Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40439
Docket No. MW-40129
10-3-NRAB-00003-070376
(07-3-376)

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 Division -
(IBT Rail Conference
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier refused to allow Mr. K. A. Janes to exercise his 'C(W)' seniority and 'walk off' rights on May 1, 2006, when System Gang 9048 left 'C(W)' designated territory and began work on 'C(E)' designated territory (System File UPRM-9739T/1450578).

(2) As a consequence of the violation referred to in Part (1) above, Claimant K. A. Janes shall now '. . . be compensated for actual expenses and mileage at the applicable IRS rate since May 1, 2006 and continuing.'"

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 Claimant's behalf, alleging that the Carrier violated the parties' Agreement when it refused to allow the Claimant to exercise his "walk off" rights on May 1, 2006, when System Gang 9048 left "C(W)" designated territory and began to work on "C(E)"designated territory.

The Organization initially contends that this matter involves undisputed facts and crystal clear Agreement terms that specifically entitled the Claimant to exercise his seniority to "walk off" System Gang 9048 when that gang moved off of the Claimant's designated Home Road territory on May 1, 2006. The Organization asserts that Appendix 13 specifically stipulates that employees with seniority dates of January 1, 1998, or earlier, may fill certain positions that have assembly points outside their home road and/or region territory, but these employees will not be required to do so. Appendix 13 further states that such employees of the C&NW will not be force-assigned or recalled to positions with an assembly point outside of their home region territory. Appendix 13 also provides that employees having seniority dates of January 1, 1998, or earlier, who are not agreeable to moving with their assignment and having an assembly point off of their home road and/or region territory must notify their Supervisor at least ten days prior to their assignment leaving their home road/region territory.

The Organization maintains that in this instance, there is no dispute that the Claimant properly notified his Supervisor at least ten days prior to his assignment leaving his home road/region territory, the C(W) territory, that he was not agreeable to moving with his assignment and having an assembly point off of his home road. Because the Claimant has a seniority date of June 12, 1980, which pre-dates January 1, 1998, and had properly notified his Supervisor that he was not agreeable to moving with his assignment and having an assembly point off of his home road, the Claimant could not be force-assigned to a position with an assembly point outside of his home road territory. The Organization submits that the Carrier's decision to force-assign the Claimant to remain on his position with

System Gang 9048 after that gang was moved off of his home road on May 1, 2006, blatantly violated Appendix 13.

The Organization emphasizes that its representatives who actually negotiated Appendix 13 forcefully articulated the history and intent of this provision. The Organization contends that these representations of the intent and proper application of Appendix 13, as well as why the Carrier's misguided application should be rejected, demonstrate that the Carrier violated both the letter and the spirit of Appendix 13.

The Organization goes on to address the Carrier's affirmative defense, which focuses on an asserted "past practice" and a maverick interpretation of Appendix 13 that would, if accepted, alter and amend Section 5(B) thereof and render Section 5(B) in conflict with Section 5(A).

The Organization insists that its consistent position has been that the language of Section 5 of Article 13 is crystal clear and not subject to misinterpretation. Emphasizing the numerous Awards holding that where the agreement is clear, there is no need to look at "past practice" to discern the parties' intentions, the Organization submits that the Carrier's assertion relating to "past practice" is utterly misplaced. Moreover, as the General Chairman argues, this is a case of first impression.

The Organization asserts that because the Carrier raised the issue of "past practice," the Carrier was obligated to present probative evidence that such a practice exists. The Organization maintains that the record is devoid of any such evidence, and that such evidence would be barred by laches from abrogating such clear Agreement language. The Organization emphasizes that the Carrier's misplaced "defense" must fail for lack of proof.

The Organization further argues that if the parties had intended to adopt the Carrier's maverick alteration/interpretation of Appendix 13, then they easily could have expressed such an intent. The fact that they did not do so demonstrates that the Carrier's interpretation was not intended and cannot validly be implied. The Organization also submits that the parties did not agree to the language conjured by

the Carrier's maverick interpretation of Section 5(B) of Appendix 13 because it would contradict the terms agreed to by the parties in Section 5(A).

The Organization suggests that adoption of the Carrier's position would lead to the absurd result that the vast majority of employees would possess no home road "walk off" protections once they bid for and held any of the many positions in the classifications set forth in Section 5 of Appendix 13. The Organization insists that because the Carrier's position leads to an absurd conclusion, it must be rejected.

The Organization then asserts that even if a "past practice" was established by the Carrier's unsubstantiated assertions, the Organization nevertheless has the right to insist upon a proper application of the clear terms of Appendix 13, Section 5.

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

The Carrier initially contends that the Organization is attempting to change the application and interpretation of the Agreement through the guise of interpretation. The instant claim seeks to expand the provisions of Rule 5 of Appendix 13 to seniority dates established subsequent to January 1, 1998. The Carrier argues that the Claimant wants to be treated differently than his peers. The Carrier submits that the instant claim is an attempt to disrupt the orderly flow and production of the consolidated system gangs.

The Carrier asserts that the intent of the Agreement is to maximize production work and achieve the operational benefits associated with the merger across the Union Pacific. The Carrier describes the instant claim as the first step to eroding those efficiencies. Pointing to monetary incentives in the Agreement for employees, the Carrier insists that those efficiencies have been bought and continue to be paid for.

The Carrier emphasizes that the Organization did not dispute that until the instant matter, there has been no claim on this issue in the eight years that the Implementing Agreement has been in effect. Moreover, the Organization has not

shown that the Carrier has treated other individuals in similar circumstances differently than it treated the Claimant. The Carrier argues that other than rhetoric, the Organization failed to advance any facts to support its allegation of a different application of the Agreement. The Carrier points out that the Organization's representatives have not been involved in the day-to-day application of the Agreement for some time, so they are not qualified to speak to its daily application.

