

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35732
Docket No. MW-32723
01-3-95-3-599**

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-
(Kansas - Texas Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned and used MoPac employees on Gang 9103 to perform work of unloading track material (tie plates, spikes and rail anchors) from gondola cars:**

- (a) at Mile Post 401.0 to Mile Post 414.0 on the MKT territory, from October 1 through 21, 1994, and**
- (b) at Mile Post 387.7 to Mile Post 401.0 on the MKT territory on September 9 through 21, 1994,**

instead of assigning Messrs. J. Ybarra, P. R. Horne, Sr., F. L. Jones, S. L. Triebel, L. L. Foster, B. C. Dunn, R. J. Hickles, J. D. Sager, R. O. Painter, E. Savala, L. Perez and C. A. Small to perform the work (System Files 2-22/950064 and 2-22/9500623 MKT)

- (2) As a consequence of the violations referred to in Part (1) above, the Claimants shall each be allowed:**

- (a) one hundred sixty-eight (168) hours' pay at their respective and appropriate straight time rates plus any and all overtime worked by the MoPac forces on October 1 through 21, 1994, and**

- (b) one hundred four (104) hours, pay at their respective and appropriate straight time rates plus any and all overtime worked by the MoPac forces on September 9 through 21, 1994.”

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.

Prior to the time the instant dispute arose, the Interstate Commerce Commission approved separate requests for the purchase of the Missouri-Kansas-Texas Railroad (MKT) by the Union Pacific Railroad (UP) and a merger of the Missouri Pacific Railroad (MP or MoPac) with the UP. Notwithstanding the purchase of the MKT by the UP and the merger of the MP into the UP, the separate Collective Bargaining Agreements in effect on each separate railroad remained in effect after the purchase and mergers and were not amended or otherwise changed to eliminate seniority rights of any employees or supersede seniority rights of any employees on the other railroads. Claimants P. R. Horne, Sr., and F. L. Jones hold seniority as Assistant Track Foremen in the Track Department on the MKT; Claimants S. L. Triebel and L. L. Foster hold seniority as Machine Operators in the Track Department on the MKT; Claimants B. C. Dunn and R. J. Hickles hold seniority as Machine Operator Helpers in the Track Department on the MKT; Claimants J. Ybarra, R. O. Painter, E. Savala, L. Perez and C. A. Small hold seniority as Laborers in the Track Department on the MKT.

It is undisputed that in each of the instant cases the Carrier utilized Maintenance of Way employees of a former Missouri Pacific Track Gang to unload track material from gondola cars in the Claimants' seniority district in connection with a rail relay

project on the former MKT territory. Nor is there any dispute that work of the character involved here has customarily and traditionally been assigned to and performed by forces of the former MKT Railroad Company and that under the controlling Agreements each of the Claimants had prior rights to the work claimed in accordance with their established seniority as MKT employees.

Although handled as two separate claims on the property, these two seniority district claims were appropriately combined for consolidated presentation to the Board because, aside from the dates, the facts and issues involved are virtually identical. See Third Division Awards 32394, 32419 and 34049. It is important to note that this is not a matter of first impression and a substantial body of precedent by the Board addresses each of the issues raised in these cases. Third Division Awards 30408, 30409, 31228, 31292, 31569, 31570, 32331, 32394, 32419, 32421, 32500, 32504, 32993 and 34049 establish that the negotiated seniority district boundaries and prior rights therein cannot be ignored except in "bona fide emergency" situations, notwithstanding the Carrier's right under Rule 6 to temporarily transfer employees across seniority district boundaries in appropriate circumstances, none of which apply to the instant cases.

Among other things, the Board has also held that such seniority district disputes are "continuing" in nature and thus viable even if filed more than 60 days after commencement, although no monetary claim shall be allowed retroactively for more than 60 days prior to the filing date. See Third Division Awards 28524, 32331, 32394, 32993 and 34049. Therefore, the Carrier's attempted denial of the claims for alleged untimely filing is misplaced. Similarly, the Carrier's defense that the Claimants were assigned to perform other work in their seniority district on claim dates when the MoPac gang was unloading the gondola cars is unavailing. A review of the Awards cited supra shows that the Board has held that such lost work opportunity is compensable and that the issuance of a monetary award is warranted to discourage recidivist violations by the Carrier. The Board has consistently held, on this property, that the proper remedy for such violations is payment to the Claimants for all time consumed by the improper employees performing the mis-assigned work. See Third Division Awards 31569, 31570, 32504 and 32421. On the other hand, the Carrier correctly relied on our holding in Award 32504 for the proposition that no Claimant is entitled to lost work opportunity compensatory damages for a date on which he elected to take a vacation day.

Consistent with all of the foregoing, the Board sustains the instant claims, with compensatory damages to be calculated in accordance with our holding in Third

Division Award 32421, to wit: "The function of a remedy for a demonstrated Agreement violation is to make adversely affected employees whole. Affirmative relief shall therefore be required in this case to remedy the loss of work opportunities. The number of hours worked by the [MoPac] employees on the dates covered by the claim shall be apportioned to Claimants. Claimants shall be made whole at the appropriate Agreement rate (i.e., punitive or pro rata) commensurate with the resulting total number of hours demonstrated by their respective records for the time covered by the claim."

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 24th day of October, 2001.