

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40327
Docket No. MW-40525
10-3-NRAB-00003-080359**

The Third Division consisted of the regular members and in addition Referee Sherwood Malamud when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned UP System Gang 9060 employe R. Abbot to perform flagging for contractors on a bridge project at Mile Post 207.6 on the Boone Subdivision instead of CNW Seniority District T-4 employe B. Wickham, beginning January 2, 2007 and continuing (System File R-0731C-305/1470581 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Wickham shall now be compensated at his respective and applicable rate of pay for all straight time and overtime hours worked by the System Gang 9060 employe in the performance of the aforesaid work beginning January 2, 2007 and continuing.”**

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.

On January 2, 2007 the Carrier bulletined and assigned System Gang 9060 Assistant Foreman, R. Abbot to perform the flagging work to protect outside forces constructing the bridge at M.P. 207.6. Claimant B. E. Wickham holds seniority as a B & B Foreman on Gang 3471 on the T-4 and B-4 seniority District at Boone, Iowa, under the November 2001 BMW/CNW Agreement. The bridge under construction is located on the T-4 District.

The Organization argues that the Claimant should have been assigned the flagging work for this project which was scheduled to take two years to complete. One and one-half years into the project System Gang 9060 was scheduled to lay the track on the newly constructed bridge. The Organization argues that under the Agreement's Scope clause and classification structure in the B & B Sub-department, the Carrier's assignment prerogative is limited to the assignment of the flagging work to an employee in the T-4 and B-4 Seniority District, where the bridge in question is located. Rule 4D protects an employee's seniority and right to consideration for work assignments based on the employee's relative length of service. The work is confined to the T-4 and B-4 Seniority District, where the bridge is located. The Third Division held in Award 30797 that work within a specific seniority district cannot be transferred to employees on a different seniority district.

The Organization further argues that System Gang 9060 is limited to the performance of switch work and laying of track, which work was not performed and was unrelated to the construction of the new bridge. The Consolidated System Gang does not include bridge work or the construction of bridges. The scope language provides that all work related to construction should be performed by employees within the appropriate sub-department, classification and seniority district. The Carrier violated the Agreement and the Claimant's seniority, when it assigned the flagging work to a system gang employee. The Claimant suffered a loss, i.e., the additional overtime related to the flagging assignment as compared to the overtime that he worked on his assignment. This loss continued over the extended length of this assignment.

The Carrier asserts a number of defenses to this claim. First, flagging work is not exclusively reserved to the Foreman classification. The Organization failed to meet its burden to establish that the work assignment in question belonged to the Claimant to the exclusion of other employees. The Organization's claim is based on the premise that system gang employees may only perform work related system gang work. The Carrier disagrees with this premise. The Carrier points to Third Division Award 37847 which held that any system employee may perform any system work. Second, the Carrier argues that under the System Implementing Agreement, new construction falls under the UP System Agreement and not the District Agreement. There is no factual dispute that the bridge work in question constitutes new construction. The Carrier properly assigned a system gang employee to perform the flagging work.

Third, the Carrier retains the managerial prerogative to assign work. To prevail, the Organization must demonstrate that this prerogative is limited by Agreement and that the Carrier violated the Agreement, when it exercised its prerogative to assign the flagging work to Abbot rather than Wickham. In Third Division Award 13083, decided in 1964, the Board noted that the more general the language of the scope rule, the greater the reliance on history, tradition and custom "to establish job content and to whom the work belongs." Here, the Scope Rule cited by the Organization is quite broad. There is no evidence in the record as to custom, history, or tradition that establishes that flagging work has been assigned to one classification or to District employees over system gang employees to the extent that it serves to limit the Carrier's prerogative to assign flagging work. In Third Division Award 37959, the Board observed:

"The Board studied the Rules and the Organization's arguments in response to the Carrier's statement that it is the . . . 'Carrier's managerial prerogative to assign whatever class or craft of employee to perform required flagging.' Our study of the Awards cited by the parties and the on-property record support the Carrier.

While seniority assignment is protected by Agreement, the failure of the Organization to provide probative evidence of the Claimant's right to this work over that of a Welder is what lies as the basis of this claim and the Board's rejection. If there was probative evidence that the Carrier was restricted from using employees in different sub-departments the Organization might prevail. Absent evidence that the Carrier used a junior employee in the same sub-department or that

language prohibited the use of a Welder as opposed to a Track Foreman, the claim must fail.”

The Organization established that the Claimant would be a proper candidate to perform the flagging work. However, it failed to establish that the Carrier’s prerogative to assign this work was limited so that it was required to assign the flagging work to the Claimant. The Organization’s argument that the Scope Rule limits work related to construction (such as flagging) to the B & B sub-department, ignores (1) the general nature of the language employed by the parties (2) the absence of any evidence of custom or practice that limits the assignment to District employees and (3) Third Division Awards that recognize that flagging may be assigned to any employee, unless there is a Rule or practice that limits the Carrier’s prerogative. See Third Division Awards 29984, 31313, 31340, and 32646. The Organization failed to meet its burden to prove that the Carrier’s exercise of its prerogative to assign the flagging work in question violated the Parties’ 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 1st day of March 2010.