PUBLIC LAW BOARD NO. 6746
AWARD NO. 2
CASE NO. 2

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

PARTIES
TO DISPUTE: and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned Global III project employes to perform Rochelle Section Crew work within the Rochelle Section Crew's territory on November 20, 22, 25, 26, December 2, 3 and 4, 2002 (System File 3KB-6816T/1351055).

(2) As a result of the violation in Part (1) above, Rochelle Section employes T. Wybourn shall now be allowed three hundred twenty-four (324) hours' pay, R. Hussung shall now be allowed two hundred eighty-eight (288) hours' pay, R. Harrington shall now be allowed two hundred eighty-eight (288) hours' pay, J. Arrellano shall now be allowed thirty-six (36) hours' pay, J. Vasquez shall now be allowed thirty-six (36) hours' pay and S. Garcia shall now be allowed thirty-six (36) hours' pay at their respective straight time rates of pay.

FINDINGS:

Upon the whole record, after hearing, this Board finds that the

parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Like the situation in Award 1 of this Board, this case also involves the interpretation and application of a part of Section 2 of the June 12, 2002 Rochelle Settlement Agreement (herein RSA) entered into by the parties to resolve a contracting dispute arising from Carrier's construction of a new $181 million intermodal facility at Rochelle, Illinois. The background leading to the negotiation and adoption of the RSA is set forth more fully in Award 1, and is incorporated herein by reference. This dispute focuses on an alleged seniority district violation occurring during a time period in late November and early December, 2002, prior to that involved in Award 1. It appears from the record that there are other claims outstanding on the issue raised in this case which the parties agreed to hold in abeyance pending the outcome of this dispute.

The RSA defines the scope of the project, limits any requirement that employees exercise seniority to this project in order to preserve any other rights to which they may be entitled, and makes a one time lump sum payment of $600,000 to the Organization for division to employees holding seniority on District 3 as of April 1, 2002. Section 2 of the RSA provides:

> If a District 3 employee has an exercise of seniority, wishes to work on this project, and makes his availability known to NPS, Union Pacific will create a position for that employee for the period of time contractors are performing work that arguably is

> covered by the sub-department in which the employee holds seniority. Said position will be paid at a rate of pay equal to or higher than the rate of the position last held by that employee, however, such employee may perform work other than what is encompassed within that sub-department.

The Organization filed the instant claim on January 16, 2003 alleging that Carrier violated the RSA by assigning eighteen (18) Seniority District 3 employees for whom positions were created under the RSA to work at the Global III project to perform section work outside the project, noting that 1008 man hours were spent by such employees performing routine section work depriving Claimants, Rochelle Section Gang employees, of a significant work opportunity and seeking monetary compensation for such loss on the seven claim dates. Carrier's March 12, 2003 denial asserts that the RSA does not apply to Claimants since they neither had an exercise of seniority nor made their availability known to Carrier. Carrier lists the status of each named Claimant on the claim dates, noting that three were assigned to Rochelle Section Gang 3040 (Wybourn, Hussung and Harrington), one was assigned to System Gang 9072 (Arellano), one was on vacation (Garcia) and one was assigned to Gang 3046 on the Global III project (Vasquez).

In its March 17, 2003 appeal, the Organization first asserts that all Claimants were assigned to Rochelle Section Gang 3040 on the claim dates. It next argues that work at locations other than the Global III project is not established under the RSA, and that Section 2 clearly stipulates that work created under that agreement is to be work on the project. The Organization contends that assigning employees whose positions were created under Section 2 of the RSA to work outside of the

project violates the RSA and the seniority rights of employees assigned to the territory where such work is performed.

Carrier's May 5, 2003 denial posits that the Organization failed to sustain its burden of showing that any contract or RSA language supports the position that employees assigned to the Global III project are limited to only working at that particular location. It notes that the contract does not confine an employee to one particular project or limit Carrier from moving employees between projects on the same seniority district. Rather, Carrier argues that employees are assigned to positions rather than projects and that their work has never been exclusive to any particular project. Carrier contends that the RSA creates an obligation on its part to make work available to specified employees and does not confine the work they are assigned only to the Global III project. It notes that the work assignments disputed herein were to District 3 employees working within District 3. Carrier asserts that Claimants were fully employed and compensated for work and some for overtime on the claim dates.

The Organization filed its appeal on September 3, 2003, indicating that the work performed by the eighteen employees for whom jobs were created under the RSA was work customarily performed by Rochelle Section Gang employees who suffered a loss of work opportunity as a result. The Organization argues that the RSA promises District 3 employees who meet the criteria the right to work at the Global III project while contractor forces are present there, and does not allow Carrier to move them to other projects or locations. It asserts that Carrier is reading language into Section 2 of the RSA that is not there ("wishes to work on this project *or anywhere on District 3.*") The Organization notes that the contract does recognize a violation where employees are sent to work at

locations outside their seniority district, alleging that is what occurred here when Carrier assigned Global III project employees to work outside of the Global III project.

