

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6399

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NORFOLK SOUTHERN RAILWAY COMPANY

)
) Case No. 2
)
) Award No. 2
)

Martin H. Malin, Chairman & Neutral Member
J. Dodd, Employee Member
D. L. Kerby, Carrier Member

Hearing Date: January 23, 2004

STATEMENT OF CLAIM:

Claim on behalf of B. E. Cummins, et al., for all hours worked by Eastern Region seniority district Gang R-12 on the West Virginia Secondary of the Northern Region seniority district from October 2 to November 20, 2002.

(Carrier File: MW-BLUE-02-31-LM-322)

FINDINGS:

Public Law Board No. 6399, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

Beginning October 2, 2002, and continuing through November 20, 2002, Carrier assigned Rail Gang R-12, which was established on the Eastern Seniority Region and whose members had no seniority on the Northern Seniority Region to perform work on the West Virginia Secondary, a ten mile portion of track within the Northern Seniority Region. Claimants are employees who hold seniority on the Northern Seniority Region.

The Organization contends that the assignment of Rail Gang R-12 to perform the work in question violated Claimants' seniority rights as established in Rules 2, 3, 4, 5, and 8. Carrier responds that the assignment was permitted by Rule 18. The case turns on interpretation of Rule 18.

Rule 18 provides:

(a) Employees may be transferred for temporary service from one seniority district to another on which they do not hold seniority rights provided, however, that employees holding seniority rights on district to which employees from another district have been transferred for temporary service will be permitted to displace employees transferred provided further, however, that such displacement will not be permitted until the expiration of five working days. Employees will not be transferred for other than temporary service to a seniority district on which they do not hold seniority unless they so desire.

(b) In even temporary service continues for more than thirty days, employees who have not been displaced as contemplated by Paragraph (a) of this Rule 18 may return to their seniority district and exercise seniority rights as provided for in the Rules of this Agreement.

(c) During the period employees are transferred with their positions for temporary service from one seniority district to another on which they do not hold seniority, their positions will not be bulletined as new positions or vacancies on either seniority district.

The Organization contends that, by its plain language, Rule 18 applies only to temporary transfers from one seniority district to another. Therefore, according to the Organization, it cannot apply to transfers from one seniority region to another, as in the instant case. We do not find this argument persuasive. When employees are temporarily transferred from one seniority region to another, they are necessarily transferred from one seniority district to another as districts are smaller geographic entities than regions. The Organization would have this Board read the words "within a seniority region" into Rule 18, so that Rule 18 would read, "Within a seniority region, employees may be transferred for temporary service from one seniority district to another on which they do not hold seniority rights provided. . ." Of course, we do not have the authority to add language that is not already contained in the Agreement.

The remainder of the dispute centers on the meaning of the term "temporary service." The Organization recounts the history of the development of seniority boundaries and the provisions for deviations from those boundaries and urges that Carrier is claiming the ability effectively to eliminate seniority boundaries. The Organization maintains that Carrier's position would allow it routinely to work employees from the Eastern Seniority Region on the Northern Seniority Region and effectively eliminate the Northern Region. In the Organization's view, "temporary service" must be read in the context of Rules 2, 3, 4, 5, and 8, and prior history to avoid destroying the seniority regions' boundaries. Relying on a series of awards interpreting Rule 6(a) of the BMW - Union Pacific Agreement, the Organization contends that temporary transfers must be limited to emergency situations.

Carrier contends that Rule 18 places no restrictions on the reasons for the temporary transfer across seniority boundaries. Carrier urges that its actions in the instant case were in

accordance with one of the reasons it advanced before the arbitration board in the New York Dock proceeding resulting from the Conrail Carve-up in support of its position that the former Conrail territory be placed under the 1986 Agreement as a separate seniority region, a position with which the arbitrator agreed. Carrier maintains that its interpretation of temporary service does not obliterate seniority boundaries. Carrier observes that Rule 18 contains several express restraints on Carrier's ability to temporarily assign employees from one seniority region to another, including Rule 18's provision allowing any employee in the seniority region to displace an employee from outside the region beginning five days after the transfer and allowing any employee transferred to the seniority region to exercise seniority back to the region on which the employee holds seniority after thirty days. Thus, in Carrier's view, its actions in the instant case were authorized by Rule 18.

