

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40404
Docket No. MW-40084
10-3-NRAB-00003-070293
(07-3-293)**

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

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1) The Agreement was violated when the Carrier assigned Western Seniority Division employees R. Kohlenberg and J. Anderson to spot ties between Mile Posts 423.33 and 501.2 on the McGhee Subdivision, which is within the territory of the Arkansas Division and Eastern District Seniority Divisions on February 16, 17, 18, 19, 20, 21, March 1, 2, 3, 4, 5 and 6, 2006 (Carrier’s File 1448630 MPR).**
- 2) As a consequence of the violation referred to in Part (1) above, Arkansas Seniority Division employees J. Ball and S. Adams shall now each be compensated for one hundred thirty (130) hours’ pay at their respective straight time 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 work on territory within the Arkansas and Eastern District Seniority Divisions to employees from the Western District Seniority Division, instead of to the Claimants, who are employed within the Arkansas Seniority Division.

The Organization initially contends that the Carrier completely disregarded the Claimants' seniority rights when it utilized two employees from the Western District, with no seniority whatsoever on the Arkansas Seniority Division or the Eastern District, to perform work on territory falling within the Arkansas Seniority Division of the Eastern District. The Organization points to a number of prior Awards addressing this same issue, all of them involving the same Carrier, the same Agreement, and the same property. The Organization asserts that these Awards demonstrate that the Carrier has flagrantly, repeatedly, and with increasing frequency violated the Agreement in this regard, making sanctions appropriate. Moreover, these Awards consistently rejected the Carrier's "fully employed claimant" theory.

The Organization emphasizes that the language of Rule 2(a) illustrates the parties' unmistakable intent to restrict the duties of an employee to the territory in which the employee retains seniority. Citing a number of prior Awards, the Organization argues that it is well established that where seniority is confined, work also is confined. The Organization submits that based on the Agreement provisions and the undisputed factual circumstances, a prima facie violation of the Agreement has been established. There can be no doubt that the Carrier violated the Agreement when it assigned Western District employees, who have no seniority on the Arkansas Seniority Division or the Eastern District, to perform fundamental track maintenance work on the Arkansas Seniority Division of the Eastern District on the claim dates, instead of assigning the Claimants, who do retain seniority on the Arkansas Seniority Division and the Eastern District.

The Organization suggests that this is more than a simple seniority boundary dispute. The Organization argues that in addition to depriving the Claimants of a work opportunity to which they were entitled pursuant to their seniority, the Carrier's ultimate goal is the destruction of all seniority boundaries. The Organization maintains that the Carrier cannot attain through this proceeding what it could not attain through bargaining, i.e., system-wide seniority for all work.

The Organization goes on to contend that the Carrier's entire defense centers on its position that the work in question is not scope-covered work, and that it has been performed by non-Agreement Supervisors/Managers in the past. The Organization asserts that even if non-Agreement Supervisors/Managers have been assigned to perform such duties in the past, which the Organization does not concede, this is not germane to the instant dispute. The Organization insists that at no time during the on-property handling of this dispute did the Carrier provide any evidence that the Western District employees who performed the work at issue held positions as non-Agreement Supervisors/Managers during the claim period. The Organization submits that the Carrier failed to present any evidence in support of its affirmative defense.

As for the Carrier's reliance on Award 48 of Public Law Board No. 6402, the Organization maintains that this Award involves a vastly different set of circumstances. Contrary to the Carrier's suggestion, the Organization argues that there has been no showing in the instant case that the subject work accrues to non-Agreement employees. There also has been no showing that the two Western District employees who performed the subject work were assigned to non-Agreement positions on the claim dates. The Organization accordingly argues that Award 48 of Public Law Board No. 6402 has no relevance to the instant dispute.

