

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39730
Docket No. MW-38423
09-3-NRAB-00003-0040380
(04-3-380)**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(CP Rail System (former Delaware and Hudson
(Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Seniority Territory No. 2 employees R. Wetsell, H. Mason and A. Spencer to perform work (change rail and work on track throw) on Seniority Territory No. 3 on the Freight Main Line at Mile Post 473.8 on October 16, 2002 and at Mile Post 474 on October 17, 2002, instead of Seniority Territory No. 3 employees M. Berner, J. Jackson and J. Khachadourian (Carrier’s File 8-00345 DHR).**
- (2) As a consequence of the violation referred to in part (1) above, Claimants M. Berner, J. Jackson and J. Khachadourian shall now be compensated for sixteen (16) hours at their respective straight time rates of pay and three (3) hours at their respective time and one-half 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 Organization filed the instant claim on the Claimants' behalf, alleging that the Carrier violated the parties' Agreement when it assigned employees from Seniority Territory No. 2 to perform work within Seniority Territory No. 3, instead of assigning this work to the Claimants, who have seniority within Seniority Territory No. 3.

The Organization initially contends that there is no dispute that the Claimants were replaced in their regular assignments on Seniority Territory No. 3 with employees from Seniority Territory No. 2 on the dates in question. The Organization asserts that because it is well-established that assignments across seniority territorial boundaries constitute a violation, the instant dispute centers upon the Carrier's defense that Appendix J allowed the short-term assignments to fill regular positions across adjoining seniority territorial boundary lines, allowing the Carrier to allegedly assign regularly assigned employees to perform other unspecified work elsewhere. The Organization argues that the Carrier's position is in serious error.

The Organization emphasizes that the Claimants' seniority was confined to Seniority Territory No. 3, and it entitled them to the work opportunities occurring within the territorial limits of Seniority Territory No. 3, including all track work within that territory. The Organization maintains that such work opportunities were reserved to the Claimants in preference to employees who did not retain seniority on Seniority Territory No. 3, such as the employees from Seniority Territory No. 2 who were assigned to perform the disputed work. Citing a number of prior Awards, the Organization insists that it is well-established that where seniority is confined, work also is confined. The Organization asserts that it established a prima facie violation of the Agreement when it cited the Agreement provisions in conjunction with the undisputed factual circumstances.

The Organization maintains that, in connection with the Carrier's reliance on Appendix J, both parties were aware that seniority territories were established for the purpose of reserving work to those with seniority established thereon. The Organization points out that the exception that the Carrier sought, and that the parties ultimately agreed upon, relating to the assignment of employees across seniority territorial boundaries was for "short term projects" on adjoining territories, provided such short term assignments were to assist employees adjacent to the boundaries of the adjoining territories for periods of up to five working days.

The Organization argues that the Carrier erroneously asserted that the assignment of Seniority Territory No. 2 employees to perform work on Seniority Territory No. 3 was to assist employees assigned to Seniority Territory No. 3. The Organization emphasizes that there were no Seniority Territory No. 3 employees present at the sites of the disputed work on the claim dates.

The Organization contends that the central issue is the Carrier's contention that it may assign employees across seniority boundaries with impunity based upon the provisions of Appendix J, whether or not employees in the adjoining territory are present. The Organization points out that common dictionary definitions of the word "assist" clearly show that the party who is assisting has to be physically present with the other party. The Organization submits that to comply with Appendix J, employees of Seniority Territory No. 3 would have to be physically present when such assist work is being performed on their territory by employees from an adjoining territory. The Organization emphasizes that in this instance, however, no employees from Seniority Territory No. 3 were present, and the employees from Seniority Territory No. 2 replaced, rather than assisted, employees from Seniority Territory No. 3. The Organization asserts that this clearly is not the intent of Appendix J.

The Organization goes on to argue that there is no validity to the Carrier's position that the Claimants were unavailable because they were assigned and working on other projects on the claim dates. The Organization asserts that the Carrier failed to produce any documentary evidence, such as work and payroll records, to support this affirmative defense, which invites application of the negative inference rule. The Organization further contends that whether or not the Claimants were working elsewhere during the claim period, this would not render them improper Claimants because the Carrier made no attempt to reschedule the

work in question, to reschedule the work to which the Claimants were assigned during the claim period, to assign the work at issue during overtime hours, or some combination thereof. The Organization insists that the Carrier therefore cannot validly question the Claimants' availability. Pointing to prior Awards, the Organization additionally contends that it is well established that the fact that an employee is working where the Carrier has assigned him does not render him unavailable or unable to perform other work.

The Organization then maintains that as to the assertion that the Claimants were "fully employed" and suffered no monetary loss, there was an *ipso facto* loss of work opportunity when the Carrier assigned employees from Seniority Territory No. 2 to perform work on Seniority Territory No. 3. Moreover, the question of whether a "fully employed" claimant is entitled to receive compensation when a carrier violates an agreement provision has been overwhelmingly answered in favor of the Organization.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that no Agreement violation occurred. The Carrier asserts that Appendix J is the controlling Rule in this matter, and it supports the Carrier's position. The Carrier confirms that there is no dispute that three employees holding seniority within Seniority Territory No. 2 did, in fact, perform track work in Seniority Territory No. 3 on the claim dates. The Carrier argues that the Claimants were employed elsewhere within Seniority Territory No. 3 and were not physically present when the employees from Seniority Territory No. 2 were assisting them with track work in Seniority Territory No. 3.

