

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39736
Docket No. MW-39067
09-3-NRAB-00003-050520
(05-3-520)**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Lake Superior and Ishpeming Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned Mechanical Department (Carmen) employes to perform Maintenance of Way and Structures Department work (fabricate and install gate) at the Eagle Mills car dumping facility beginning on August 20 and continuing through September 3, 2004, instead of Welder T. Tyner and Carpenter H. Woodruff (System File C-04-060-052).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Tyner shall now be compensated for seventy (70) hours at his respective time and one-half rate of pay and Claimant H. Woodruff shall now be compensated for thirty (30) hours at his respective time and one-half 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.

As Third Party in Interest, the Brotherhood Railway Carmen Division of the Transportation Communications International Union was advised of the pendency of this dispute, but chose not to file a Submission with the Board.

The Organization filed the instant claim on the Claimants' behalf, alleging that the Carrier violated the parties' Agreement when it failed to call and assign the Claimants to perform certain work at the Eagle Mills car dumping facility, but instead assigned this work to Carmen working in the Mechanical Department.

The Organization initially contends that the Board consistently has held that in order to preserve the sanctity and integrity of the agreement, consideration of proper classification of work to be performed must be enforced. The Organization asserts that in accordance with the Scope Rule, the Claimants have established and hold seniority as Welder and Carpenter/Mechanic, respectively, within the Bridge and Building Sub-Department. The Organization argues that the Board frequently has held that when seniority is restricted to a department, sub-department, or group, all work of that classification is likewise restricted.

The Organization maintains that the Carrier did not dispute that fabrication and installation of structures is work that accrues to its B&B forces. The Carrier also did not dispute that its B&B forces had installed the platform used for its trapping machine. The Organization emphasizes that the Carrier nevertheless attempted to distinguish the subject modifications to the fence around the platform and the installation of a gate to allow access in and out of the dumping facility as modifications to the platform which Carmen had built. The Carrier also argued that the fence was merely a handrail and an integral part of the platform. The Organization argues that because the platform admittedly had been installed by B&B forces and because the subject work was the modification of the hand railing around the platform, the subject work belonged to the Carrier's B&B forces, not to Carmen.

The Organization insists that there can be no dispute that the subject work was squarely within the Scope of the Agreement, and that it is work which was intended to be performed by the Claimants. The Organization contends that the Agreement clearly contemplates that work of a class belongs to those employees for whom the contract was negotiated.

The Organization emphasizes that the Carrier violated the Agreement when it assigned work belonging to its B&B Sub-Department to employees holding assignments in its Mechanical Department, rather than to the Claimants. Instead of performing their own Mechanical Department duties, the Carmen assigned to the subject work performed work belonging to B&B Sub-Department Welders and Carpenter/Mechanics when they modified a fence and installed a gate that controlled access to a platform designed for a trapping machine. The Organization asserts that such work accrued to the Claimants under the terms of the Agreement and by essentially undisputed past practice.

The Organization argues that because the Carrier failed to call and assign the Claimants to perform the work in question, in accordance with their seniority, the instant claim should be sustained.

The Organization then contends that the Carrier attempted to shift the focus from the subject work to the platform designed for a trapping machine which was moved into and out of the dumping facility. The Organization points out that the trapping machine is maintained by the Carmen who also built the platform, but did not install it. The Carrier's B&B forces installed the platform at the dumping facility. The Organization submits that because the subject work consisted of modifications to the fence around the platform and the installation of a gate, the Carrier's contentions are immaterial insofar as the violation of the Agreement is concerned, and these contentions cannot validly be construed to defeat the instant claim. The Organization insists that the record shows that B&B Welder and Carpenter/Mechanic work was performed in violation of the Agreement.

The Organization points out that the Carrier raised no objection to the number of hours claimed or the rate of pay sought during the handling on the property. The Carrier therefore cannot raise any such objections in its Submission to the Board.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the Organization failed to meet its burden of proof in this matter. The record is insufficient to establish a violation of the governing Agreement. The Carrier asserts that the Organization has not even correctly described the work at issue, much less provided any evidence to support its position regarding rights to the work. Moreover, the cited Rules have no application to this dispute.

The Carrier argues that the Organization incorrectly referenced a “fence” or “gate,” when there actually was a handrail that was an integral part of the platform. The Carrier points out that during the on-property handling of this matter, the Organization never responded to the Carrier’s description of the work, so the record stands with the Carrier’s final and correct description of the work as undisputed.

The Carrier contends that the Organization is splitting hairs in this matter. The Organization is not laying claim to the design and fabrication of the platform, but it is claiming the handrail that is an integral part of the platform and is permanently attached thereto. The Organization’s description of this handrail as a “fence . . . modified to swing like a gate” is neither accurate nor true.

The Carrier emphasizes that while the Organization has the obligation to establish all essential elements of its claim, the Organization failed to even establish that its description of the work in question is correct. The Carrier insists that the Organization failed to meet its burden of proof, and the instant claim should be denied on that basis alone.

The Carrier goes on to contend that because the Scope Rule is “general” in nature, the Organization must prove that BMW-represented employees have performed the disputed work on a historical and system-wide basis to the exclusion of any others. The Organization cited Rule 1 in support of its claim, but the Carrier asserts that this is nothing more than a general description of the governance of the Rules contained in the Agreement to the employees within the Maintenance of Way Department. The Carrier insists that Rule 1 does not describe or define work, nor

does it support any of the specific allegations that the Organization made in this dispute.

The Carrier points out that the Organization also cited Rule 3 in support of its claim. The Carrier asserts, however, that this Classification of Work Rule does not define work, nor does it establish that such work belongs exclusively, or otherwise, to the employees covered thereby. The Organization alleged that the work relating to the "fence" falls within the language of Rule 3, but the Carrier asserts that this is difficult to understand in light of the fact that the Organization takes no exception to Carmen designing and fabricating the platform in question.

The Carrier argues that the Organization failed to present any evidence to support its allegations that the work involved has historically and exclusively been performed by BMW-employees. The Carrier points out that allegations are not proof.

The Carrier then insists that the Organization's citation to Rule 4, almost as an afterthought, does not support its position. The Carrier contends that Rule 4 has no application whatsoever to the instant dispute.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization met its burden of proof that the Carrier violated the Agreement when it assigned Carmen to perform work that should have been performed by BMW-employees. The record reveals that the Carrier required modifications to the fence surrounding the platform at the Eagle Mills car dumping facility. That work was assigned to Carmen from the Mechanical Department and it is work that has historically and customarily been assigned and performed by BMW Welders and B&B Carpenter/Mechanics and reserved to them by the Agreement. The Claimants established and hold seniority in that Department and were entitled to perform the work. The record clearly shows that the B&B Welders and Carpenter/Mechanics have performed the same type of work that was involved in this case.

Once the Board has determined that there is sufficient evidence in the record to support the finding that the Carrier violated the Agreement, we next turn our

attention to the remedy. The Carrier never challenged the number of hours claimed and the rate of pay being sought by the Organization in this claim. Consequently, the claim will be sustained in its entirety.

AWARD

Claim sustained.

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 26th day of June 2009.