

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40442
Docket No. MW-40212
10-3-NRAB-00003-070423
(07-3-423)**

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: (
(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 Carrier violated the Agreement when it assigned System Gang 9045 employees to surface track between Mile Posts 48.25 and 63.75 on the Estherville Subdivision on June 26, 27, 28, 29 and 30, 2006, instead of Seniority District T-2 Surfacing Gang 2926 employees T. Sorensen, M. Hanus and C. Gatewood (System File 2RM-9748T/1454874 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants T. Sorensen, M. Hanus and C. Gatewood shall now each be compensated for forty (40) hours at their respective straight time rates of pay and fifteen (15) hours at their respective time and one-half rates 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 Claimants' behalf, alleging that the Carrier violated the parties' Agreement when it assigned three employees from System Surfacing Gang 9045 to perform routine track maintenance work between Mile Posts 48.25 and 63.75 on the Estherville Subdivision, instead of assigning this work to the Claimants, who are District Gang employees.

The Organization initially contends that the Agreement Rules clearly and conclusively place all work such as that at issue here within the scope of the Agreement. The Organization acknowledges that the Consolidated System Gang Agreement allows for System Gangs to work across seniority district boundaries, but emphasizes that it also restricts the work that may be performed by such gangs. The Organization maintains that although the Carrier implied that the work at issue was of an emergency nature, the Carrier nevertheless confirmed that the work was that of surfacing track.

The Organization emphasizes that the Carrier never refuted that the work at issue was not performed in conjunction with any project work in the area. The work was routine track maintenance. The Organization therefore contends that it is evident that the Agreement was violated when the Carrier assigned and used System Gang employees to perform work that contractually belonged to the Claimants on Seniority District T-2. Citing prior Awards, the Organization points out that work on a district belongs to those employees assigned thereon.

As for the Carrier's assertion of an emergency, the Organization points out that it is well established that the party asserting an alleged emergency must submit proof thereof, and that mere assertions are not acceptable substitutes for such proof.

The Organization submits that there is absolutely no evidence whatsoever to support an assertion of an emergency. The Organization emphasizes that the Carrier failed to refute any of the Organization's contentions that there was no emergency. Citing prior Awards, the Organization argues that it is well established that undenied/unchallenged statements must be accepted as fact, so the Organization's statements must be accepted as accurate.

The Organization insists that it is clear that the Estherville Subdivision was not out of service, nor were any trains stopped as a result of the rough spots. Even if the rough spots constituted an emergency, which they clearly did not, the Organization contends that this would not relieve the Carrier of its contractual obligation to use Seniority District T-2 employees to make any needed repairs. Pointing to prior Awards, the Organization asserts that even with the latitude permitted to carriers in emergency situations, the Carrier nevertheless must make a reasonable effort to call and use the employees stipulated by the Agreement Rules. The Organization emphasizes that there is no evidence that any attempt, much less a reasonable one, was made to secure the services of the fully qualified, available Claimants for the subject work.

As for the Carrier's position that the Organization is trying to establish that the subject work cannot be performed by System Surfacing and Lining Gangs, the Organization maintains that this position is misleading. The Organization argues that the track surfacing work at issue was not performed in connection with any System Gang work project on the Estherville Subdivision. The Organization insists that, contrary to the Carrier's assertions, this dispute does not involve a System Surfacing Gang performing project work related to System Gang work. Instead, this matter involves the routine track maintenance work of surfacing track which was performed by System Gang employees on the claim dates, to the exclusion of fully qualified and available Seniority District T-2 employees. The Organization submits that not only did the Carrier violate the Agreement, but it presented no valid defense to the instant claim.

The Organization goes on to emphasize that the Carrier never presented any evidence to refute the Organization's contention that three System Gang 9045 employees each expended 40 straight-time and 15 overtime hours during the claim

period in the performance of the subject work. The Organization therefore asserts that there can be no doubt as to the accuracy of the hours claimed as remedy for the Carrier's violation of the Agreement.

Addressing the Carrier's time-worn and consistently rejected "full employment" defense, the Organization references prior Third Division Awards involving these parties that have sustained claims for fully employed claimants for loss of work opportunity. The Organization argues that the Claimants here have suffered a loss of work opportunity, and they are entitled to full compensation therefore.

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

The Carrier initially contends that the Agreement does not bar it from assigning the work at issue to the Consolidated System Gang forces, who have an Agreement right to work on the territory between the mile posts referenced in the instant claim. The Carrier asserts that the subject work can be performed by BMW-represented forces assigned to Consolidated System Gangs, Interdivisional Gangs, or District Gangs. Moreover, each seniority group or territory can have employees assigned to operate tampers and ballast regulators.

The Carrier argues that the subject work is not exclusively assigned to any seniority group, so the instant claim can be considered to be no more than a jurisdictional dispute for which the Organization carries a heavy burden of proof. The Carrier points out that in a jurisdictional dispute between employees of the same craft, the Organization carries a heavier burden of proof in establishing exclusivity. Citing prior Awards, the Carrier emphasizes that the Organization is required to show that only employees assigned to District Seniority Gangs can perform the subject work.

