

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36942
Docket No. MW-36145
04-3-00-3-334**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to furnish Jacksonville-Tampa Seniority District foremen seniority rosters of the Jacksonville-Tampa Seniority District for proper posting and failed to send copies of the rosters to each employee not assigned to a gang during the month of January 1999 and continuing [System File 91102499/12(99-0486) SSY].**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall furnish foremen for proper posting, copies of the revised 1999 Jacksonville-Tampa Seniority District Seniority Rosters, provide Claimant S. R. Wilson with copies of the revised rosters, including SPG rosters, and compensate him one hundred dollars (\$100.00) per week, each week, beginning with the first week of February 1999 and continuing until Agreement Rule 7 is fully complied with.”**

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 issue raised by this claim is whether the Carrier's admitted violation of Rule 7 by not timely posting its 1999 seniority rosters and sending a copy of the applicable rosters to the Claimant, an employee not assigned to a gang, supports the requested relief, including monetary compensation.

The Claimant holds seniority in Group A of the Track Subdepartment as a Trackman dating from July 17, 1979 and on the Jacksonville-Tampa Seniority District as a Machine Operator from May 31, 1982. He has been on approved leave of absence (LOA) since January 28, 1987 to work as a Submission Writer in the Organization's Chicago office. Thus, he has not been assigned to a gang since that date. Rule 7, Section 2 of the Agreement in effect at the time the claim was filed in March 1999, provides that seniority rosters are to be revised and posted during the month of January each year, and that "a copy will be sent to each employee not assigned to a gang. . . ."

The Claimant's failure to receive a copy of his two seniority rosters after January led to the filing of the instant claim, and the contention that rosters have not been posted or sent to employees in January repeatedly over a sustained course of time led to the request for monetary compensation of \$100.00 for each week beginning February 1, 1999 that the Claimant did not receive his rosters. The correspondence on the property includes statements from the Carrier Foremen and employees revealing that such rosters were never sent to them for posting, and that the Carrier's failure to post its rosters in January is an annual problem of concern to employees. It also contains statements and prior claims initiated by the Claimant concerning his failure to receive timely copies of his rosters in 1995 and on a yearly basis. The Carrier's correspondence asserts that whenever such occasional inadvertent errors were brought to its attention, usually informally, it rectified the situation, and that no employee has been harmed by its late posting of rosters. It

notes that arrangements were made to forward the Claimant copies of the 1999 rosters in April, and again at the end of May 1999.

The Organization argues that Rule 7 was intended to have some meaning by the parties, and enables employees to protect their crucial seniority rights. It asserts that the Carrier's admitted repeated and flagrant refusal to comply with the negotiated language requiring the Carrier to post and send copies of its revised rosters annually by the end of January must be remedied and the integrity of the Agreement upheld by requiring a monetary assessment of damages, otherwise the Carrier would have no incentive to comply with its contractual obligations, citing Third Division Awards 35503, 30931, 29856, 23928, 20311, 19770, 12374, 11701; First Division Award 25459. The Organization urges the Board not to consider all of the new arguments raised by the Carrier for the first time in its Submission to the Board, including the fact that any violation is de minimis or trivial, personal attacks on the Claimant and his motives, the fact that no employee had been harmed by the late posting and that the Claimant has had no opportunity to exercise his seniority.

On the property, the Carrier contended that any failure to post or send rosters timely were occasional, inadvertent, and immediately corrected when brought to its attention, and that its Officers were unaware of such actions. In its Submission to the Board, the Carrier argues that rosters have never been posted or sent in January in the normal course, and that it was a practice not to do so and to deal with it informally when the Organization requested such copies. The Carrier also asserts that any violation of Rule 7 was de minimis and remedied by the fact that employees had their seniority roster information available to them on the Carrier's mainframe system which they had access to, the rosters were posted when requested, and any proof of loss of wages as a result of the late posting, of which there were none in this case, could be dealt with accordingly, noting that in the only other claim filed alleging a similar violation, there was never a monetary penalty demanded. The Carrier noted on the property that the new Agreement in effect since June 1, 1999 does not require it to send copies of its rosters to unassigned employees, and before the Board asserted that the claim is moot and there is no Agreement whose integrity needs to be upheld, citing Fourth Division Award 4932. The Carrier argues that there is no provision in the Agreement for penalty payments, especially in the absence of any showing of harm, and asserts that it would be outside the scope of the Board's authority to order a monetary remedy in this case, relying upon Public Law Board No. 5700; Third Division Award 35632; Second Division Award 11460.

Initially we note that the only matters properly before us are those raised by the parties on the property, not the belated arguments raised for the first time in the Submissions to the Board. A careful review of the proper record convinces the Board that there is no dispute of fact in this case as to the Carrier's violation of Rule 7 Section 2 by its failure to both post its 1999 seniority rosters by the end of January 1999 or send a copy to the Claimant prior to the end of April 1999. The real question before us is whether, under the proven circumstances of the Carrier's long-standing practice of failing to meet its time commitments for posting and sending its seniority rosters under the specific requirements of Rule 7, and considering that the Agreement Rule was changed by the parties effective June 1, 1999 negating the Carrier's obligation to send the Claimant copies of such roster, a monetary remedy to the Claimant is appropriate without the establishment of specific harm or loss of earnings as a result of the late receipt of the rosters.

Despite the Carrier's claims on the property that its officers were unaware of any failure to properly post and send the rosters and that any such actions were inadvertent and occasional, a position apparently abandoned before the Board with its argument that ignoring the time limits in Rule 7 was its customary practice, the evidence supports the Organization's contention that the Carrier knowingly and repeatedly violated its obligation to timely post and send its seniority rosters to employees to enable them to verify their standings, unlike the situation in Second Division Award 11460 and Third Division Award 35632. While the Board has normally adopted the Carrier's assertion that a penalty payment to a Claimant who has suffered no ascertainable harm is inappropriate, we have also made exceptions for a clear showing that the contract has been breached with impunity, in order to deter future violations and permit the Organization to uphold the integrity of the Agreement. Third Division Award 30931, 29856, 19770. Accordingly, we shall sustain the claim for damages to the Claimant in the amount of \$100.00 per week for the period commencing February 1, 1999 and ending on the date when the Carrier can prove that it sent the rosters to the Claimant in either April or May 1999 or upon his receipt of same, whichever is earlier, but in no event after June 1, 1999 when the parties negotiated a change to the Carrier's obligation found to have been violated in this case.

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 22nd day of March 2004.