The Carrier contends that it complied with the Agreement, and there is no basis to find otherwise. The Carrier insists that since the inception of the Agreement, it never granted employees the benefits of "walk off" under Section 5 for positions on which they held seniority subsequent to January 1, 1998. The Carrier points out that "walk off" rights attach to the seniority date of the position being worked, as the Agreement consistently has been interpreted and applied. The Carrier argues that throughout the language of Section 5, it is clear that the qualifier for whether an individual is entitled to Section 5 benefits is that the seniority date attached to the position be prior to January 1, 1998.

The Carrier characterizes as unscrupulous the Organization's attempt to change the Agreement language, its intent, and its application eight years after its implementation. The Carrier contends that both parties walked away from signing the Agreement with a complete understanding of the intent of the language.

The Carrier contends that if the language is read as the Organization now suggests, then claims surely would have been filed in the previous eight years; the Claimant was not the first employee to be denied a "walk off" under similar seniority date circumstances. The Carrier argues that it has consistently applied the language in the manner in which it was written and intended; Section 5 benefits were to apply to positions where the seniority date of an employee working on a particular position was January 1, 1998, or earlier. The Organization was unable to demonstrate that any individuals assigned to positions with seniority dates on those positions after January 1, 1998, were allowed to utilize the "walk off" option.

The Carrier asserts that this application of the Rule never was legitimately contested by the Organization. The Carrier submits that the absence of claims

during the eight years since the inception of the Agreement signified the universal acceptance of this application of Section 5. The Carrier insists that nowhere during the negotiations was it ever contemplated that "walk off" rights would be granted for employees to use on positions where they had established seniority subsequent to January 1, 1998.

The Carrier argues that the Claimant has not been treated differently than any other employee. The Carrier points out that after being told that he was not being accorded Section 5 "walk off," the Claimant waited three months to bid to another position, even though the Claimant had the opportunity to bid weekly to another consolidated system gang or to his home seniority district without forfeiture of seniority. The Carrier therefore suggests that the Claimant did not want to leave the gang after all, thereby undermining the Organization's rhetoric.

The Carrier goes on to assert that, contrary to the Organization's allegations, the Claimant was not placed in a position of harm. Notwithstanding the fact that the Claimant was compensated with per diem and rest day travel allowances, the Carrier asserts that any mileage or expense claims associated with the new position are not reasonable and amount to a penalty request.

Citing the parties' discussions during the on-property handling of this matter, the Carrier insists that since the inception of the negotiated Agreement, the Carrier never applied or granted employees the benefit of the Section 5 "walk off" in circumstances like those of the Claimant in this matter. "Walk off" rights attach to the seniority date and the position being worked. The Carrier contends that the parties did not contemplate that "walk off" rights would be granted for positions subsequent to those rights, because nonsensical results would have occurred.

The Carrier asserts that the focus must be on the intent and practice of the Agreement. The Carrier submits that eight years of practice and interpretation are not to be set aside because a representative decides to interpret the language differently than it had been in the past. The Carrier argues that although it is disappointing that some representatives decide to change course, this does not change the factual application of how "walk off" rights have been applied since

inception. The Carrier points to a recent Award denying a claim that challenged the application of a Rule years after that Rule was written, interpreted, and applied.

The Carrier emphasizes that, as stated in prior Awards, arbitration is not the forum in which agreements are changed. The Carrier argues that it is too late, eight years after the fact, for the Organization to attempt to have language added to the Agreement that would apply Section 5 to seniority dates after January 1, 1998, particularly because Section 5 has been consistently interpreted and applied over the past eight years. The Carrier insists that laches would bar the Organization from taking exception to the interpretation and application of this provision at such a late date.

The Carrier argues that the Organization has not met its burden of proof. The mere citation of Rules in a collective bargaining agreement does not constitute a violation of that agreement. The Carrier points out that Boards consistently have held that a party alleging an Agreement violation must show proof of the claim and prove a definite violation of the Agreement. In this matter, the Organization utterly failed to support any of its allegations.

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

The Board reviewed the record and finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it refused to allow the Claimant to exercise his seniority and "walk off" rights on May 1, 2006, when System Gang 9048 left the designated territory and began work on a different designated territory. Therefore, the claim must be denied.

It is true that the Claimant has established and holds seniority as a Trackman dating back to June 12, 1980. However, the record also reveals that the Claimant only established seniority as a System Welding Gang Foreman on March 3, 2005. The Agreement that is in dispute allows employees who held seniority dates on system gangs prior to January 1, 1998, to vacate such positions if the system gang moves off of the employees' home territory. The record reveals that that section of the Agreement was put into effect to protect the employees who were being required

or forced to follow their work to a greater extent than they were obligated to prior to August 1, 1998.

Because the Claimant in this case did not acquire seniority as a System Gang Welder Foreman until March 3, 2005, which was long after the Agreement was entered into by the parties, the Rule does not apply to him. The Claimant's seniority date as a System Gang Welder Foreman was not prior to January 1, 1998, and the Carrier had every right to deny his request.

The Carrier has put in evidence that the parties have consistently interpreted that section of the Agreement for the past eight years. The Carrier points out that the Organization did not produce any evidence of an employee who was allowed to walk off a system gang in similar circumstances who did not have seniority on that particular job dating back to 1998.

Consequently, even if there is some ambiguity in the actual language of the Agreement, the Board must be guided by how the Agreement has been consistently applied in the past.

For all of the above reasons, the claim must be 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 14th day of May 2010.