

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36061
Docket No. MW-35367
02-3-99-3-246

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe Railway
(former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned Welding Subdepartment forces to perform Track Subdepartment work (cut rail, drill holes, apply bars and use rail expander to close open joints from Huntley, Montana Mile Post 829.3 and east through Hardin, Montana) on August 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 27, 28, 29, 30, September 3, 4 and 5, 1996 (System File D-D-137-L/MWB 97-01-02AC BNR).
- (2) As a consequence of the violation referred to in Part (1) above, District 17 Foreman T. A. Anderson, Truck Driver D. J. Roebeling and Sectionmen L. P. Dillinger and L. H. Stadheim shall each be compensated at their respective rates of pay for ninety-eight (98) hours straight time and thirty (30) hours at their time and one-half rates and Sectionman G. A. Zink shall be compensated at his respective rate of pay for twenty-four (24) hours straight time and four and one-half (4.5) hours at his time and one-half rate.”

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 claim is an intra-craft dispute over rail destressing work performed while working ahead of a tie gang. All of the employees involved, from two different sub-departments, are represented by the Organization.

The Organization contends that Rules 1, 2, 5 and 55 "... clearly reserve work of the character involved here to Track Sub-department employees. Although the Carrier apparently abandoned its initial emergency circumstances contention, it did clearly refute the Organization's contention that the disputed work was reserved to Track Sub-department employees.

The record herein is not well developed. For example, it is silent about the device used by the Welding Sub-department employees to cut the rail before using a rail expander to close the three-inch gaps cut every .2 to .3 miles. Moreover, it cites Agreement Rules which have already been construed in prior Awards involving these same parties. Third Division Award 18441 noted that the Scope Rule is general and does not explicitly reserve work. Similarly, Award 35 of Public Law Board No. 2206 found that seniority Rules 2 and 5 do not reserve work. Finally, Award 13 of Public Law Board No. 4104 determined that Rule 55 is a classification of work rule and does not reserve work exclusively to employees of a given class. Our review of the Rule language cited by the Organization confirms those prior determinations; the language does not explicitly reserve the work in dispute to Track Sub-department employees. We do note, however, that cutting of rail is clearly referenced within Rule 55K pertaining to the Welder classification, as long as a welding device is used, and Rule 55L refers to the use of a cutting torch by a Grinder Operator, while none of the other cited sub-sections of Rule 55 specifically mentions destressing.

In the absence of explicit reservation language in the Agreement, the evidentiary analysis for intra-craft work jurisdiction disputes is well settled in this industry. Indeed, Third Division Award 18441, which reviewed a similar dispute between these same parties (B&B Subdepartment employees versus Track Subdepartment employees) described the test as follows:

"The scope rule of the Agreement is general in nature. For Petitioner to prevail it had the burden to prove that the work, by history, tradition and custom, was, system-wide, exclusively performed by employees in the B&B Sub-department."

See also Third Division Award 31211 and the decisions it cites.

The record herein provides no evidence whatsoever about past performance of the disputed work. While the Organization's appeal dated March 22, 1999 did include a signed statement from one of the Claimants, a careful reading of the statement shows it to lack meaningful information. Indeed, at most, it merely expresses the writer's opinion about work jurisdiction without any supporting evidentiary foundation. The

Organization also provided a copy of a bulletin concerning destressing crew makeup for the 1998 work season, which post-dates the instant claim by some two years.

The prior Awards cited by the Organization in support of its position have been reviewed and are not found to be persuasive. They are either inapposite, in that they involve disputes with rival crafts as well as outside contractors or different parties, Rules and facts, or they provide insufficient information about the contentions, Rules and facts to be of precedential value. The one exception is Third Division Award 35961. The text of the Award, however, makes it clear that the Carrier failed to refute certain factual assertions and also did not persuasively establish its asserted defense. The apparent uniqueness of that record renders it inapplicable here.

For the foregoing reasons, we find that the Organization has not satisfied its burden of proof, on this record, to establish the validity of the claim.

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 21st day of May, 2002.