Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39739
Docket No. MW-38813
09-3-NRAB-00003-050225
(05-3-225)

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

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned Supervisors K. Pelletier and/or C. Gessman to perform Maintenance of Way work (hang filter fabric underneath a trestle) in Gray, Maine on May 28 and 29, 2004 (Carrier's File MW-04-26).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Hafford shall now be compensated at the B&B mechanic's rate of pay for three (3) hours at the straight time rate of pay and a total of seven (7) hours at the overtime 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 Organization filed the instant claim on the Claimant's behalf, alleging that the Carrier violated the parties' Agreement when it assigned supervisors, instead of the Claimant, to perform certain Maintenance of Way work.

The Organization initially contends that arbitral Boards long have recognized that seniority is a valuable property right of an employee. The Organization asserts that the parties' Agreement, which does not apply to supervisory forces above the rank of Foreman or to employees covered by other agreements, provides for the establishment of seniority, as well as the duties of a B&B Mechanic. The Organization argues that because the parties listed the various classes to be covered under their Agreement, they thereby excluded all those not listed.

The Organization emphasizes that the supervisors who performed the B&B work at issue were excluded from the Agreement and had no contractual right to perform this work. The Organization maintains that there can be little question that this work historically has been performed by B&B forces within the scope of the Agreement.

The Organization argues that countless Awards have recognized that work of a class belongs to those for whose benefit a contract is made, and that delegation of such work to others not covered thereby is a violation. Moreover, arbitral Boards consistently have held that it is improper for supervisors to perform scope-covered work.

The Organization goes on to assert that the Carrier's defenses are without merit. It points out that the Carrier's "emergency" defense is an affirmative defense that requires the Carrier to present probative supportive evidence. The Carrier, however, failed to submit any proof of an alleged emergency. It asserts that although the Carrier claimed that the situation was an "emergency" because the Department of Environmental Protection "ordered" the bridge work, there is no

information in the record as to when this "order" was made or how long the Carrier had been aware of the situation.

The Organization further argues that the claimed work was not performed as a continuous operation. The fact that the supervisors performed this work for three hours on one day and seven hours on the next does not support the Carrier's emergency defense. The Organization insists that this establishes just the opposite. The Organization contends that although the Carrier cried "emergency," its actions in the assignment of its forces belie this assertion. The Organization insists that under the circumstances, it cannot seriously be held that an emergency situation existed relative to the work in question.

Addressing the Carrier's position that neither B&B Mechanics nor any other class has exclusivity with regard to emergency work, the Organization asserts that the Carrier is wrong in asserting that the so-called exclusivity test has some application in this dispute. The Organization emphasizes that the exclusivity test has been held to apply in cases involving a question of the proper assignment of employees between various classes of employees covered by collective bargaining agreements. The Organization points out that this is not the situation here because this case involves the improper assignment of scope-covered work to supervisory employees outside of the Agreement. Pointing to a number of Awards, the Organization contends that the exclusivity test has no application here.

The Organization goes on to dispute the Carrier's suggestion that the Claimant has not been affected by the situation at issue. The Organization insists that there can be little question that the Claimant suffered a very real and substantial monetary loss as a direct result of the Carrier's improper assignment of supervisory personnel to perform scope-covered B&B work. The Organization contends that whether the Claimant was immediately available, or whether another employee may have had a greater right to perform the claimed work, are not the central issues in this matter. The Organization asserts that it is hornbook that claims are filed to protect the integrity of the Agreement and that who the Organization names as a claimant is immaterial insofar as the violation of the Agreement is concerned.

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 Carrier asserts that the Maine Department of Environmental Protection ordered it to stop the dripping of creosote underneath a bridge. The Carrier argues that everyone on hand at that time immediately commenced hanging filter fabric from the bridge trestle in an attempt to remedy the problem and abide by the DEP order. The Carrier points out that the work began on the evening of May 28 and was completed on May 29. The Carrier insists that this was a direct emergency response to the environmental safety concerns of a Maine DEP official.

The Carrier asserts that despite the Organization's assertions, the Scope Rule does not apply to the instant dispute, nor does Article 2 of the Agreement, which addresses intra-craft jurisdiction. This situation does not involve an employee from one classification performing work that commonly is associated with another classification. In the present case, with a claim that supervisors performed a task that is exclusively reserved to BMWE Mechanics, Article 2 is inapplicable and warrants no further consideration.

The Carrier asserts that even if Article 2 did apply to this dispute, it fails to support the Organization's claim. The Carrier points out that the Claimant was on furlough until July 30, 2004, and the Carrier could not reasonably have contacted the furloughed Claimant, scheduled a return-to-work physical, waited for the results of this exam, and received notice of his clearance to return to service in order to have the Claimant assist in the work at issue. The Carrier emphasizes that this work arose out of an unforeseeable set of circumstances and had to be completed immediately. The Carrier argues that based on these facts, the Claimant was not an affected furloughed employee, and there has been no violation of Article 2 of the Agreement.

As for the allegation that there was a violation of Article 5, the seniority clause, the Carrier asserts that it does not support the Organization's position. The Carrier insists that hanging filter fabric underneath a bridge trestle does not

constitute "constructing, repairing, dismantling, inspecting or maintaining" the bridge. The Carrier points out that the work in question was done to prevent an environmentally unsound condition from continuing, in accordance with a direct order from Maine's DEP. The Carrier emphasizes that the work was not done to maintain the structural integrity of the bridge.

The Carrier then argues that B&B Mechanics cannot lay exclusive claim to this particular task, given the circumstances of the case. The work in question consisted of "emergency work ordered by the DEP," and no class can claim exclusive rights to emergency work that has been ordered by a governmental agency, regardless of what the particular task to be performed may entail.

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

The Board reviewed the record and finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it assigned Supervisors Pelletier and/or Gessman to perform maintenance-of-way work on May 28 and 29, 2004. Therefore, the claim must be denied.

The record reveals that a State of Maine environmental official was traveling under the bridge in question and noticed that creosote had dripped down onto the boat in which he was traveling. The Carrier was ordered to prevent this situation from continuing any further. It drafted everybody who was on hand at the time of the incident to hang the filter fabric from the bridge trestle in an effort to remedy the problem and comply with the environmental agency's order. There is no question that this was an emergency response to the environmental order from the State of Maine.

It is true that the B&B Department has reserved the work of constructing, repairing, dismantling, inspecting, and maintaining bridges. This case, however, involved an emergency response to an unsound condition and it is accurate as the Carrier points out that no craft or class can claim exclusive rights to emergency work that has been ordered by a government agency.

The Carrier did not act in violation of the Agreement when it assigned Supervisors to perform the work. Therefore, the claim must be denied.

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 June 2009.