Rule 2 of the 1986 Agreement provides that employees are divided into seniority Groups, Classes and Grades. Rule 2(b) further provides for employees in the track Sub-Department to accumulate seniority in specified seniority districts within specified seniority regions. Rule 3 contains the rules governing the establishment of seniority. Rule 4(a) requires that "[s]eniority rosters of employees as provided for in Rule 2 will be separately compiled. . . ." Rule 5 specifies, "Seniority rights of employees will be restricted to seniority established in a Grade or Grades on any seniority roster or rosters . . ." Rule 8 requires that vacancies and new positions be posted on a regional basis and sets forth a hierarchy for assignment based on seniority with no reference to employees who hold seniority in regions other than the region of the bulletined position. Taken together, these rules restrict employees to performing work within their own seniority regions.

Rule 18 is an express exception to that restriction. As such, the Organization urges that the Rule 18 exception be confined to temporary transfers needed to meet emergencies. As indicated above, the Organization finds support for its position in a series of awards so interpreting Rule 6(a) of the BMW-UP Agreement. *See* Third Division Awards Nos. 25964, 28852, 30076, 30408, 31228, 32394, 32500, 32504 and 35732. BMW-UP Agreement Rule 6(a), interpreted in these awards, provided:

Employees or gangs temporarily transferred by direction of the management, from one seniority district to another, will retain their seniority rights on the district from which transferred.

In all of the BMW-UP cases, the carrier argued that Rule 6(a) allowed it to temporarily work employees off their seniority districts. However, as expressly recognized in Third Division Award No. 30408, and impliedly recognized in the other awards, Rule 6(a) did not expressly authorize the transfer of employees off their seniority districts but, "concerns primarily the retention of seniority by employees who are temporarily transferred." Thus, any authority that the UP had to temporarily transfer employees off their seniority districts had to be implied from Rule 6(a). In implying such authority, the awards recognized that they would be implying authority in contradiction of express provisions of the Agreement. Consequently, it is not surprising that the awards limited that implied authority to emergency situations.

In contrast, Rule 18 is an express grant of authority to transfer employees for temporary service outside seniority boundaries. On its face, it does not limit the use of such express authority to emergency situations. The Organization's argument would have us add such a limitation to the language of Rule 18. We lack the authority to do so. We must interpret and apply Rule 18 as written, not as the Organization would prefer it be written.

Both parties point to representations made by Carrier concerning Rule 18 in the Conrail Carve-up New York Dock proceeding. The Organization quotes from the Declaration of Gary W. Woods, Carrier's Assistant Vice President Maintenance of Way Structures, as follows: "Rule 18 permits NSR to use employees outside their seniority districts for up to thirty days. This enables the carrier efficiently and flexibly to deploy gangs to respond to unscheduled or immediate maintenance needs, without effecting lasting workforce changes."

Taken in isolation, the quoted portion of the Woods Declaration might suggest Carrier's recognition that Rule 18 is limited to unscheduled and immediate maintenance needs. However, the quoted portion must be read in context of the entire Woods Declaration with respect to Rule 18:

68. Consistently with these workforce arrangements, NSR intends to operate the allocated lines under the terms of the NW-Wabash/BMWE Agreement, which currently applies on most of the NSR lines adjoining the NSR-allocated properties. The NW-Wabash/BMWE Agreement contains rules, not found in the Conrail/BMWE Agreement, for further merging maintenance of way operations, as needed, to address future needs. Rule 18 permits NSR to use employees outside their seniority districts for up to thirty days. This enables the carrier efficiently and flexibly to deploy gangs to respond to unscheduled or immediate maintenance needs, without effecting lasting workforce changes. Applying this rule to the allocated lines, in coordination with the adjoining NW-Wabash lines, will enable NSR to deploy its workforces quickly and efficiently to meet operational needs, without regard to historic territorial restrictions. This flexibility will be particularly important to NSR's ability to operate the allocated lines as part of its expanded system, rather than as fragments of a formerly separate rail system.

69. As depicted in Carriers' Exh. A-46, the NSR-allocated lines cross or parallel NSR's existing lines at many points, including Columbus, Ohio; Cincinnati, Ohio; Sandusky, Ohio; Hagerstown, Maryland; Detroit, Michigan; Butler, Indiana; Wabash, Indiana; and Deepwater, West Virginia. In order to take operational advantage of these common points, NSR needs the ability to deploy gangs based on geographic proximity or availability without regard to the previous NSR/Conrail boundaries. Applying Rule 18 of the NW-Wabash Agreement to the allocated lines will enable NSR to integrate operations as needed, promoting efficient and responsive transportation. Under NSR's proposal, for example, a surfacing gang working under the NW-Wabash/BMWE Agreement on the former NW line north of Columbus could be directed to surface a segment of a former Conrail line in the immediate vicinity, rather than deploying a surfacing gang working at a more distant location on the NW-Wabash lines. Likewise, a tie-patch gang working on

the former Conrail lines could be directed to an adjacent former NW line to meet operating needs.