The Carrier contends that the Organization has not met its burden of proof. The Carrier insists that there is no reservation of work in any of the Agreement Rules, nor is there any documentation supporting the Organization's assertions that the work cannot be assigned to Consolidated System Gangs. The Carrier also

points out that under Appendix 13, there is no dispute that the territory in question is part of the territory on which the Consolidated System Gangs can perform work. Citing prior Awards, the Carrier argues that the subject work is not reserved to district employees.

The Carrier then points to a line of Awards on other parts of the Railroad involving jurisdictional points. Based on these Awards, the Carrier contends that unless the Organization can provide substantive proof that the work belongs to one group or another, then both groups may perform the work. The Carrier insists that it may assign the work to whichever group it deems fit. The Carrier argues that neither the practice, by custom and tradition, nor the language of the Agreement supports any of the Organization's contentions of an Agreement violation.

The Carrier goes on to assert that it has steadfastly maintained and safeguarded its inherent right to manage its operations by assigning work as it deems fit, except where that right has been impeded and restricted by law or by Agreement language. The Carrier therefore argues that one issue here involves managerial prerogative. The Carrier points out that prior Awards have universally established and accepted the principle of managerial prerogative.

The Carrier submits that the Organization is wrong in asserting that the subject work is reserved for district employees governed by the November 1, 2001, Agreement. The Carrier suggests that the Organization is attempting to carve out certain work that consistently has been performed by Consolidated System Gangs who work under the UP Agreement. The Carrier contends that the territory involved here is subject to two separate Agreements, with neither one being granted exclusivity for BMWE-represented work. The Carrier insists that the Schedule Agreement does not contain the work preservation rule that the Organization would like to claim, and the Agreement does not reserve the subject work to either Consolidated System Gang employees or District Seniority employees. The Carrier contends that the Organization failed to establish proof of such exclusivity for District Seniority employees over Consolidated System Gang employees, so the instant claim should be denied.

Addressing the Organization's reliance on Rule 1, the Carrier asserts that the exclusivity that the Organization claims does not appear in Rule 1(b). The language of the Scope Rule is general in nature, and it simply does not support the Organization's claim of exclusivity. The Carrier argues that if such exclusivity were granted, then the Carrier would not be able to assign Consolidated System Construction Gangs, Tie Gangs, Rail Gangs, Curve Gangs, etc., on this territory. The Carrier emphasizes, however, that the Organization has not disputed that Consolidated System Gangs can work on this territory.

The Carrier emphasizes that the Organization must establish that the subject work is contained in the Scope Rule and that the work has been exclusively performed by one seniority group or another. The Carrier reiterates that the Scope Rule is general in nature, and it submits that the remaining Rules do not delineate the type of work reserved to a particular group in the Maintenance of Way craft as a whole, let alone that the work necessarily is reserved to employees of any one particular Surfacing Gang.

The Carrier goes on to contend that the subject work has not been exclusively reserved by custom, tradition, or practice to either Consolidated System Gang employees or district seniority employees. The Carrier asserts that this work may be performed by either group. The Carrier argues that because Consolidated System Gangs can work on this territory, and they are covered by the Rules of the UP Agreement, those Rules and that practice applies. The Carrier contends that the Organization is wrong in asserting that only the C&NW Agreement applies on this territory and that there is a seniority limit dispute. The Carrier points out that prior Third Division Awards have found, contrary to the Organization's position, that Consolidated System Gangs can work on this territory.

The Carrier insists that the Organization has failed to meet its burden of proving how and to what extent the Carrier's actions supposedly constitute a violation of the Agreement. Accordingly, there is no alternative but to deny the instant claim for lack of proof. The Carrier submits that the Organization is attempting to write into the Agreement, through the guise of an interpretation by the Board, certain restrictions that the Organization was unable to obtain at the negotiating table. Citing several prior Awards, the Carrier argues that this is the

wrong forum if the Organization desires to establish restricting classification of work Rules that would specifically reserve particular types of work among various classes of employees.

The Carrier points out that a sustaining award in this matter would improperly restrict the Carrier's managerial rights in arranging its method of operations and also would improperly expand the Agreement by providing the Organization with a work classification rule. The Carrier contends that the relief demanded by the Organization therefore is without merit and devoid of any Agreement support.

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

The Board reviewed the record evidence and concludes that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it assigned System Gang 9045 employees to surface track on several dates in June 2006 instead of Seniority District T-2 Surfacing Gang 2926 employees. Therefore, the claim must be denied.

The record reveals that both groups of employees have seniority to work on the territory that is involved in this dispute. In Third Division Award 37847, the Board held:

"Initially, there is no question that the Implementing Agreement effective January 1, 1998, extended the seniority territory of all the Carrier's System Gangs to the former C&NW."

The record reveals that the Board ruled the System Gang employees may perform the exact work in question. See Award 37847, where the Board stated:

"The Organization contends that system gang employees may only perform work related to their own system gang. We disagree."

See also Third Division Awards 38087 and 39707.

This dispute has been resolved on several occasions by the Board. The Board sees no reason to overturn those decisions and, therefore, we must deny the claim.

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 14th day of May 2010.