The Organization points out that the Carrier has not disputed the number of hours claimed. The Organization submits that the proper remedy here is the amount the employee was entitled to receive had the employee been assigned to perform the subject work. The Organization argues that although the monetary loss is important, far more serious damage will occur if this claim is not sustained. The Organization suggests that seniority rights would have no value unless certain work accrues to employees by virtue of those rights. The Organization emphasizes that assigning the work of one seniority district to employees of another seniority district would, for all practical purposes, nullify the negotiated seniority district

Rules and render those seniority rights meaningless. The Organization asserts that a monetary award is justified if for no other reason than to protect the integrity of the Agreement.

The Carrier initially contends that the work at issue historically has belonged to management employees. The Carrier asserts that it steadfastly has maintained and safeguarded its inherent right to manage its operations by assigning work to be accomplished in a productive and safe manner as it deems fit, except where its rights to do so have been restricted either by law or by agreement language.

The Carrier argues that the Organization never asserted that the subject work is included under the scope of the Agreement, or that the Claimants have performed this work. The Carrier points to four other claims for the same type of work that never were progressed to arbitration, indicating that the Organization admits that the work is not performed by its membership.

The Carrier contends that the subject work never has been reserved exclusively by Agreement, custom, tradition, or practice, to either Division seniority or District seniority employees. The Organization, in fact, never alleged that its Scope Rule was violated. The Carrier further submits that the Organization failed to substantiate how or to what extent the Carrier's actions purportedly constituted a violation of the Agreement.

The Carrier suggests that the Organization is merely attempting to write into the Agreement, under the guise of an interpretation by the Board, certain restrictions on the way work is to be performed. Citing a number of prior Awards, the Carrier argues that the Board has no authority to write agreement language. The Carrier contends that if the Organization desires to establish work Rules embodying the subject work under its Agreement, then the Organization will have to negotiate such provisions. The Carrier asserts that there is no specific Agreement language that restricts the Carrier's right to assign the subject work to employees outside the Arkansas Division or Eastern District.

The Carrier points out that the Organization failed to cite any agreement language proving that the subject work is under its Agreement. The Carrier insists that there is no such agreement language. The Carrier argues that if the Organization cannot demonstrate that the subject work is reserved, then it follows

that the assignment of this work is a matter of managerial prerogative. The Carrier contends that its position is consistent with sound Labor Relations philosophy and with numerous Awards.

The Carrier submits that if the Organization is to prevail in its exclusivity argument, then it first must establish that the subject work is contained in the Scope Rule, and then that the work has been performed exclusively by the class of employees that it asserts has the right to the work. The Carrier points out, however, that the Scope Rule is very general in nature, and the remaining Rules do not delineate the type of work reserved to a particular Agreement in the Maintenance of Way craft as a whole, let alone that the work is reserved to employees of any one particular seniority district. The Carrier insists that if the parties intended to grant the subject work to BMW-represented employees under this Agreement, then the parties would have written this into the Agreement. The parties, however, did not do so.

The Carrier submits that none of the Rules referenced by the Organization confer the exclusivity that the Organization is seeking, nor do any of these Rules support the Organization's contentions.

The Board concludes that the Organization failed to meet its burden to prove that the Carrier violated the Agreement when it assigned Western District Seniority Division employees to spot ties on the McGhee Subdivision, which is within the Arkansas Division and the Eastern District's Seniority Divisions. The record reveals that the work involved historically management work or non-Agreement work and, therefore, BMW-represented employees have no claim to it. The Carrier has shown that spotting ties is the type of work where determinations are made as to whether or not a tie has to be replaced. That work is one of "managerial prerogative;" and once it is determined that a tie has to be changed out, then BMW-represented employees are the ones who replace the ties. The Organization failed to prove that the Claimants had ever performed the involved work, nor did the Organization assert that the work was included under the scope of the Agreement. The Carrier contends that the work has not been reserved exclusively by the Agreement, custom, tradition, or practice to either the Division Seniority or District Seniority employees and that there is no Scope Rule violation. The Carrier also provided statements from two Directors who confirmed that the work had historically been performed by management personnel. Seniority territory

boundaries are not relevant when work is not subject to the Agreement in the first place.

Because the Organization bears the burden of proof in cases such as this and it failed to meet that burden, the Board has no choice other than to deny the claim.

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.