

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39304
Docket No. MW-37920
NRAB-00003-030333
(03-3-333)

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna 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 call and assign Nebraska Division Track Subdepartment Section Gang 4571 employes E. Corrill, T. Renteria and M. Reed to repair track within their assigned section territory limits (river lead track) on April 21, 2002 and instead assigned Omaha Section Gang 4883 employes (System File W-0235-158/1328338).
2. As a consequence of the violation referred to in Part (1) above, Claimants E. Corrill, T. Renteria and M. Reed shall now ‘. . . be allowed compensation equal to the amount they would have received absent the violation of the Agreement. That is, the referred to claimants must each be allowed four (4) hours pay at his respective overtime rate of pay as compensation for this violation of the Agreement.”

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 relevant facts giving rise to this claim are not in dispute.

The Claimants established and hold seniority in the Track Subdepartment as Group Sectionmen on the Nebraska Division. At all relevant times the Claimants were assigned as such on Section Gang 4751 within a work territory on Seniority District No. 10171 of the Nebraska Division.

On Sunday, April 21, 2002, the Carrier assigned employees from Section Gang 4883 to reset four rails overturned in a derailment on the River Lead Track outside the Omaha-Council Bluffs Terminal area. It is the Organization's stated position that the Carrier was obligated under Rules 13 and 26 to call and assign the Claimants to perform this work. In response, the Carrier disagreed with the Organization's position in which the Manager of Special Projects noted, in relevant part:

"As a result of my investigation into the merits of your claim, Manager Track Maintenance Tim Hecker informed me that the territory limits of 4901, 4883, 4751 are all the same MP 0.00 to 30.00. The work done by gang 4883 was accomplished on an assigned day on the assigned territory."

In response, the Organization noted in relevant part:

"The Carrier has tried to raise a smoke screen stating that all of the employees are assigned to the territory in question which is part of the major terminal of Omaha-Council Bluffs area. This is not correct. Section 4751 is not part of the alleged Omaha-Council Bluffs area but instead has separate and distinct section limits and work assignments and has territory completely outside of the terminal. The Carrier's

further argument that the positions are seven (7) day positions and they somehow have a right to establish staggered work weeks is not true. There are no corresponding and identical positions which work on the rest days of Section 4751.”

In reviewing the record of this case, it is significant to the Board that the Organization’s response was not refuted by the Carrier. Accordingly, such statement by the Organization must, under well established rules, be viewed as factual. (See e.g. Third Division Award 23460.) Accordingly, for purposes of further review of this claim, the Board views the territorial limits of Section Gang 4751 as being outside the Omaha-Council Bluffs Terminal, while the territorial limits of Section Gang 4883 were within the Omaha-Council Bluffs Terminal, a territory separate and distinct from the territory of Section Gang 4751.

Rule 13, Section II(b) provides:

“Regular section forces assigned to the particular section where the work arises will be given preference over track maintenance gangs for overtime service.”

Given the fact that the Claimants were the regular section forces assigned to the territory outside the Omaha-Council Bluffs terminal area, the Board finds that the Agreement was violated when the Carrier assigned Section Gang 4883 and not Section Gang 4751 to perform the subject track maintenance. (See Third Division Awards 11152, 17931 and 24584 together with cases cited therein.)

Next, Rule 26(h) Work on Unassigned Days, provides:

“Where work is required by the Company to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have forty (40) hours of work that week; in all other cases by regular employee.”

Following a careful review of the record, it is significant that there was no showing by the Carrier that the employees on Section Gang 4883 who performed the work at issue were available extra or unassigned employees who would otherwise have

40 hours of work that week. Accordingly, Rule 26(h) obligated the Carrier to assign the Claimants, who were at all relevant times the “regular employees” to perform this work. The fact that the Carrier failed to do so violated Rule 26(h).

Third Division Award 23460 relied upon by the Carrier does not change the outcome of the instant case. The Organization there challenged the Carrier’s use of Gang members outside the territory where the work was to be performed. The Board placed great emphasis on the fact that the Carrier’s assertion that both Gangs worked the same territory was not refuted by the Organization. Accordingly, this finding by the Board in Award 23460 places that case at odds with the instant matter where, as noted and discussed above, the Carrier did not refute the Organization’s claim that the two Gangs at issue were from different territories.

Finally, to the extent that the Carrier relied upon the staggered workweeks in the Omaha-Council Bluffs Terminal, a recent case decided by the Third Division involving these same parties held that the Carrier’s assignment of Omaha and Council Bluffs Section Gangs to staggered workweek schedules violated the Agreement. (See Third Division Award 36772.) Accordingly, to the extent that the Carrier relied upon this staggered workweek as a defense to its action, Award 36772 effectively rejected this defense.

As to the remedy, the Carrier asserts that the Organization’s sought after remedy is “excessive” due to the fact that the remedy sought seeks four hours of overtime for three employees while the Organization alleges that only two employees actually performed the work for a total of 12 man hours. Accordingly, the Board shall direct a remedy consisting of the award of three hours for each Claimant at his respective overtime rate of pay.

AWARD

Claim sustained in accordance with the Findings.

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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 29th day of September 2008.