

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 29691
Docket No. MS-29601
93-3-90-3-576

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

PARTIES TO DISPUTE: (B. L. Heiney, L. L. Davis
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(Burlington Northern Railroad

STATEMENT OF CLAIM:

"The Frisco agreement and company Book of Rules were viloated June 25, 1988 through June 27, 1988, when the welding sub department personnel were used for fire protection for Loram rail grinding train, working from Monette, Missouri to Claremore, Oklahoma. Welder Dick Clark and his two helpers from seniority district No. 2, welder T.W. Patocka, and his two helpers from seniority district No. 5, and two welders helpers, seniority district No. 1, were used for fire control for Loram rail grinding train working on seniority district No. 4. This is a violation of Rule 3, Paragraph (B), Frisco agreement, August 1, 1975...."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

The Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Claimants in this dispute are members of Patrol Gang 503. Their territory extends from Monette, Missouri to Afton, Oklahoma, and they are primarily responsible for track structure and any condition which may affect the safe operation of trains.

Track structure is inspected to detect items such as defective rails and fastenings; deviations in alignment, surface or cross level on tangent track; variations in superelevation on curves; flangeways in road crossings and all moving parts of switches to assure they are properly positioned and secure. Inspection is made on foot and/or by riding over the track in a vehicle which allows the individual performing the inspection to visually observe the track structure for compliance with BN standards.

On the dates of this claim, Saturday, Sunday and Monday, June 25, 26, and 27, 1988, a contractor operated a rail grinding machine, the Loram Rail Grinder, between Claremore, Oklahoma and Monette, Missouri, territory which extends farther than Claimants' assigned area. Two regional welding gangs, each consisting of a welder, welder helper and welder laborer, were assigned to aid the rail grinder in any grinding efforts. Two of the men were behind the grinder to inspect the rail that was ground and throw hot slag out of the track. Three men were used to spray water on the ties and hot metal to prevent fires. The sixth man followed several miles behind the grinder looking for Right Of Way fires. On Saturday and Sunday, June 25 and 26, the Claimants worked overtime on their regular patrol assignment between Monette and Afton. On Monday, June 27, the Claimants performed their regular assignment at straight time.

On August 10, 1988, the Organization filed a claim on behalf of the Claimants challenging the assignment of Welding sub-department employees, rather than Track Sub-Department employees to work with the rail grinding machine. The Carrier's appeal officer rejected the Organization's claim stating that the Welding Sub-Department employees were not patrolling track "in a normal sense", and that the "work in question did not belong exclusively to Track Sub-department employees".

Subsequent to handling the claim with the Carrier's highest designated appeal officer, the Organization did not pursue this matter further. However, Claimants progressed the dispute charging violations of Rules 2, 4, 5 (a and b), 27, 31, 32, 33, 57(b), 58, 76 and 79 of the August 1, 1975 Agreement. In addition, the Claimants alleged, for the first time in a letter of intent to this Board, that various operating and safety rules were also violated.

The Claimants assert that "track sub departments have always provided fire protection for the Loram rail grinder." Claimant Heiney further stated that he "personally knows roadmasters, welders and track personnel that could verify that the track sub departments have always provided fire protection, but these employees would be jeopardizing their jobs to write a letter about

this claim or any other dispute." Finally, the Claimants submit that, without union representation, "this dispute is at a disadvantage and Burlington has been prejudiced against us."

For its part, the Carrier maintains that the basic issue to be decided in this case is whether there is any rule or agreement between the parties which gives the Claimants, a Foreman and Assistant Foreman in the Track Sub-department, the exclusive right to be assigned to the rail grinder and to assist in the grinding and fire protection efforts. The Carrier asserts that the "work in question is not work reserved exclusively to the Claimants or anyone else." According to the carrier, the exclusivity claimed by the Claimants either by rule or past practice "is simply non-existent." According to the Carrier, "the Organization has not met its burden of proof and have failed to make a prima facie showing of exclusivity based on the rules and evidence."

With regard to the issue raised by the Claimants in subsequent correspondence to the Board, Carrier correctly points out that "it is a well-established principle that the jurisdiction of the Board is confined to disputes between an employee or employees of the Carrier with regard to the interpretation and application of the negotiated agreement, and The Maintenance of Way Rules and the Track Welding Manual rules are operating rules unilaterally imposed by management as a condition of employment to which the employees must adhere." Moreover, the alleged safety violations cited by the Claimants were presented de novo to this Board and will not be further addressed.

With relation to the merits of this dispute, the Claimants had the burden of making a prima facie showing, predicated upon a preponderance of substantial evidence, that Track Sub-departments were entitled to perform the work in dispute to the practical exclusion of others. The Claimants failed to demonstrate that the disputed work is work reserved exclusively to Track Sub-department employees by tradition or contract. Further, Claimants were working their regularly assigned territory on June 25, 26 and 27, 1988, and the Carrier was not obliged to call them to work on a territory which extended beyond their assigned area. For the aforementioned reasons, this claim is denied.

A W A R D

Claim denied.

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By Order of Third Division

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Attest:


Nancy J. Dever, Secretary To The Board

Dated at Chicago, Illinois, this 16th day of July 1993.