

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35854
Docket No. MW-35259
01-3-99-3-52**

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 Employees
(Union Pacific Railroad Company (former Denver and
(Rio Grande Western Railroad)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned a Union Pacific roadway equipment operator to work (operate a crane to unload rail) on the Denver and Rio Grande Western Seniority District on the Provo Sub-division between Mile Posts 720.3 and 728.6 located between Mesa and Riverton, Utah beginning September 26 through October 1, 1997, to the exclusion of senior Denver and Rio Grande Western Work Equipment Operator R.C. Martinez (System File D-97-53C/1111754 DRG).
- (2) As a consequence of the violation referred to in Part (1) above, Crane Operator R. C. Martinez shall be allowed twenty-one and one-half (21.5) hours' pay at his respective straight time rate and four (4) hours' at his respective overtime 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.

This dispute arose when the Carrier assigned Union Pacific equipment operators to use a crane to unload rail between Mesa and Riverton, Utah, which is located on the Carrier's Denver and Rio Grand (DRG) property. The Carrier does not deny that it assigned UP employees across Agreement and Seniority District lines. Instead, the Carrier defends its actions by asserting that, first, the subject work was not maintenance of DRG track and therefore the Agreement was not violated; second, the Claimant was not qualified to operate the crane that was used to unload the rail; and, third, the Claimant was fully employed and therefore was not deprived of a work opportunity.

The Board rejects the Carrier's defenses and finds that the Agreement was violated. It is well established that work within a specific seniority district must be reserved for employees holding seniority thereon. The UP employees who were assigned in this instance had no contractual right to perform the work at issue. Third Division Awards 10125, 14981, 19543, 30781, 32419 and 34049.

Although the Carrier contended that the subject work was performed at the request of the State of Utah and the Carrier merely served as a subcontractor to the State, the Board is constrained to point out that this is not a contracting out claim. Once the Carrier elected to assign its employees to perform the subject work for the State of Utah, it was obligated to do so in accordance with the Agreement.

The work at issue was unloading rail with a crane on DRG property - work which is encompassed within the scope of the Agreement. The Carrier argued that the crane used was an Ohio Crane, and that no DRG Machine Operator, including the Claimant, was qualified to operate the Ohio Crane. Even if that were the case, the Carrier did not establish that the Ohio Crane was the only machine that could be used to unload the rail. In Third Division Award 6905, the Board stated:

"It is to be remembered that the subject of the Carrier's contract with its employees is work and not equipment. If the Carrier has equipment and no work and its employees stand idle, no rights accrue to the employees under the contract. If the Carrier has work but not equipment and under those

circumstances alone, could contract out its work . . . the last vestige of right which the employees have under the collective bargaining agreement would disappear.”

The principle cited above applies with equal force here. In this case, the Carrier decided not to use the equipment on DRG property. However, this decision did not give the Carrier the right to use an employee from another seniority district to perform the work.

The Carrier further contends that the Claimant was fully employed on the dates in question. There is a long line of cases holding that the payment of a monetary remedy is proper in cases of this nature even though the Claimants may have been fully employed. See Third Division Awards 20090, 30064, 31569, 32331, 32440 and 34049. The loss of work opportunity was established. We therefore find no reason to depart from that precedent.

The claim is 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 18th day of December, 2001.