

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32602
Docket No. MW-31755
98-3-94-3-22**

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Soo Line Railroad Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Crew 47-Z to perform concrete work (forming and encasing piers) on the Mississippi River Bridge at Camden during the period of September 28 through November 20, 1992 instead of assigning B&B Crew 616 employes R. Iwen, G. Day, J. Engebregtsen and A. Launderville (System File R696/8-00108).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimants shall ' . . . be reimbursed for the equivalent of three hundred and twelve (312) hours of pay at the pro rata rate and have all overtime, vacation, fringe benefits, and other rights restored which were lost to them as a result of the above violation.'"**

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.

This dispute concerns the Carrier's assignment of work repairing piers on the Mississippi River Bridge at Camden, Minnesota. The Organization contends that maintenance work at this location and of the type here undertaken should have been assigned to B&B Crew 616, represented under the Soo Line-BMWE Agreement. Instead, following a conference with the General Chairman, the Carrier assigned the work to Maintenance of Way forces (Gang 47-Z), represented under the Milwaukee Road Agreement between the Carrier and the BMWE.

The Carrier argued that its Milwaukee Road Gang was experienced in this work and had the necessary equipment. The Carrier contended that B&B Crew 616 was not experienced in this work and challenged the Organization to show that the Claimants had performed such work in the past. The record shows this challenge was not met. Further, there is evidence that, in the past, such work has been contracted to outside forces.

The Board notes that the Carrier utilized its own Maintenance of Way employees (although not on territory encompassed by their seniority) and that all Claimants were otherwise fully employed at the time.

Under these particular circumstances, the Board finds no Rule support to require assignment of the work in question to the Claimants rather than to other Carrier Maintenance of Way employees with demonstrated experience in the required tasks.

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 22nd day of May 1998.

LABOR MEMBER'S DISSENT
TO
AWARD 32602, DOCKET MW-31755
(Referee Marx)

The Organization is compelled to issue a vehement dissent to the determination and misguided reasoning asserted by the Majority.

First, the Majority erroneously held that:

"*** The Carrier contended that B&B Crew 616 was not experienced in this work and challenged the Organization to show that the Claimants had performed such work in the past. The record shows this challenge was not met. ***"

The problem here is that a review of the record reveals the Organization clearly presented substantial evidence that this Carrier routinely assigned, and the Claimants performed, work identical to the work involved in this dispute. Furthermore, the record shows the Claimants were performing the claimed work over a five (5) week period immediately prior to the work dates listed in the initial claim. Moreover, in the Carrier's Submission at Page 21 corroborates the Claimants had been performing said work at the very same location prior to the claim period.

The crux of this dispute is the Carrier's failure to assign work in accordance with the seniority provisions as set forth in the Agreement between the parties. In this case the Board correctly recognized the Carrier utilized its own Maintenance of Way employees, although the employees so assigned were on territory NOT encompassed by their seniority nor were they employees covered by the SOO Line Agreement. The employees assigned to perform the work were covered by the Agreement between the Carrier and the employees covered under the Chicago, Milwaukee, St. Paul and Pacific Agreement. Nonetheless, the Majority chose to ignore said recognition, and the crystal clear provisions of the Agreement, in rendering their decision. This Board has consistently held that work is reserved by seniority districts and in this connection we invite attention to Award 25964, one of nineteen (19) awards supporting such position cited in our submission to the Board and ignored by the Majority, wherein it held:

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"*** To follow the Carrier's reasoning here would permit the indiscriminate use of employees in contradiction to the Rule. Where, as here, the seniority rights of employees are violated, a remedy is appropriate consonant with the violation involved, as established in a myriad of other Awards."

The Majority in this case also erroneously held that:

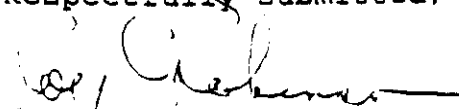
"*** Further, there is evidence that, in the past, such work has been contracted to outside forces."

The obvious error of the above-cited statement is that the record is absolutely void of any evidence that such work had ever been contracted to outside forces, and in any event sub-contracting was not an issue in this case. In this connection we note that the Carrier submission, at Page 21, states: "*** First, there was no subcontracting involved in this dispute, as there was no agreement that operated independently or had the potential of derivation of their collective bargaining agreement. ***"

Again, the dispute does not concern subcontracting but does concern work assigned to Maintenance of Way Employees without regard to the applicable seniority rights of the Claimants under the terms of the operative Agreement, i.e., the Soo Line Agreement.

The record of this case clearly shows the Carrier blatantly disregarded the applicable Agreement and defended their violative action with insupportable and factually incorrect assertions. However, the Majority simply chose to credit the Carrier's insupportable assertions rather than the detailed statements by the Claimants and the factual evidence presented by the Organization. Hence, the Majority exceeded its jurisdiction when it rendered its decision in this case which leaves the findings fundamentally flawed and of no precedential value.

Respectfully submitted,


Roy C. Robinson
Labor Member