

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41061
Docket No. MW-39025
11-3-NRAB-00003-050229**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Eastern District Steel Erection Gang 4943 to perform work (rebuilding standard timber bridge) on the Wyoming Division at Mile Post 19.9 in the vicinity of Louviers, Colorado beginning December 16, 2003 and continuing, instead of Wyoming Division Bridge and Building Subdepartment employees T. Easler, R. Prijatel, L. Ferraro, G. Wiese, R. Anderson, II, T. Smith, A. Bisbee, H. Deputy, III and J. Brainard (System File D-04-03B/1396618).
- (2) As a consequence of the violation referred to in Part (1) above, Claimants T. Easler, R. Prijatel, L. Ferraro, G. Wiese, R. Anderson, II, T. Smith, A. Bisbee, H. Deputy, III and J. Brainard shall now each ‘. . . be compensated an equal and proportionate share of all straight time and overtime hours worked by the Union Pacific prior rights “U” employees assigned to Eastern District Steel Erection Gang #4943 working at MP 19.9 in the vicinity of Louviers, Colorado, on Main (Track)#1, commencing from December 16, 2003, and continuing until such time as this Agreement violation ceases. ****”

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.

At the outset, it must be noted that within a letter dated August 9, 2004, the Carrier's highest designated officer raised an argument that, if found to have merit, would have deprived the Board of jurisdiction over this claim. However, before the Board, the Carrier waived its jurisdictional argument and the Board therefore makes no finding thereon. Consequently, the Board will proceed to consideration of the merits of the claim.

After a series of mergers and acquisitions, the former Denver and Rio Grande Western (D&RGW) became a part of the Union Pacific Railroad Company (UPRR) through the merger of the Union Pacific and the former Southern Pacific Transportation Company component railroads. . Following that merger, an Implementing Agreement dated December 1, 1998 was negotiated consolidating the former Colorado Division Seniority District of the D&RGW into the UPRR Wyoming Division and Eastern District and establishing the conditions under which employees' seniority would be handled when the Maintenance of Way employees covered by the former D&RGW were brought under the coverage of the Collective Bargaining Agreement in effect on the Wyoming Division and Eastern District between BMWE and UPRR.

Among other things, Section 1 of the Implementing Agreement provided that the former Colorado Division lines of the D&RGW would be transferred to and become a part of the UPRR Wyoming Division and its Eastern District. Section 1 further provided that the Collective Bargaining Agreement between BMWE and D&RGW would be abrogated effective the date of signing. Paragraphs (A) and (B) of Section 2 of the Implementing Agreement addressed the consolidation of the former D&RGW Colorado Division territory with the UPRR Wyoming Division and Eastern District seniority rosters, as follows:

“(A) All employees holding seniority on the D&RGW Colorado Division on the effective date of this agreement will have their names and seniority

dates dovetailed into the appropriate UPRR Wyoming Division and Eastern District seniority rosters. Except as provided hereinafter, the employees, who possess a seniority date of June 19, 1997 or earlier, will have the designation 'D' placed next to their names to signify that they have prior rights to all positions and work on the former D&RGW Colorado Division territory associated with their seniority for as long as they maintain the seniority.

(B) Except as provided hereinafter, all employees holding seniority on the UPRR Wyoming Division and Eastern District seniority rosters involved in the dovetail process identified in (A), who possess a seniority date of June 19, 1997, or earlier, will have the designation 'U' placed next to their names to signify that they have prior rights to all positions and work in the Wyoming Division and Eastern District territory outside the former D&RGW Colorado Division that is associated with their seniority for as long as they maintain the seniority."

Section 12 of the Implementing Agreement established a 90-day seniority roster protest period after the distribution of the new seniority rosters and designated the Carrier official to whom written protests were to be sent.

The basic facts underlying this claim are not in dispute. Beginning on December 16, 2003 and continuing, the Carrier assigned Eastern District Steel Erection Gang 4943 to perform work rebuilding a timber bridge on the Wyoming Division at Mile Post 19.9 in the vicinity of Louviers, Colorado. The location of the bridge was former D&RGW Colorado Division territory. The Claimants possessed "prior rights" on this territory under the Implementing Agreement and the employees assigned to the Eastern District Steel Erection Gang 4943 did not possess such prior rights.