Thus, the Woods Declaration represented Rule 18 as having an application much broader than unscheduled and immediate needs. Indeed, there is nothing in the record before this Board reflecting that the Organization maintained in the New York Dock proceeding that Rule 18 was limited to emergency transfers. Rather, it appears that during the hearing in the New York Dock proceeding, the Organization's representative disputed the efficiencies that Carrier claimed it would get by being able to apply Rule 18 to the former Conrail lines because of the ability of employees with seniority within the region to displace the temporary transferees after five days and because of Rule 18's inapplicability to the Southern and Nickel Plate lines.

Consequently, we are unable to imply any limitations on the type of "temporary service" to be performed by employees transferred under Rule 18. Nevertheless, Rule 18 expressly limits transfers across seniority boundaries to the provision of temporary service. The final sentence of Rule 18(a) makes this clear: "Employees will not be transferred for other than temporary service to a seniority district on which they do not hold seniority unless they so desire." Although in its submission, Carrier maintains that it may transfer employees across seniority boundaries without any cap as to length of time, subject only to the displacement rights of employees within the seniority region and to the right of transferred employees to exercise seniority back to their regions after thirty days, such a reading of Rule 18 ignores the temporary service limitation.

The temporary service limitation is significant in light of the limitations on Carrier's authority with respect to seniority boundaries. Carrier may not unilaterally change seniority boundaries. *See* Public Law Board 4362, Award No. 1. When Carrier has gained the right to work employees on a regular basis across seniority boundaries it has done so through express provisions obtained in negotiations and/or arbitration, such as floating section gangs or designated production gangs. In contrast to such gangs that regularly work across seniority boundaries, a transfer across seniority boundaries for temporary service must involve a transfer for a specified task or tasks that will be of relatively short duration and that will have a beginning and end time specified by date or completion of the task.

Both parties in the New York Dock proceeding referred to Rule 18 as enabling Carrier to transfer employees across seniority boundaries for up to thirty days. As Carrier points out in its submission to this Board, Rule 18(b) recognizes that there will be instances where transfers for temporary service will exceed thirty days. However, Rule 18(b)'s provision that after thirty days transferred employees may exercise seniority on the territories where they hold seniority recognizes that temporary service exceeding thirty days will be the exception rather than the norm. Such a reading of Rule 18(b) comports with the representations made by both parties in the New York Dock proceeding concerning the effect of Rule 18.

Accordingly, we hold that a transfer of up to thirty days in duration is presumptively a transfer for temporary service. The Organization has the burden of rebutting the presumption. The Organization can meet its burden by, for example, showing that a group of employees was

transferred for a period of less than thirty days, returned to their seniority region for a relatively short period of time and then transferred again for another period of less than thirty days. Such a pattern of short-term transfers with short interludes of work within their seniority regions would strongly suggest that Carrier was using Rule 18 not to cover temporary service but instead to unilaterally realign seniority boundaries and/or regularly work employees across seniority boundaries.

Similarly, we hold that a transfer that exceeds thirty days in duration is presumptively suspect. This does not mean that a transfer that exceeds thirty days is automatically not for temporary service, but it does require Carrier to come forward with an explanation which is consistent with temporary service.

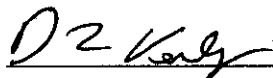
Applying the above-detailed presumptions to the instant case reveals that the transfers exceeded thirty days in duration. Thus, they are presumed not to have been for temporary service. During handling on the property, Carrier asserted, "At the time the work commenced it was anticipated that it would take less than 30 days to complete; however, the project lasted slightly longer . . ." The Organization never contested this assertion and, thus, we must accept it as true. Although it would have been better if Carrier had explained why the project lasted longer than thirty days, the assertion is sufficient in the absence of any contest from the Organization to rebut the presumption and establish that the transfer was for temporary service, i.e. to perform a discrete project for a relatively short period of time. Accordingly, we hold that in the instant case Carrier acted within the dictates of Rule 18 and that the claims must be denied.

AWARD

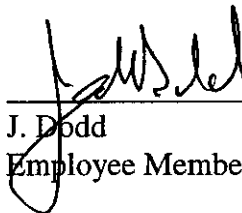
Claim denied.



Martin H. Malin, Chairman



D. L. Kerby,
Carrier Member



J. Dodd
Employee Member

Dated at Chicago, Illinois, April 19, 2004.