In Carrier's December 5, 2003 denial it argues that the RSA does not create a new or separate seniority district or supersede any collective bargaining agreement provisions governing the terms and conditions of employment, but was only intended to settle a Rule 1(b) issue concerning the use of contractors to build the intermodal facility and to ensure that employees would not be forced to furlough due to the agreed upon contracting. Carrier asserts that assignment of District 3 employees to work within District 3 does not violate the collective bargaining agreement and the Organization has failed to show that the RSA superseded such agreement or created a line of demarcation of work within District 3. Carrier contends that it has the agreement right to work employees who made their availability known under Section 2 of the RSA outside the Global III project as well as assigning its regular workforce to work on the Global III project so long as the work assignment is within the District 3 seniority district.

The Organization argues that Section 2 of the RSA clearly and unambiguously defines the territorial limits within which work can be assigned to employees who meet the criteria and for whom jobs are created. It relies upon the language "wishes to work on this project" contained in Section 2 in support of its interpretation of the provision and a finding that these "'Global III project employees" cannot be assigned to work outside of the territorial confines of the project performing other than project work without violating the seniority district rights of other employees within the territory or section to which they are assigned who

customarily perform the work in dispute. It asserts that a special territory was created by the RSA - the Global III project - to which employees exercised their seniority to perform work within this defined work territory, and that such special agreement takes precedence over the general language of the collective bargaining agreement with respect to district seniority lines.

The Organization notes that the principle that section work belongs to section employees on whose territory the work occurs is well established, relying on Third Division Awards 9334, 11152, 17931, 24584 and 33421. The Organization contends that Carrier's action is akin to the crossing of a seniority district or line, which has been found to violate the agreement and for which fully employed claimants are compensated on this property, citing Public Law Board No. 2960, Award 138; Public Law Board No. 1844, Award 82; Third Division Awards 14321, 19840, 32414, 32415. See also, Third Division Awards 24576, 29313, 30076, 30408, 30409, 31228, 31290, 32192, 31569, 31570, 32331, 32394, 32419, 32421, 32500, 32504, 32993, 34049, 35082, 35732, 35733, 20090, 23046, 28928, 29985, 35085, 27847, 28852, 30283, 30721 and 36291. It asserts that Carrier's defense of exclusivity is misplaced in a seniority rights claim of this sort.

Carrier argues that this is not a crossing seniority line dispute, since all District 3 employees were assigned to work within their home seniority district on the claim dates. It avers that the awards relied upon by the Organization dealing with cross seniority district assignments do not apply, and that the two interdivisional awards cited are based upon restrictive language in those collective bargaining agreements not pertinent to the controlling language on this property. Carrier contends

that the RSA does not say that it carves out a special territory for employees, and only indicates that if qualified employees want to work on the Global III project Carrier will create positions for them. Carrier avers that the language does not support an interpretation that employees must stay on the Global III project during such assignment and gives Carrier the right to assign employees to perform work that is not part of their regular duties or sub-department. It states that it is absurd to say that eighteen employees should just sit around when there is track work available elsewhere on their district. Carrier notes that the three Claimants who were assigned to the Rochelle Section Gang during this time period were performing work which they were entitled to do alongside these eighteen employees, were not deprived of any valuable work opportunity, and were fully employed and not available to perform the additional 24 to 36 hours of compensated service per day sought by this claim.

Carrier argues that the RSA does not supersede the collective bargaining agreement including provisions defining seniority districts and work classifications as well as Carrier's right to assign work to employees and move them from location to location within the same seniority district. It asserts that Section 2 of the RSA is not a guarantee of any specific work and does not create a new seniority district. Carrier notes that the RSA does not apply to claimants or exclusively reserve work at the 199 Yard to the Rochelle Section Gang and that the Organization never refuted these facts, citing Third Division awards 31529 and 29308. It posits that the Organization failed to meet its burden of proving a violation of the agreement in this case, relying on Third Division Awards 26033, 27851 and 27895.

In determining whether the Organization has sustained its burden of

proving that Carrier violated the RSA in this case, we turn first to the specific language used by the parties with respect to work to be performed in Section 2 of the RSA. The Board notes that nowhere in Section 2 does it clearly state that the positions to be created by Carrier for qualified employees will be for work performed only at the Global III project. Nor does it restrict the type of work such employees may perform as was the case in Third Division Awards 32414 and 32415. The final sentence of Section 2 does give Carrier the specific right to assign such employees to work other than what is encompassed within the sub-department in which the employee holds seniority.

The language relied upon by the Organization is contained in the part of Section 2 setting out the criteria that an employee must meet in order for Carrier to have an obligation to create a position for him. Along with the requirement of having an exercise of seniority and making his availability known to NPR, is the criteria that the employee "wishes to work on this project." To the Organization, the fact that the position is created in response to this desire and for the period of time contractors are performing work arguably within the employee's sub-department on the Global III project, translates into Carrier's obligation to create a position working solely at Global III for the employee. The RSA language does not say that and is ambiguous with respect to whether any such limits have been placed upon Carrier's obligation. Thus, the Board must attempt to ascertain the parties intent by looking at evidence outside the plain language of the RSA.