Based on these facts, the Carrier asserts that even if a violation occurred, the Claimants were fully employed and were not monetarily harmed. The Carrier emphasizes that the Organization never refuted this fact during the on-property handling, so it is barred from doing so now. The Carrier accordingly asserts that there is no merit to the argument that the Claimants were being replaced, in that the Claimants were working in another part of their seniority district. The Carrier insists that the Claimants simply were being assisted by the employees from Seniority Territory No. 2, in full compliance with Appendix J.

The Carrier does not dispute that Rule 14.3 sets out the specific seniority territories. It contends, however, that Appendix J puts limitations upon the application of Rule 4.13. The Carrier asserts that Appendix J clearly states that the parties agreed to make exceptions to the application of the defined seniority territories provided for in Rule 4.13, and these exceptions relate to short-term assignments for periods of up to five working days. The Carrier insists that Appendix J contains language that controls in the instant dispute, and it takes precedence over Rule 4.13. Accordingly, the Carrier contends that there has been no violation of Rule 4.13 in connection with the instant matter.

The Carrier asserts that during the on-property handling, the Organization never argued that Appendix J was violated, so the Organization is barred from doing so now. Moreover, because the claim refers to only two dates in connection with the claimed work, the Carrier insists that there can be no dispute that this matter involved a "short-term assignment" of less than five working days, in full compliance with Appendix J. The Carrier emphasizes that the employees from Seniority Territory No. 2 entered Seniority Territory No. 3 in order to assist the employees working in Seniority Territory No. 3, namely the Claimants. The Carrier asserts that the intent of Appendix J did not require the employees from Seniority Territory No. 3 to be physically present, and this has been the past application of Appendix J throughout the Carrier's system. The Carrier asserts that the Organization never disputed this fact, despite repeated opportunities to raise such a dispute, and it therefore is barred from doing so now. The Carrier contends that the Organization failed to dispute this fact because it knows that the parties' intent was just as the Carrier has described it.

The Carrier points to a prior Award involving two different seniority districts, emphasizing that in this other matter, the Organization never took exception to the fact that no employees from the territory in which the work was being performed were present while an employee from another territory performed the work. The Carrier argues that this demonstrates that the Organization fully understood that the intent of the word "assist" in Appendix J does not require the presence of employees from the adjoining territory being assisted.

The Carrier submits that the Organization is attempting to gain a benefit without negotiating for it. The Carrier asserts that putting such a restriction upon

the Carrier would be to change the true meaning and intent of Appendix J without the benefit of negotiation. The Carrier argues that this cannot be allowed.

The Carrier asserts that Appendix J clearly allows for the movement of employees between territories, over and above the ability to do so in emergency situations. The Carrier contends that the short-term work at issue was performed in full compliance with Appendix J of the parties' Agreement. The Carrier argues that no violation of the parties' Agreement occurred in connection with the instant dispute.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization met its burden of proof that the Carrier acted in violation of the parties' Agreement when it assigned Seniority Territory No. 2 employees to perform work on Seniority Territory No. 3 instead of Seniority Territory No. 3 employees on October 17, 2002. Therefore, the claim must be sustained.

The record reveals that the Claimants' seniority was confined to Seniority Territory No. 3. and they were entitled to the work opportunities that took place within those territorial limits. On the date in question, the Carrier had Seniority Territory No. 2 employees perform work on Seniority Territory No. 3. It is true that the Rules allow the Carrier to move employees across seniority territories to "assist" other employees of that particular territory. The problem with the Carrier's case here is that it appears that there was no "assistance" being provided. As has been found in several other cases, the Carrier basically "replaced" Seniority Territory No. 3 employees with Seniority Territory No. 2 employees.

This issue is discussed extensively in Award 9 of Public Law Board No. 6493. In that case, the PLB fully discusses the meaning of the word "assist" and defines it as "to give aid or support to (someone)" or "to act as an assistant in a subordinate or supportive function." In that case, as in this case, the employees from the adjoining territories were not used as assistants or helpers on the projects that the Seniority Territory No. 3 employees were performing. Those employees who had been moved from one territory to another were working on something different at a different location than the Seniority Territory No. 3 employees. The Board

concluded in Award 9 of Public Law Board No. 6493 that, "Given the plain meaning of the words 'to assist' and 'projects,' such utilization of the Seniority Territory No. 2 employees was not permissible under the literal language of Appendix J." That PLB followed the holding by the Board in Third Division Award 14321 and sustained the claim.

The Board reaches the same conclusion as Public Law Board No. 6493. The employees who were brought in from Seniority Territory No. 2 to work on Seniority Territory No. 3 were not assisting under the interpreted meaning of the word and, therefore, the claim must be sustained.

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 26th day of June 2009.