

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40385
Docket No. MW-39859
10-3-NRAB-00003-070002
(07-3-2)**

The Third Division consisted of the regular members and in addition Referee Michael D. Gordon when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to allow Mr. D. Rote the lump sum payment of the production incentive bonus pursuant to the provisions of Rule 7 and Appendix FF [System File C-05-A040-1/10-05-0088(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Rote shall now ‘. . . be paid his incentive bonus pro-rated between the period of July 26, 2004 and December 2, 2004 as settlement of this claim.’”**

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.

Mobile Gang TMGX0573 was established on March 1, 2004 with a Foreman and Truck Driver. On July 1, with less than six months remaining on the calendar year, the Carrier, without notice to the Organization, bulletined a new additional position of Group 3/4 Machine Operator.

The Claimant, who had been working on Mobile Gang TMGX0571 since March 22, 2004, voluntarily bid and was awarded the job. He began on July 26 and worked until Mobile Gang TMGX0573 was abolished in its entirety on December 2, 2004. He did not displace to another mobile position. He did not receive a production incentive bonus.

On at least one previous occasion, when the Carrier sought to add a position to gangs with less than six calendar months remaining, it notified the Organization and an understanding was reached regarding certain factors, including lump sum production incentives.

The Organization seeks a pro rata production incentive bonus for the period that the Claimant worked Mobile Gang TMGX0573 from July 26 to December 2, 2004. Citing Rules 1, 7 and Appendix FF, it argues that (1) the Carrier should not have added the position because there were not six months left in the year to qualify for the incentive bonus (2) Rule 7 clearly implies district mobile gangs will exist more than six months, because otherwise, the six month prohibition against leaving is meaningless (3) because the Carrier bulletined the position knowing it would not exist for six months, the gang effectively was disbanded thereby triggering the Rule 7G payment and (4) the Carrier's reading leads to absurd, harsh results and is contrary to the Agreement's goal of paying incentives to new positions if a mobile gang was started without six months of available work.

The Carrier contends that no bonus is due under the Agreement's plain language. It also states that (1) creation of new mobile gang positions does not

require a special agreement between the parties and does not automatically qualify an employee for a bonus (2) the Claimant voluntarily bid on the position, choosing to move to another mobile gang (3) Rule 7 refers to mobile gangs, not positions (4) Seniority Consolidation Agreement Section 5A refers to gangs and single district mobile gangs, not positions on the gang (5) Appendix FF Section 2 supports the Carrier because the Claimant did not complete six months on either of the two gangs that he worked and he did not displace to another gang (6) the Rules are designed to encourage continued work on a single gang (7) past practice does not, and cannot, change unambiguous language and (8) Third Division Awards support the Carrier's reading.

Rule 7, Appendix FF and the Seniority Consolidation Agreement provides, in relevant part:

**“RULE 7. DISTRICT, REGIONAL AND SYSTEMWIDE GANGS
SECTION I. DISTRICT GANGS**

G. Each employee assigned to any district mobile gang who does not leave the gang voluntarily for a period of at least six (6) months shall be entitled to a lump sum payment annually equal to 5% of his/her compensation earned during the calendar year on that gang. Such compensation shall not exceed \$1,000 and shall be paid within 30 days of the completion of the employee's service on the gang; for mobile gangs not required to be disbanded each year, payment will be made within 30 days of the completion of each calendar year. If the company disbands the gang in less than six months, the company will be responsible for payment of the production incentive earned as of that date. This lump sum payment shall be made in accordance with Appendix FF.

APPENDIX FF

1. Each employee assigned to a district mobile gang including employees not originally assigned when the district mobile gang begins working, shall become eligible for the September 26, 1996

National Agreement Article XVI, Section 4 bonus upon completion of six months of service on a particular single district mobile gang computed from the first day the employee reports to work on that district mobile gang. The parties agree that employees assigned to a district mobile gang later in the year who do not complete six continuous months of service on that district mobile gang or employees who voluntarily leave the district mobile gang prior to completing six continuous months of service on that district mobile gang will not be eligible for the bonus."

June 10, 1999 SENIORITY DISTRICTS CONSOLIDATION AGREEMENT

This letter will confirm some understandings reached in connection with Section 5A of the Seniority Districts Consolidation Agreement.

1. Each employee assigned to a district mobile gang, including employees not originally assigned when the district mobile gang begins working, shall become eligible for the September 26, 1996 National Agreement Article XVI, Section 4 bonus upon completion of six continuous months of service on a particular single district mobile gang computed from the first day the employee reports to work on that district mobile gang. The parties agree that employees assigned to a district mobile gang later in the year who do not complete six continuous months of service on that district mobile gang or employees who voluntarily leave the district mobile gang prior to completing six continuous months of service on that district mobile gang will not be eligible for the bonus."

Rule 7G, read together with Appendix FF, governs this controversy. Evidence regarding the 1999 Seniority Districts Consolidation Agreement is sparse. On its face, it apparently applies to the consequences of a seniority district consolidation. Moreover, the Carrier does not argue that it governs the present dispute as much as it is an aid to interpreting Rule language that it asserts is clearly unmistakable on its face.

Read in isolation, Rule 7G and Appendix FF are not free from all doubt. The five references to “six months” and “six continuous months” could mean (1) the time the gang exists or (2) the time an employee serves on a gang.

However, read as a whole, the intended meaning becomes apparent. Thus, the potential uncertainties about “six months” are resolved in Appendix FF which is expressly incorporated into Rule 7G by its last sentence. Indeed, Appendix FF speaks directly to the Claimant's situation.

It says, “. . . employees assigned to a district mobile gang later in the year who do not complete six continuous months of service on that district mobile gang . . . will not be eligible for the bonus.” The fact that the parties anticipated and expressly spoke to potential gang assignments lasting less than six months refutes the Organization's contentions that (1) the Claimant's job should not have been created (2) any gang assignments will last more than six months and (3) assigning positions for less than six months effectively disbands the gang. The single example of a possible practice proffered by the Organization does not trump the plain language of the Rule. The parties made their bargain and must be held to it. In view of the foregoing, the claim is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of March 2010.