As we have found in Award 1, the Organization's goal in entering into the RSA was to preserve as much of the work opportunity existing at the Global III project for its members and to protect their priority to the

work over that of the contractors. It wanted an assurance from Carrier that employees would have an opportunity to perform work rather than being furloughed during a period when Carrier was engaged in subcontracting. Having found in Award 1 that the loss of work opportunity is tied directly to the period when contractors are performing work at the Global III project, we held that the parties did not limit the number of positions Carrier was required to create so long as any contractor was working on the site. We did not accept Carrier's argument that it never agreed to create an unlimited number of positions without reference to the number of contractor employees working on site.

Given our finding that Carrier is obligated to create positions for any number of qualified employees so long as even one contractor is working on the Global III project, it would be nonsensical to conclude that it was the parties' intention that all such positions must be limited to performing only work existing at the Global III project and not elsewhere within the District 3 seniority district if there is insufficient work at the project. If there is only work for one contractor remaining on the Global III project, but an obligation on Carrier's part to create positions for eighteen qualified employees, the parties could never have intended to limit Carrier's proper use of such employees under the provisions of the collective bargaining agreement. They did not indicate such intent in the language of Section 2 of the RSA. Rather, the parties understood that Carrier must have flexibility with respect to the use of such employees by providing that they can be assigned to work outside the work they customarily and ordinarily perform within their sub-department.

Further, the Board found in Award 1 that the parties never intended to have the rights established under the RSA supersede obligations and

responsibilities of employees under the collective bargaining agreement. We concluded that an employee who had been properly furloughed from the Global III project on December 20, 2002 when all of the contractors left the site was obligated to follow the requirements of the applicable provisions of the collective bargaining agreement with respect to exercising seniority. Similarly in this case, absent clear language to the contrary, we find that the obligations imposed on Carrier in Section 2 of the RSA do not negate its rights concerning assignment of employees to work within their seniority district under the collective bargaining agreement. If, as Carrier says, it may permissibly move an employee assigned to one gang to perform necessary work elsewhere within District 3 under the agreement, such entitlement is not changed by Section 2 of the RSA.

Section 2 of the RSA does not clearly set out an agreement to vary the collective bargaining agreement's seniority districts or territories. It does not state that the Global III project will be considered a separate and distinct seniority district, or that work assigned on the project will only be to employees who have had jobs created for them by Carrier under Section 2 of the RSA. Carrier has made unrefuted statements that it has assigned District 3 employees working on other gangs to perform work on the Global III project, when necessary. Its right to assign Gang 3046 employees to work elsewhere within District 3 under the terms of the agreement has not been compromised by the adoption of the RSA.

The Organization has never contended that Claimants, Rochelle Section Gang employees, were covered by the provisions of the RSA. Rather, its focus is on the loss of work opportunity for Claimants when eighteen employees who had positions created for them under the RSA

were assigned to perform work that would otherwise have been performed by the Rochelle Section Gang. The Board does not agree with the Organization that assigning a Gang 3046 employee to work outside the Global III project is akin to a cross seniority district or territory assignment such as those involved in Third Division Awards 9334, 14321, 19840, 33421. Employees qualifying under Section 2 of the RSA are guaranteed a position for a specified period of time. They are not guaranteed a certain type of work or restricted from performing other work within their seniority district. If that were the intent of the parties, it was not expressed in Section 2 of the RSA, nor would it be a logical extension of our broad interpretation of Carrier's responsibility to create positions.

As stated in Award 1, so long as Carrier is utilizing contractors arguably performing scope-covered work at the Global III project, it has the concomitant obligation to create positions for all eligible District 3 employees. As noted herein, Carrier also has the right to assign such Gang 3046 employees to other District 3 work when there is insufficient work for them to do on the Global III project, which Carrier contends was the case on the claim dates herein. We are unable to conclude that the intent of the parties in negotiating the RSA was to create an extensive obligation on Carrier's part while at the same time restricting its ability to use the employees it must pay on an ongoing basis. While employees may have expressed their desire to work on the Global III project, and had positions on Gang 3046 created for them, when there is insufficient work for them to perform at that project on a particular day, Carrier is not obliged to have them sit around when they can be utilized elsewhere within their seniority district in accord with Carrier's rights under the collective bargaining agreement.

Accordingly, we find that the Organization has failed to sustain its burden of proving a violation of the RSA in assigning Gang 3046 employees to perform work normally performed by the Rochelle Section Gang on the claim dates. The Organization has not shown that there was specific work for these employees on the Global III project on the claim dates or that Carrier violated the collective bargaining agreement by assigning them work off the project but within the District 3 seniority district. Claimants were otherwise employed on the claim dates and suffered no loss of work opportunity as a result of these assignments.

AWARD:

The claim is denied.

Margo R Newman

Margo R. Newman
Neutral Chairperson

Dominic A Ring

Dominic A. Ring
Carrier Member

Steven V. Powers

Steven V. Powers
Employee Member

Dated: November 19, 2004

Dated: November 30, 2004