

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40500
Docket No. MW-39798
10-3-NRAB-00003-060329
(06-3-329)

The Third Division consisted of the regular members and in addition Referee Michael D. Gordon when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned Welding Subdepartment employes R. Warnke and D. Raddick to perform Track Subdepartment work of replacing a frog at West Crest, Mile Post 489.5, on October 24, 2002 [System File C-03-J010-6/10-03-0091(MW)BNR].

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Moos and L. Rael shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for eight (8) 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.

On October 24, 2002, Welder R. Warnke and Grinder Operator D. Raddick, both in the Welding Subdepartment, found a broken frog at MP 489.5 near West Crest, Colorado. They could not repair the frog. Supervision directed the Brush Section Gang to replace the frog with assistance from the Welding Crew. The Welding Crew removed bolts, pulled spikes, helped drill holes and spiked the new frog. They made no welds. The work took eight straight time and eight overtime hours.

The Claimants hold seniority as Track Foreman (Moos) and Truck Driver (Rael) in the Track Subdepartment. Until March 22, 2002, when the location closed, the Claimants Warnke and Raddick, had been headquartered at Keensesber, Colorado.

The Organization grieved, alleging violations of Rules 1, 2, 5 and 55 and seeking compensation for Moos and Rael. It contends: (1) Rule 55P ("such other work as may be assigned . . . when not engaged in driving a truck") and Rule 55Q ("constructing, repairing and maintaining . . . track and other work incident thereto") lists work performed by the Track Subdepartment, while Rules 55K and 55L provide that Welders or Grinders perform Welding Subdepartment work involving welding, cutting and tempering, etc. or grinder operations (2) Rule 55 reserves work to employees who customarily perform it (3) all work was routine track maintenance customarily done by the Track Subdepartment (4) the disputed work was not "incidental" because no welding was done (5) the Carrier's position is contrary to its prior unsuccessful 1990 bargaining proposals and related testimony (6) whether the Claimants were assigned to Keenesburg or elsewhere is irrelevant because the Organization can name anyone to be compensated for an Agreement violation (7) the proper make whole monetary award is the undisputed number of hours used in the improper assignment and (8) arbitral precedent supports the Organization's position.

The Carrier states (1) Rules 1, 2 and 55, read separately or together, do not reserve work to any particular employee class (2) Welders, like other MOW

classifications, remove bolts and spikes as incidental work permitted by Rule 78 (3) a Keenesburg Section Crew could not have performed the disputed work because it did not then exist (4) The Organization failed to prove Section Gangs or Track Subdepartment forces exclusively pull spikes, remove bolts and respike on a system-wide basis (5) no monetary damages are due because Rael was on personal leave and Moos was fully employed during the disputed work (6) overtime cannot be awarded for time not worked and (7) arbitral precedent supports the Carrier's position.

The disputed work involved removing bolts, pulling spikes, drilling holes and replacing spikes to replace a newly discovered, existing defective frog with a new one. Essentially, the parties agree that Track Subdepartment employees normally perform these tasks and that Welding Sub-department employees also may do them under Rule 78 when incidental to welding/grinder work.¹

This is an intra-craft dispute. On this property, the Third Division repeatedly has held that proof of exclusive, system-wide jurisdiction is necessary to reserve work to one Organization craft rather than another craft represented by the Organization. The principle appears so well established that the Organization uses it to differentiate intra-craft assignments from subcontracting situations where vigorously disputed obligations are far less settled. Indeed, in several subcontracting disputes presently under consideration, the Organization makes the specific distinction. As two examples, in its Submissions for Dockets MW-39948 and MW-39980, the Organization states:

“. . . the Third Division has repeatedly considered the question of whether it was necessary for the Organization to prove exclusive reservation of scope covered work when the dispute involved the assignment of work to outsiders and has held that the proper

¹Rule 78 concerns intra-craft work jurisdiction. It became effective after October 24, 2002. It provides, in part:

“Employees will be allowed to perform incidental tasks which are directly related to the service being performed and which they are capable of performing, provided the tasks are within the jurisdiction of the BMW. . . . This provision is not intended to alter the establishment and manning of work forces accomplished in accordance with existing assignment, seniority, scope and classification rules.”

application of the exclusivity doctrine was to disputes over the proper assignment of work between different classes and crafts of the Carrier's own employees – not to disputes involving outside contractors. . . .”

The Organization cites recent Third Division Award 40106 between these parties. It held that manual labor with hand tool work normally performed by Sectionmen/Trackmen/Laborers in the Track Subdepartment (removing and replacing rail clips, applying epoxy and removing and replacing rail insulators related to replacement of rail on concrete ties) was not incidental to work of Machine Operators in the Roadway Equipment Subdepartment because (1) there was a clear demarcation between the two positions in separate and distinct departments (2) Machine Operators did not operate their assigned machines which remained parked and unused on the days the disputed work was performed (3) the work was substantial and not de minimus or casual and (4) assignment of the disputed work to Machine Operators deprived Track Sub-department employees of work due them under Rule 55. The Award granted payment to any of the eight claimants who lost compensation as a result of the improper assignment.

Award 40106 logically concludes that work cannot be incidental to regular duties when no regular duties are performed whatsoever. However, it provides weak support to the Organization here. It contains little, if any, analysis of the “exclusivity” requirement in intra-craft disputes. Moreover, its facts appear materially different. Machine Operators arrived at, performed and left their disputed assignment without using their machines in any way. It appears the Carrier never intended to use machines at any time in any manner. Here, however, Welders arrived at the work site to weld a broken frog, but continued on the problem immediately after it was determined replacement rather than repair was the appropriate option. Their non-welding work was an extension of their original task, but modified to the immediate exigencies of the modified task. Finally, the remedy set forth in Award 40106 would provide the Organization no relief in the current dispute, because therein the monetary make-whole order was limited to claimants who lost compensation due to their improper assignment. No Claimant here meets that criterion.

Accordingly, the claim is denied.

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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 15th day of June 2010.