The Organization claims that the Claimants should have been assigned to the work at issue here because it was performed within their prior rights territory (the former D&RGW Colorado Division) by employees not holding prior rights within that territory. In essence, the Organization argues that the language of the Implementing Agreement granting the former D&RGW employees "prior rights to all positions and work on the former D&RGW Colorado Division territory associated with their seniority for as long as they maintain the seniority" precludes the Carrier from assigning employees who do not hold such prior rights to perform work on the Claimants' prior rights territory.

For its part on the merits, the Carrier first characterizes the claim as one based on the dovetailing of the seniority rosters pursuant to the Implementing Agreement. Thus, it argues, any objection to the implementation of the dovetailing of seniority rosters should have been protested years earlier and are now barred under the doctrine

of laches. Second, the Carrier argues that the Implementing Agreement does not reserve this work to the Claimants to the exclusion of Wyoming Division and Eastern District employees lacking prior rights on the former D&RGW Colorado Division.

Regarding the Carrier's argument concerning laches, examination of the arguments advanced during the handling of this dispute on the property reveals that the Organization did not frame its position as a protest of the handling of the Claimants' placement or notations on any seniority roster. The Board therefore finds that such argument is not germane to its deliberations in this instance. Thus, the Carrier's argument in this regard is dismissed.

With respect to the reservation of the work to the Claimants, to the exclusion of Wyoming Division and Eastern District employees lacking prior rights on the former D&RGW Colorado Division, we note that the Board considered a similar claim involving a similar Implementing Agreement between the UPRR and BMWE wherein a portion of the former Chicago & North Western Transportation Company (C&NW) District 4 was consolidated into the UPRR Nebraska Division and Eastern District. In Third Division Award 38140, the Board held:

"The Board recognizes that the June 1, 1997 Implementing Agreement gave employees holding seniority on the Nebraska Division prior to January 1, 1997, 'prior rights to all positions and work on the Nebraska Division.' Despite the reference to 'work,' in the Implementing Agreement, the intent of the Agreement is clear. It is intended to give Nebraska Division employees 'prior rights' to advertised positions on their former territory. The Agreement was never intended to give Nebraska Division employees the exclusive right to all work on their former seniority district. Such a result would make the Implementing Agreement illusory.

The Implementing Agreement did not restrict former C&NW Zone 'C' Seniority District 4 employees to work on their former territory. Rather, they had the right to work throughout the consolidated Nebraska Division."

The language of the December 1, 1998 Implementing Agreement and the issues involved in this case are closely similar to those involved in Award 38140. We do not find the reasoning in that Award to be palpably erroneous and we will apply the

reasoning therein to resolve the instant dispute. Therefore, we find that the December 1, 1998 Implementing Agreement did not restrict former UPRR Wyoming Division and Eastern District employees to work on their former territory. Rather, they had the right to work throughout the consolidated Wyoming Division and Eastern District. Moreover, the use of Wyoming Division and Eastern District B&B Subdepartment employees (Eastern District Steel Erection Gang 4943) on the Wyoming Division to perform necessary bridge repair and maintenance work does not create a situation in which the former D&RGW employees are denied positions or work pursuant to their prior rights, especially when those employees are assigned to B&B Subdepartment positions pursuant to their seniority and are working within their prior rights territory. Accordingly, the claim must be denied.

Finally, the Board notes that the issues and arguments raised during the handling of this dispute on the property on the merits of the claim were confined to the proper implementation and interpretation of the December 1, 1998 Implementing Agreement and the "prior rights" accruing to the employees covered thereunder. Although both parties included additional information and argument in their Submissions and presentations to the Board, we confined our consideration and findings, as we must, to only those facts and contentions that were properly part of the evidentiary record developed during the handling of the claim on the property.

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 23rd day of August 2011.