work, handling dirt, sand, gravel or other similar material, replacing and spiking rails on bridges when tie renewals are made, and for the performance of such work they will be paid \$1.306 per hour.”**

The critical point is that, as between the Claimants and the employees covered under the DT&I Agreement, the Claimants have preference to the work claimed. Whether the D&TSL B&B employees would have greater preferential rights to the disputed work than the Claimants is irrelevant.

For the first time during panel discussion at the Board, the Carrier Member contended that several Awards on this property denied similar claims and should control the outcome here. See Third Division Awards 32912, 30914, 29723 and 29685. In all four cases cited, the Organization protested work assignments by GTW employees on locations within the D&TSL seniority district that otherwise would have been assigned to D&TSL employees. The critical difference, however, between those cases and the instant matter is that the Carrier defended by arguing that the assignments were tantamount to contracting out work under the provisions of Article 52(m). We are unable to entertain that defense in the present case because it was never advanced during the handling of the dispute on the property. No citation is required for the well-

established proposition that the Board must confine itself to the arguments raised by the parties prior to submission of the case before the Board.

With regard to the remedy, we note that the Carrier's "full employment" argument is not persuasive. The assertion that the Claimants were performing their duties elsewhere has been rejected by the Board on numerous occasions, including a decision on this property. See Third Division Awards 28676, 28185 and 20090. The claim will be sustained as presented.

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 28th day of August, 2001.