

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34995
Docket No. MW-31053
00-3-93-3-34**

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Burlington Northern Railroad Company (former St. Louis -
(San Francisco Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned four (4) shop craft employes represented by the Firemen and Oilers to perform Track Subdepartment work comprised of unloading rail from a train, removing the angle bars and other track materials, separating them and reloading them onto another train on September 13 and 14, 1990 (System File B-846-1/MWC 90-12-30A SLF).**
- (2) The Agreement was also violated when the Carrier assigned two (2) shop craft employes represented by the Firemen and Oilers to perform Track Subdepartment work comprised of loading the rack at the welding plant in Springfield, Missouri, on April 9, 1991 (System File B-846-6/MWC 91-06-17).**
- (3) The Agreement was also violated when the Carrier assigned two (2) shop craft employes represented by the Firemen and Oilers to perform Track Subdepartment work comprised of loading the rack at the welding plant in Springfield, Missouri, on July 16 and 17, 1991 (System File B-846-7/MWC 91-10-08).**
- (4) The Agreement was also violated when the Carrier assigned three (3) shop craft employes represented by the Firemen and Oilers to perform Track Subdepartment work comprised of loading and unloading rail from trains on October 29 through December 5, 1991 (System File B-846-8/MWC 92-02-18).**

- (5) The Agreement was also violated when the Carrier assigned two (2) shop craft employes represented by the Firemen and Oilers to perform Track Subdepartment work comprised of loading the rack at the welding plant in Springfield, Missouri, on January 3 and January 17, 1992 (System File B-846-9/8MWC 92-05-19).
- (6) The Carrier further violated the Agreement when it failed to timely respond to the initial letter of claim, presented to division General Manager W. V. Eisenman on February 4, 1992, in connection with the violation referenced in Part (5) above.
- (7) The Agreement was also violated when the Carrier assigned two (2) shop craft employes represented by the Firemen and Oilers to perform Track Subdepartment work comprised of unloading, loading and stacking rail at the welding plan in Springfield, Missouri, on January 22, 23, February 27, 28, March 1, 2, 4, 5, 6 and 7, 1991 (System File B-2451/8MWC 91-05-15).
- (8) As a consequence of the violation referred to in Part (1) above, Foreman T. D. Johannsen, Special Equipment Operator W. T. Hudgens, Trackmen E. Fisher and H. D. Barger shall each be allowed pay for twelve (12) man-hours at their respective pro rata straight time rates of pay.
- (9) As a consequence of the violation referred to in Part (2) above, Foreman T. D. Johannsen and Special Equipment Operator W. T. Hudgens shall each be allowed pay for three and one-half (3.5) man-hours at their respective pro rata straight time rates of pay.
- (10) As a consequence of the violation referred to in Part (3) above, Foreman T. D. Johannsen and Special Equipment Operator W. T. Hudgens shall each be allowed pay at their respective pro rata straight time rates for eight (8) man-hours for each of the two (2) claim dates and for as long as the violation continues.
- (11) As a consequence of the violation referred to in Part (4) above, Foreman T. D. Johannsen, Special Equipment Operator W. T. Hudgens and Trackman E. Fisher shall each be allowed pay for 240.7

man-hours at their respective pro rata straight time rates of pay and their applicable overtime rates for all overtime hours worked.

- (12) As a consequence of the violation referred to in Parts (5) and/or (6) above, Foreman T. D. Johannsen and Special Equipment Operator W. T. Hudgens shall each be allowed pay for ninety (90) man-hours at their respective pro rata straight time rates.**
- (13) As a consequence of the violation referred to in Part (7) above, Foreman T. D. Johannsen and Special Equipment Operator W. T. Hudgens shall each be allowed pay for fifty-seven (57) man-hours at their respective pro rata straight time rates and ten and one-half (10.5) man-hours at their respective time and one-half overtime rates."**

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.

As Third Party in Interest, the National Conference of Firemen & Oilers (Service Employees International Union) was advised of the pendency of this dispute, but chose not to file a Submission with the Board.

This case involves several claims by the Organization that the Carrier violated the Agreement by using Shop Craft employees represented by the National Conference of Firemen & Oilers to perform the work of loading and unloading rails, and the work of loading rail onto the feeding rack for the contractor's welding machine. According to the Organization, the Agreement reserves such work for employees of the classes and groups

in which the Claimants hold seniority. It argues that the delegation of such work to another class of employees, in this case Firemen & Oilers, violates the Agreement.

The Organization disputes the Carrier's contention that the disputed assignments are consistent with a long-standing past practice. It maintains that the Carrier has not presented evidence to support the existence of such a practice. Moreover, according to the Organization, its past acquiescence to de minimus crossings of craft lines did not establish a practice of assigning Shop Craft employees to perform work contractually reserved to Maintenance of Way employees.

The Organization asserts that the Claimants lost work opportunities, and are entitled to receive pay at the rate they would have been paid had the Carrier not violated the Agreement. The Organization disputes the Carrier's allegation that the Claimants were fully employed, but argues in any case that a remedy is required to protect the integrity of the Agreement. With respect to the claim for January 3 and 17, 1992, described in paragraph (5) above, the Organization asserts that the Carrier did not timely respond and, in accordance with Rule 90, asserts that the claim must be allowed as presented.

The Carrier, on the other hand, argues that there has been no violation of the Agreement. According to the Carrier, the claims merely describe the common practice of using the crane operated by Shop Craft employees when the crane operated by Maintenance of Way employees breaks down. According to the Carrier, in such instances, the Shop Craft crew remains with its crane for safety purposes, while the Maintenance of Way Crane Operator and Helpers remain under pay. Thus, the Carrier asserts, no employee has suffered any loss.

According to the Carrier, the practice has been in effect for many years and the Organization's claims therefore are barred by the doctrine of laches. As to the merits of the claims, the Carrier maintains that the Organization failed to shoulder its burden of showing that the disputed work, by custom, practice and tradition, is reserved exclusively on a system-wide basis to Maintenance of Way employees.

After carefully reviewing the record evidence, we have determined that the claim must be denied in part and sustained in part.

The Carrier does not contest the fact that the disputed work belongs to Maintenance of Way employees. Rather, it merely asserts that under extraordinary conditions where the BMW-operated crane breaks down, it should be free to utilize a crane operated by

Shop Craft employees on a temporary basis, in order to ensure continued operations, and as long as the Maintenance of Way employees suffer no loss of pay as a result of the breakdown.

We agree with the Carrier. Because the utilization of cranes operated by Shop Craft employees was temporary and occurred only during breakdowns of cranes operated by Maintenance of Way employees, and because no BMW-represented employee suffered any loss of pay, we dismiss the claims, with one exception.

We agree with the Organization that the Carrier's response to the Organization's claim dated February 4, 1992 and amended on February 6, 1992, File No. B-846-9, was not timely. According to the record, the Carrier did not respond to the claim until April 12, 1992, more than 60 days after the claim was filed. Accordingly, said claim shall be allowed as presented.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 20th day of September, 2000.