

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37856
Docket No. MW-37065
06-3-01-3-636

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to assign Idaho Division Assistant Extra Gang Foreman D. Martin, Idaho Division Extra Gang Truck Operator R. R. Olsen and Idaho Division Extra Gang Laborers O. Torres, J. L. Paz and J. Trevino, III to perform extra gang work on Welding Gang 6196 (eliminate jointed rail and/or creating continuous welded rail) on the Idaho Division beginning August 14, 2000 and continuing and instead assigned said work to regularly assigned Idaho Division section force employees (System File W-0009-52/1247797).
- (2) As a consequence of the violation referred to in Part (1) above, Claimants D. Martin, R. R. Olsen, O. Torres, J. L. Paz and J. Trevino, III shall now ‘. . . each be paid a proportionate share for all time worked by section forces assisting Gang 6196 starting on August 14, 2000, continuing until such time as extra gang forces are assigned this work.’***”

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.

In-Track Welding Gang 6196 was formed to utilize a Plasser Super Jack welding machine to eliminate rail joints and create continuous welded rail on the Idaho Division. Positions on Gang 6196 were bulletined, and the Claimants were subsequently assigned to extra gang positions responsible for pulling spikes, removing anchors, joint bars and bolts, and replacing spikes and anchors after welding had been completed. On August 11, 2000, the Claimants' positions were abolished, leaving six members on Gang 6196 to perform work between Georgetown and Soda Springs, Idaho.

On September 2, 2000, the Organization submitted a claim on behalf of the Claimants alleging that section gang employees T. Passey, E. Hymas, R. Holm, R. Jimenez, A. Lucio and N. Bartschi had been improperly assigned on August 14, and on dates thereafter, to assist Gang 6196 and perform the work that the Claimants had formerly performed. The Carrier denied the claim, and having failed to reach a satisfactory resolution of the issues on the property, the parties submitted the dispute to the Board for final and binding resolution.

The Organization contends that the Carrier improperly removed the Claimants from their assigned extra gang positions on Gang 6196 and replaced them with section gang employees. According to the Organization, while both extra gang and section gang employees perform track maintenance work (including removing ties, installing new ties and tie plates, spiking ties, installing rail anchors,

and surfacing, lining and tamping track), the parties' Agreement specifies when such work is to be performed by section gang employees, and when it is to be performed by extra gang employees. It is the Organization's position that the work at issue here belonged to extra gang employees.

In support of its contention that Section Gang employees replaced Claimants in assisting Welding Gang 6196, the Organization relies on an undated statement from in-track Welder J. Wigington, stating that on various dates between August 15 and October 1, 2000, the Soda Springs Section Gang (comprised of T. Passey, R. Holm and R. Jimenez), as well as E. Hymas from the Montpelier section gang on four dates in August, and J. Skinner on October 1, were assigned to assist Gang 6196. The Carrier, however, produced Labor Distribution Reports for August 2000 showing the work performed by Gang 6196 (field welding under Work Order No. 37964 on Segment 5025) as well as the work performed by the six employees the Organization claims replaced Claimants. Lucio and Hymas were assigned to Gang 6103, performing track maintenance along Segments 5010, 5015, 5025, 5026 and 5028; no work order number was specified. Passey, Jimenez and Holm were assigned to Gang 6104, performing track maintenance along Segments 5015, 5025, 5026, 5028, 5030, 5031, 5033; no work order number was specified. Bartschi was assigned to Gang 6081, working along Segments 5000, 5003, and 5010, 5015 under Work Order Nos. 407 and 39145. According to the reports, while Lucio, Hymas, Passey, Jimenez and Holm were at times performing work along the same segment as Gang 6196, they were also performing work along other segments on the dates in question and, therefore, were not shadowing Gang 6196. Bartschi was apparently working nowhere near Gang 6196.

In response to the Carrier's submission of the Labor Distribution Reports, the Organization submitted 15 undated statements by various employees attesting that work performed under one work order may be charged to another work order to use up the budgeted money, so that the Carrier's Labor Distribution Reports may be inaccurate. Regardless of whether or not these statements are truthful, however, they are not probative of the accuracy of the Labor Distribution Reports submitted in the instant case regarding the work performed by Gang 6196 and the six employees the Organization claims replaced the Claimants in August 2000. The Board thus is left with a contradiction between Wigington's statement, and the Carrier's business records. Because the instant proceedings are appellate in nature,

the Board has no authority to make factual determinations. The Board therefore finds that, on the record, the Organization failed to meet its burden of proving that section gang employees performed any work in assistance to Gang 6196 and previously performed by the Claimants.

