

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39951
Docket No. MW-40204
09-3-NRAB-00003-070472
(07-3-472)**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
(National Railroad Passenger Corporation (Amtrak) –
(Northeast Corridor

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier established and assigned Gangs Y-408 and Y-412 as Rule 89 gangs and when it assigned said gangs to perform Rule 90 B Northern District work, such as material handling for switches at Davisville Yard in North Kingston, Rhode Island, on April 16, 2006 (Carrier’s File NEC-BMWE-SD-4619 AMT).**
- (2) As a consequence of the violations referred to in Part (1) above, Claimant W. Jackson shall now be compensated for ten and one-half (10.5) hours of overtime at his respective and 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 Carrier established Gangs Y-408 and Y-412 pursuant to Rule 89. The instant claim challenges the establishment of those gangs and their assignment on April 16, 2006, to perform switch installation/replacement work on the Northern District at Davisville Yard in North Kingston, Rhode Island. At issue is whether the gangs and the work they performed are authorized by Rule 89, which reads, in pertinent part:

“AMTRAK may establish one or more of the following units not assigned to fixed headquarters to work over Amtrak’s present Northeast territory: MBTA, Albany, Northern and Southern Districts as herein provided:

1. Ballast Cleaner, Speno, Rail; Pick-up Train, or other large on track units.
2. Rail Surface Grinding Train.
3. Rail Laying Train.
4. Track Welding and Grinding.
5. Structural Welding.
6. Camp Car Cook, Camp Car Attendant.
7. Track Sweeper (on-track).
8. Pile Driver.
9. Track Laying Machine and Track Laying System Support Unit.
10. Track Laying System Welders and Grinders.
11. Track Undercutter Machine.
12. Ditcher Machine.
13. Unimats.
14. MDZ surfacing units.
15. Switch turnout exchange systems.
16. Other high technology machines not on the property as of June 27, 1992.”

The Organization argues that Rule 89 contemplates the assignment of gangs to use specialized high technology equipment, including the Switch Turnout Exchange

System, which the Organization characterizes as a high technology method of exchanging one switch for another. The Organization notes that item 16 of Rule 89 refers to "other high technology machines," reflecting the parties' understanding that Rule 89 gangs are restricted to high technology equipment. In contrast, the Organization maintains, the work at issue involved switch construction using a common rubber tired crane.

The Carrier argues that Rule 89 does not prohibit it from combining two or more of the units listed in the Rule. The Carrier contends that the assignment in issue was covered by rail laying, item 4 of Rule 89; track laying, item 8: and switch/turnout exchange, item 15. In the Carrier's view, item 16 is irrelevant because it did not establish the gangs pursuant to item 16.

The language of Rule 89 is ambiguous. It may reasonably be read, as the Organization reads it, to allow only the functions and equipment literally listed in the Rule for gangs established pursuant to the Rule and only functions performed with high tech equipment. It may also reasonably be read, as the Carrier reads it, to impliedly cover the work at issue. Neither party introduced any evidence during handling on the property, such as evidence of bargaining history or practice on the property that might clarify the ambiguity. Indeed, the record developed on the property reminds us of two school children engaged in a dispute in the schoolyard, with each child continuously shouting his unsupported allegations at the other in increasingly louder tones.

As the moving party, the Organization bears the burden of proof. Naked assertions, no matter how often reiterated, are no substitute for evidence of probative value. We conclude that the Organization failed to carry its burden of proving that Rule 89 prohibited the assignments in question.

AWARD

Claim denied.

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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 30th day of September 2009.