

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36717
Docket No. MW-36232
03-3-00-3-438**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Soo Line Railroad (former Chicago, Milwaukee,
(St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim on the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned a 'Soo' Seniority District tie gang to perform routine tie installation and related maintenance work on 'Milwaukee' Seniority District #1 territory in the vicinity of Rosemount, Minnesota beginning on November 9, 1998 and continuing through November 25, 1998 (System File C-38-98-060-12/8-00373 CMP).**
- (2) As a consequence of the violations referred to in Part (1) above, the Claimants* listed below, shall now each be allowed pay at their respective straight time and overtime rates of pay for an equal proportionate share of the total number of straight time and overtime man-hours expended by the tie gang and its approximately fifty-three (53) employees in the performance of the aforesaid tie installation work on November 9, 10, 11, 12, 16, 17, 18, 19, 20, 23, 24 and 25, 1998.**

***T. F. Bailey
R. Bautch
B. J. Blanchar
K. J. Bremer
R. W. Brownell
A. Bustamante**

**S. M. Gruber
G. L. Hall
R. W. Hammer
D. M. Hengstl
J. F. Jick
J. Jones**

**T. Peterson
T. R. Puccio, Jr.
E. J. Raimer
R. J. Ricci
A. Richardson
D. D. Sauer**

R. J. Carpenter
D. Deboer
M. C. Deml
R. L. DeSmith
F. R. Einsmann
T. D. Finland
R. M. Grant

A. S. Kupietz
J. P. Limberg
J. C. Martens
J. L. Miller
G. A. Morrissey
M. A. Nelson
R. J. O'Kane"

W. E. Scott
B. J. Seebruck
R. V. Slack
R. A. Strauss
D. E. Swift
C.G. Vradenburg

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.

The material facts giving rise to this claim are not in dispute. It is well understood that track maintenance work is generally seasonal, especially in Minnesota where this case arose. As the 1998 working season was nearing its end in Fall 1998, Carrier managers realized that their current fiscal year budget would permit completion of a project replacing approximately 7,000 ties in the vicinity of Rosemount, Minnesota. That work was on the former "Milwaukee territory" in Seniority District No. 1 wherein each of the Claimants named in this case had established Track Department seniority. There were no currently furloughed employees in Seniority District No. 1 for recall so the Carrier initially issued bulletins during the month of October 1998 seeking bidders to perform the Rosemount track renewal project from the Claimants, who were all then performing various other Track Department assignments. After the close of the bid periods, however, the Carrier cancelled those bulletins, assigned Track Department forces from the Soo Line to perform the Rosemount track renewal job and utilized the Claimants to perform other work on Seniority District No. 1.

Prior to bringing in the Soo Line track forces to do this work, the Carrier sought concurrence of the General Chairman, explaining that its proposed arrangement would permit both Claimants and the Soo Line employees to work and postpone their anticipated annual furlough at the end of the 1998 season. When the General Chairman withheld his consent to assignment of the Soo Line employees to perform this routine track maintenance work on the Claimants' former Milwaukee Seniority District No. 1, the Carrier went forward and used the Soo Line forces to complete the project during the period November 9, 10, 11, 12, 16, 17, 18, 19, 20, 23, 24 and 25, 1998. The instant claim ensued and remained unadjusted through all levels of appeal until final appeal to the Board for determination in arbitration.

Given the undisputed operative facts, there is not much room for reasonable debate that the Organization made out a prima facie case that the Carrier violated the Claimants' seniority rights under the Agreement, as claimed in Part 1, supra, by assigning employees from a separate seniority district to perform work on the Claimants' seniority district which they routinely perform. See Third Division Awards 29985, 30721, 31131, 31228, 31259, 31292, 31828 and 32331. While the Carrier's apparent motivation to maximize efficiency and productivity of both the Claimants and other Carrier employees from the foreign seniority district is certainly reasonable, the Agreement language and arbitral precedent does not permit disregard of the language of the Scope and Seniority Rules based on such subjective factors. In the final analysis, the case comes down to the following summary statement from the Carrier's Submission to the Board: "There is no dispute that Carrier worked BMW employees from the former Soo property on the former Milwaukee property. However, the Agreement does not provide for the remedy sought by the Organization."

There is really no good reason to burden the record further with a recitation of the legion of prior Awards concerning "availability" and "full employment" when the Claimants are assigned elsewhere by the Carrier. The hundred of decisions go both ways and/or compromise the question presented. It is sufficient to say that those decisions all turn on the individual facts presented and that given the undisputed facts in the present record we conclude that an award of compensatory damages for the Claimants' proven loss of work opportunity is warranted in this case. See Third Division Awards 13832, 14061, 14621, 15497, 16946, 19324, 21678, 24576, 24897, 26709, 28851, 30683, 30778, 31085, 31129 and Award 64 of Public Law Board No. 1844. See also Third Division Awards 1306, 2585, 3582, 4385, 4543, 5091, 5413, 6021, 6938 and 20891.

Accordingly, Part 2 of the claim is sustained, with a direction that the amount of total damages be determined by a joint inspection of the Carrier's records of the straight time and overtime, if any, paid to the Claimants and the Soo Line employees used to perform the Rosemount tie renewal work on Seniority District No. 1 during the period November 9, 10, 11, 12, 16, 17, 18, 19, 20, 23, 24 and 25, 1998.

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 17th day of September 2003.