Even assuming arguendo, however, that such allegation had been proved, the Board finds that the Organization failed to prove that the Carrier's use of section employees to perform the work in question would have been improper. The Organization contends that Track Sub-department employees assigned to Division Welding Gangs (other than Welding Foremen, Welders and Welder Helpers) have been Extra Gang employees both by Agreement and by practice. The Organization pointed to several Agreement provisions in support of its contention. It notes that under Rule 4 of the parties' Agreement, the employees of the Track Sub-department are classified in groups, with Group 8 distinguishing between Assistant Section and Assistant Extra Gang Foremen, Groups 15 and 28 distinguishing between Extra Gang and Section Truck Operators, and Groups 17 and 18 distinguishing between Sectionmen and Extra Gang Track Laborers. Therefore, the Organization argues, extra gang and section employees were intended to have distinct and separate responsibilities. Thus Rule 9(u), the Organization argues, defines a Sectionman as an "[e]mploye assigned on section or track maintenance gangs to perform work which has customarily been recognized as Sectionman's work," while Rule 9(w) defines a Track Laborer extra gang as an "[e]mploye assigned on extra gangs engaged in new construction or work not customarily done by section gangs...." According to the Organization, under Rule 13, Section II (c), Section Gangs perform routine maintenance, while Extra Gangs work on large projects, new construction and work not customarily done by Section Gangs.

The Organization's reliance on Rules 9 and 13, Section II (c) is misplaced. While it is true that Rule 9 distinguishes between the positions of Sectionman and Track Laborer extra gang, it sheds no light on what work is "customarily recognized" as Section Gang work. Rule 13, Section II(c) provides:

"Seasonal or temporary extra gangs engaged in work not customarily done by section gangs such as reballasting and rail laying including tie renewals in connection therewith, bank widening, grad and line changes, or emergency work occasioned by

inclement weather will not be worked in the place of regular section gangs."

By its language, this Rule protects the work of Section Gangs from encroachment by Extra Gangs temporarily in the area doing work not customarily performed by those Section Gangs. It does not, however, reserve any particular work - not customarily done by Section Gangs or otherwise - to Extra Gang employees.

The Organization further seeks to show that by agreement of the parties and by practice, Welding Gangs utilize Extra Gang rather than Section Gang employees, citing a May 4, 1982 Letter Agreement regarding an intent to establish Division Rail Heat Treating-Welding Gangs to "tentatively consist" of employees in classifications including Extra Gang positions. The Organization also cites a June 8, 1993 Letter Agreement regarding the establishment of an in-track welding crew to follow a detector car working on the Nebraska and Wyoming Divisions, stating that the positions that might be assigned to such a crew would include Extra Gang positions. In addition, the Organization submits 19 bulletins reflecting the assignment of Extra Gang employees to in-track Welding Gangs.

The Board finds that the Letter Agreements and bulletins presented by the Organization show only that Extra Gang employees have been assigned to the Welding Gangs that were the subjects of those Letter Agreements and bulletins, not that the support members of every Welding Gang have been Extra Gang employees. More importantly, the issue presented in the instant case is not whether only Extra Gang employees have been assigned to Welding Gangs, but rather whether the work of assisting Welding Gangs by performing track maintenance tasks has been reserved to such Extra Gang employees, or as the Carrier contends, may be performed by regular Section Gangs.

The Organization presented no evidence to counter the Carrier's contention in this regard. In fact, faced with the contention during on-property handling of the instant matter, the Organization stated "It may be true that under emergency situations or unusual circumstances Sections are utilized to assist in the work of Thermite Welding" and "In your letter you assert that you have 'historically used section forces to support in-track welders when they cross the territories.' While

this may be somewhat accurate. . . ." The Carrier submitted a September 26, 2001 e-mail authored by Director of Track Maintenance P. Dannelly attesting that "On the Union Pacific property, section gangs have historically supported and worked with in-track welding gangs. Extra gangs do not have an exclusive practice supporting the in-track welders." The Organization failed to submit evidence refuting this statement. The Board therefore finds that the Organization has not met its burden in proving a practice reserving the work at issue herein to Extra Gang employees.

In light of the Organization's failure to meet its burden of proof regarding the material facts of its claim, the Board must deny 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 1st day of August 2006.