

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39709
Docket No. MW-38788
09-3-NRAB-00003-050162
(05-3-162)**

The Third Division consisted of the regular members and in addition Referee Jacalyn J. Zimmerman when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago &
(North Western Transportation Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when, following a November 23, 2003 derailment at Mile Post 67.31 resulting in damages to a bridge, it failed to call and assign Seniority District B-3 B&B employees B. Asselin, B. Wakefield, H. Harbors, R. Hadsall, Jr., W. Weitzell, J. Naughton, E. Ray and C. Jones to perform the related bridge repair work and instead called and assigned System Bridge Gang employees to perform such bridge repair work on November 23, 24 and 25, 2003 (System File 3SW-2073T/1393508 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants B. Asselin, B. Wakefield, H. Harbors, R. Hadsall, Jr., W. Weitzell, J. Naughton, E. Ray and C. Jones shall now ‘ . . . be compensated forty two and one half (42.5) hours each at the applicable rate of pay.’”**

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 facts of this case are not in dispute. The Claimants hold seniority in the Bridge and Building (B & B) Department on Seniority District B-3, and at the relevant time were assigned to headquartered B&B positions. On Sunday, November 23, 2003, a coal train derailed at Milepost 67.31 on the Peoria, Illinois, Subdivision, damaging a 60-foot bridge. The Carrier assigned eight employees from its System Bridge gang, then located in Wisconsin, to perform cleanup and to install and backfill new culverts.

The instant claim followed. The Organization contended that the Claimants customarily and commonly performed B&B maintenance and repair. The System Bridge Gang, the Organization further contended, was established to perform pre-planned work, as established by the following language of Appendix 14 of the November 1, 2001 Chicago North Western Agreement:

“Section 1.

On the effective date of this agreement, the Carrier may establish no more than three (3) System Bridge Gangs to perform programmed work on the six (6) Bridge and Building seniority districts.”

Because the repair of the derailment site was unplanned work, the Organization asserted that the Claimants, rather than the System Bridge Gang, were the appropriate employees to perform the work.

The Organization asserts that the work in question could not, under any reasonable definition of the term, be viewed as "programmed." Instead, the Organization contends, this is the type of work customarily assigned to, and performed by, Division forces, and it was contractually reserved to them. Thus, the Organization concludes, because the Claimants were regularly assigned such work, they suffered a lost work and wage opportunity within the meaning of Rule 23. The Rule provides, in relevant part:

"L. Work on unassigned days – Where work is required 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 shall otherwise not have 40 hours of work that week; in all other cases by the regular employee."

The Organization further asserts that the Carrier did not demonstrate the existence of an emergency which justified its disregard of the Claimants' asserted contractual entitlement to the work.

In support of its assertion that the Claimants had a contractual entitlement to the work, the Organization relies primarily upon Third Division Awards 32414 and 32415. However, those cases do not support the Organization's position in this case, because they involved different agreement language which described programmed work more precisely and also provided that the gangs at issue could not be used in lieu of regularly assigned section gangs for their customarily assigned work. No such language is present in the instant Agreement, and the general reference to "programmed" work is insufficient to satisfy the Organization's burden to prove an explicit limitation of the type of work that can be performed by system gangs, or an explicit reservation of particular work to the Claimants. Lacking specific Agreement language, it was incumbent upon the Organization to provide probative evidence to support its definition of "programmed" and to establish that the

practice under this Agreement demonstrates the work in question could not be performed by a System gang. There is no such evidence in this record.

We conclude that the Organization has not satisfied its burden of proving a violation of the Agreement.

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 26th day of May 2009.