Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35961
Docket No. MW-31780
02-3-94-3-58

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned the members of Welding Gang Nos. 2 and 34 instead of Track Subdepartment employes to perform track work (remove and install rail and associated materials) in connection with the repair of track switches located at Atwater and Litchfield, Illinois on June 20, 21, 24 and July 2, 1991 (System File C-91-JO10-23/MWA 91-10-4E).

(2) As a consequence of the violation referred to in Part (1) above, Claimants V. L. Smith, L. J. White and W. K. Hoxsey shall each be allowed thirty-two (32) hours' straight time pay and any applicable overtime pay."

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.

When these claims arose in June and July 1991, Section Foreman V. L. Smith, Laborer L. J. White and Laborer W. K. Hoxsey, the Claimants in this case, each held seniority in his respective class in the Track Sub-Department and was regularly assigned to work on the Virdin Section. On June 20, 21, 24 and July 2, 1991, the Carrier assigned the members of Welding Gang Nos. 2 and 34, who have established seniority within the Welding Sub-Department, to perform certain work in connection with the large switches at Atwater and Litchfield, Illinois, on the Virdin Section. As a consequence, the BMWE Local Chairman filed the instant claim, alleging violations of the Claimants' rights under Rule 2 Seniority Rights and Sub-Department Limits, Rule 5 Seniority Rosters and also citing Rule 55 Classification of Work, as follows:

"Rule 55 Q. Sectionmen.

Employes assigned to constructing, repairing and maintaining roadway and track and other work incident thereto.

Rule 55 K. Welder.

An employe assigned to the operation of any welding device used in the performance of such work as repairing, tempering and cutting rails, frogs and switches, welding and cutting in connection with construction, maintenance and dismantling of bridges, buildings and other structures, and any other welding and cutting in Maintenance of Way Structures Department shall be classified as a maintenance of way welder.

Rule 55 L. Grinder Operator.

An employe assigned to the operation of a grinding device, performing all grinder operations, either preparatory or finishing, and including the use of the cutting torch, shall be classified as a grinder operator."

The claim was promptly denied by the Galesburg Division General Manager on grounds that any rail replacement work performed by the Welders was "incidental" to their main welding tasks, including "joint elimination" and "eliminating bolt holes and old welds." The General Chairman perfected timely appeals, which were denied at all

levels of handling on the property by the Carrier, with the assertion that the Organization "failed to carry the burden of proof as to its validity."

Careful review of the record before us shows that, contrary to the Carrier's assertions on the property, the Organization did make out a prima facie case of contract violation in the facts and circumstances presented, which the Carrier never did effectively refute. Specifically, in appealing the initial denial of the claim, the General Chairman set forth the following facts which were never contested by the Carrier in handling on the property:

> "In the case of the switches at Atwater and Litchfield, Illinois, besides welding the rail ends as indicated the Welding Subdepartment employes replaced all of the rail in those switches. To do that they had to pull all of the spikes, remove all of the anchors, remove all of the joint bars, spike the new rail down and replace all of the anchors. Within the schematic attached is a table of data on the various measurements of the switch components. Review of that data discloses that a total of three hundred eight (308) feet of rail was replaced in the Number 11 switches and five hundred ninety-eight (598) feet of rail was replaced in Number 20 switches.
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> To give you an even better grasp of the magnitude of Track Sub-department work that was performed in this instant case, in one Number 20 switch approximately nine hundred (900) spikes had to be pulled and driven and the same number of anchors had to be removed and reapplied. Also nineteen (19) angle bars would have to be removed."

In this instance, the work project performed by Welding Gang Nos. 2 and 34 was to completely remove and replace rail in switches, requiring the removal and reinstallation of rail, spikes and anchors; spacing of ties and tamping of track. This cannot be deemed "incidental" because it did not happen by chance or as an undesigned feature of their primary assignment (welding rail ends), it was not "casual" work and it entailed the expenditure of 32 man-hours. Given the state of the present record, it is clear that the Organization carried its burden of proof and the Carrier's "incidental work" defense was not persuasively established. In the facts presented in this record, the Carrier simply used the Welders to perform large scale track work of a magnitude to which the Claimants were contractually entitled by custom, practice and tradition

under Rules 1, 2, 5 and 55 of the Agreement. See Third Division Awards 7958, 17982 and 28236. See also Awards 30 and 43 of Special Board of Adjustment No. 1110. In closing, we note that the claim dates preceded the effective date of the so-called imposed Agreement of July 29, 1991 and so neither Contract Interpretation Committee nor PEB 219 determinations played any role in this decision.

AWARD

Claim sustained.

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 8th day of March, 2002.