

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40774
Docket No. MW-40201
10-3-NRAB-00003-070475
(07-3-475)

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(
(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 Steel Gang RP-04 to perform Maintenance Gang work (remove/replace track panels and ballast, roadbed rehabilitation, surface and line track and related work) between Mile Posts 82.3 and 125.5 on the Orin Subdivision on May 17, 18, 19, 20, 22, 23 and 24, 2005 [System File C-05-J010-29/10-05-0250(MW) BNR].
- (2) As a consequence of the violation referred to in Part (1) above, Claimants K. Rager, D. Powers, M. Larson, G. Hagen, J. Sisneros, M. Narramore, M. Brueckner, A. Wiengart, M. Wiengart and T. Wickham shall now each be compensated for fifty-six (56) hours at their respective straight time rates of pay and for twenty-eight (28) 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 June 27, 2005, the Organization filed a claim alleging the Carrier assigned Steel Gang RP-04 to perform maintenance work in violation of Rules 7 and 21. The work consisted of cutting in rail panels to repair mud hole faults on the Orin Subdivision of the Powder River North Division. In May 2005, according to the Organization, the Carrier began replacing portions of track plagued with muddy ballast using 39 foot track panels. This work is historically and customarily performed by maintenance or section gangs, whereas steel gangs have historically and customarily been bulletined and assigned to work rail relay projects.

On August 30, 2005, the Carrier denied the claim stating that extreme moisture (snow plus rain on May 11, 2005) and coal dust combined to reduce the ballast's ability to drain water from the track and created slippery conditions making the track less stable under the stress of passing trains. The moisture and coal dust at two derailments (May 14 and 15, 2005) impeded movement of coal between coal facilities and electrical plants, so the Carrier acted quickly in this emergency to ensure continued service. The Carrier states that the work handled by Steel Gang RP-04 was not general in nature, but urgent maintenance and construction to stabilize tracks to continue coal shipments.

On October 18, 2005, the Organization appealed. The work involved cutting rail and removing a portion of track so as to enable a front end loader to remove the muddy ballast and rehabilitate the roadbed. Thereafter, a new track panel was installed in the track with ballast poured in place and the track returned to proper surface and alignment. The removal of track panels is customarily performed by maintenance gangs, whereas steel gangs are heavily mechanized and customarily perform rail relay work. Steel Gang RP-04 did not use heavily mechanized equipment to perform this maintenance work. Furthermore, the derailments and weather did not constitute an emergency.

On December 12, 2005, the Carrier denied the appeal; it stated this is the same claim as presented in Third Division Award 40767 and there was no violation of Rules 7 and 21. In this regard, Rule 7 (District, Regional and System-Wide Production Gangs) allows the Carrier to work this District 400 steel gang as alleged in the claim. The Carrier may change a district mobile gang's assignment of work and schedule

especially when there is an emergency. This was not normal maintenance. Rule 21 (Bulletin Procedure) was not violated.

By letter dated March 27, 2007, the Organization confirmed the claims conference of that date. Rule 7 was violated when the Carrier assigned a District 400 Production Gang (RP-04) meeting the Regional and System-Wide Production Gang definition (Referee Sickles) to perform routine maintenance. Steel Gang RP-04 did not perform the work that was bulletined and scheduled or use its assigned equipment. A steel gang does not remove ties or ballast or install track, but handles major repair and replacement work. This claim is different from the claim relied upon by the Carrier which involved contracting out.

At the outset the Board finds that this claim is materially different from the claim in Award 40767 because the Claimants are not one and the same and the loci of the dispute is the use of Carrier forces in this claim versus the use of outside forces in the other claim.

As for the work performed by Steel Gang RP-04 on the claim dates (remove and replace track panels and ballast, roadbed rehabilitation, surface and line track and related work) it is a type of work customarily performed by maintenance or section gangs. Steel Gang RP-04, however, is a district mobile gang meeting the Regional and System-Wide Production Gang definition. Under that definition, the kind of work performed by Steel Gang RP-04 is major repair and replacement work using heavily mechanized equipment. Steel Gang RP-04 did not use its assigned equipment or perform work related to a specific program. Rather, it engaged in maintenance work on an emphatic schedule established by the Carrier.

Pursuant to Rule 7, a steel gang's schedule of work is for informational purposes only, "subject to change without notice" and "shall not constitute a guarantee that the gang will perform the work specified or at the time and place specified." Rule 21B states that each bulletin "will show . . . [the] nature of work[.]"

Rules 7 and 21 are interpreted within the context of the definition for the Regional and System-Wide Production Gang. That is, a steel gang's work may be changed and the nature of its work may vary after bulletined. Rule 7 and Rule 21, however, do not sanction the wholesale use of a steel gang such as RP-04 to do any kind of work as long as it is within district. The Organization's interpretation of Rule 7 and

Rule 21 is more persuasive in the circumstances of this dispute. The Carrier did not comply with Rule 7 and Rule 21.

Although the Carrier asserts it has wide latitude to operate when, as here, an emergency exists, the factual basis for finding an "emergency" is indeterminate. The competing articles and other data sources submitted by each party vary in interpretation of the same data and circumstances. Nevertheless, the burden to establish the emergency rests with the Carrier. Weather contributed to and complicated this situation, but emergency conditions did not exist.

The Claimants were subjected to a loss of work opportunity due to a Rule violation. Full employment or approved leave with absence from work during the claim period does not relieve the Carrier from compliance with the Agreement. Monetary relief is appropriate to preserve and protect the integrity of the Agreement. The Claimants shall be made whole for the number of hours claimed at their respective rates of pay. (See Third Division Awards 30661, 31521, 36093 and 37470.)

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 15th day of December 2010.