

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37744
Docket No. MW-36586
06-3-01-3-74

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned forces assigned to System Gangs 9039, 9149, 9001, 9070, 9056 and 9102 to perform routine Track Subdepartment Group 14 Division work (repair and maintain existing rail joints using the thermite welding process) on the Marysville Subdivision on the Kansas Division between Mile Posts Z150.00 and Z230.00 beginning on October 1, 1999 and continuing, instead of assigning said work to the Kansas Division Track Subdepartment Group 14 Class A Foreman C. F. Schwindamann, Class C Thermite Welder V. E. O'Toole and Class F. Welder Helper D. E. Wilson (System File W-9909-155/1217201).
- (2) As a consequence of the violation referred to in Part (1) above, Claimants C. F. Schwindamann, V. E. O'Toole and D. E. Wilson shall now be “*** allowed compensation at their respective Group 14 straight time and overtime rates of pay for an equal proportionate share of the total man hours consumed by Employees of the system Gangs referred to herein, in performing the referred to work that is customarily and traditionally assigned to Group 14 employees.’ ”

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 Claimants in this matter have all established seniority in the Track Subdepartment, Group 14 on the Kansas Division. Claimant C. F. Schwindamnann is a Class A Welding Foreman, Claimant V. E. O'Toole is a Class C Thermite Welder and Claimant D. E. Wilson is a Class F Welder Helper. At all relevant times, the Claimants were employed and assigned to their regular duties.

Beginning on October 1, 1999 and continuing, the Carrier assigned the members of welding components of several System Gangs to weld any joints that they encountered on the Marysville Subdivision on the Kansas Division. As of November 29, 1999, the date of the initial letter of claim, the System Welders had welded joints between Miles Posts Z150.00 and Z230.00 using the thermite welding process.

The Organization claims that the Agreement was violated when the Carrier designated System Gangs rather than Division Gangs to perform "... routine Track Subdepartment Group 14 Division work (repair and maintain existing rail joints using the thermite welding process). . ." instead of assigning the Claimants to the work. As a result of this alleged violation, the Organization requested that they be allowed compensation at their respective Group 14 straight time and overtime rates of pay for an equal proportionate share of the total man hours consumed by the System Gang employees. The Organization contends that the claim was filed in a timely manner. It further argues that regardless of when the work commenced, the

Carrier's timeliness argument is void because it was not raised at the appropriate time. Further, the claim is in the form of a continuing violation and is therefore timely.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. Initially, the Carrier contends that because the work actually began on September 26, 1999 and the claim was not filed until November 29, 1999, it is untimely. Be that as it may, the Carrier further argues that the work was properly performed by the System Gangs who were merely welding rail that they had installed in connection with their own work. The Carrier asserts that this work is considered new construction and, therefore, is within the province of the System Gangs.

The Board finds that the Organization has not been able to meet its burden of proof. As to the Carrier's time limit argument, the Board finds that the claim is a continuing claim and is thus, by nature, timely. See Third Division Awards 32331, 32394, 32993 and 35732.

As to the merits, in order to sustain its position, the Organization must be able to prove that only Division Gangs can perform this type of work to the exclusion of System Gangs. According to Side Letter No. 4, System Gang Welders are to ". . . work in conjunction with installation or renewal of rail." The Organization has not been able to prove that thermite welding has always been assigned to and performed by Division Gangs. Because the work in question entailed new construction, it was appropriately performed by the System Gang.

Because there has been no showing that the disputed work has been reserved to Division Gangs, we find that the claim must be denied.

AWARD

Claim denied.

Form 1
Page 4

Award No. 37744
Docket No. MW-36586
06-3-01-3-74

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 March 2006.

LABOR MEMBER'S DISSENT
TO
AWARD 37744, DOCKET MW-36586
(Referee Bierig)

The Majority in this case has clearly overlooked the glaring contract violation in this case and a Dissent is required because the reasoning of the Majority in denying the claim is based on false premises. In this instance, the Majority found that:

“As to the merits, in order to sustain its position, the Organization must be able to prove that only Division Gangs can perform this type of work to the exclusion of System Gangs. According to Side Letter No. 4, System Gang Welders are to ‘. . . work in conjunction with installation or renewal of rail.’ The Organization has not been able to prove that thermite welding has always been assigned to and performed by Division Gangs. ***”

Clearly, if the Agreement as cited by the Majority was correct, this Dissent would not be necessary. The problem in this case is that Side Letter No. 4 says more than what was cited by the Majority. The entire citation states:

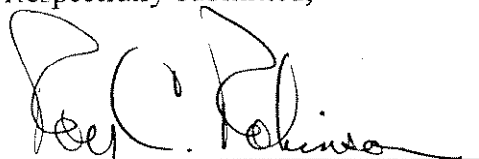
“In connection with this Agreement, it is understood that work associated with Group 27 assignments will only encompass work in conjunction with installation or renewal of rail by System Gangs (i.e. Steel Gangs, Curve Gangs, Switch Gangs, Concrete Tie Gangs, New Construction Gangs).” (Emphasis added)

In this case, there was no dispute but that the work that was performed by the System Welding Gang was not in connection with work in conjunction with installation or renewal of rail

Labor Member's Dissent
Award 37744
Page Two

by System Gangs (i.e., Steel Gangs, Curve Gangs, Switch Gangs, Concrete Tie Gangs, New Construction Gangs). Hence, any welding performed by the System Gang was performed outside the purview of the Agreement. The award is based on insupportable assumptions and therefore without any precedential value.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy C. Robinson", written over a horizontal line.

Roy C. Robinson
Labor Member