

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36052
Docket No. MW-33808
02-3-97-3-215**

The Third Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier advertised four (4) Track Subdepartment positions as Indianapolis Zone 5 Production Super CAT Surfacing Gang positions and, effective June 12, 1995, one (1) of the positions was canceled and three (3) of the positions were awarded to employees who hold no seniority on the Southwest Seniority District, instead of properly advertising the positions as Southwest Seniority District positions and awarding them to employees holding seniority therein (System Docket MW-4160).**
- (2) As a consequence of the aforesaid violation, the three (3) senior furloughed employees on the Southwest Seniority District shall each be compensated a day's pay at the applicable rate for each day the Columbus Seniority District employees worked on the Southwest Seniority District beginning June 12, 1995 and continuing until the violation ceases.”**

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 facts in this case are not in dispute. On March 29, 1995, the Carrier issued Bulletin Number 278 advertising four positions to comprise an Indianapolis Zone Production Gang. This gang would work throughout the Indianapolis Division (Zone) and employees of both the Southwest and Columbus seniority districts were eligible to bid on these positions. The Carrier explains the purpose of this gang to be straight railing turnouts, cutting switch timbers, replacing ties, removing road crossings and gathering track materials while utilizing rail pick up trains. When the assignments were made, the Carrier elected to fill only three of the four positions.

The Organization filed this claim asserting the gang failed to meet the criteria of a Zone Production Gang as provided in Article X of the July 28, 1992 Agreement. It explains that this Agreement was the product of bargaining between the parties subsequent to the Report of Presidential Emergency Board 221. It asserts the recommendations of PEB 221, while not patterned after, took judicious note of PEB 219, which subsequently formed the basis for the NRLC/BMWE Imposed Agreement of April 17, 1991. The Organization cites Awards interpretative of the April 17, 1991 Agreement that, inter alia, impose restrictions upon regional and system-wide production gangs with respect to minimum number of employees and degree of mechanization.

This dispute is nearly identical to one decided in Third Division Award 35964, between these parties. There, the Organization argued an Indianapolis Production Gang established 16 days before the one in this case was void ab initio because its size and function made it fall outside the ambit of Article X of the July 28, 1992 Agreement. In denying the claim, the Board took note of Third Division Award 34141, which cited with approval three arbitral decisions interpreting the term "regional and system-wide production gangs" under Section 11 of the NRLC/BMWE Imposed Agreement of April 17, 1991, in deciding a claim alleging violations of Article X of the parties' Agreement. In Award 35964, though, the Board noted Award 34141 declined to adopt a definition, and instead wrote:

"The Board does not define production gangs by the sheer number of employees and/or machinery assigned thereto, but with the Carrier not responding to the Organization's arguments, the Board has no choice but to sustain the claim as presented. Any monetary award, however, is based solely upon the hours each gang worked on the Pittsburgh Seniority District wherein each Claimant retains his seniority."

The Board then denied the claim before it, holding:

“We find no reason to disagree with the dicta in Award 34141 concerning the efficacy and consistency of using the carefully reasoned definitions of ‘production gangs’ in the Section 11 arbitration decisions cited therein. But the sine qua non for importing into the interpretation and application of Article X of the Conrail/BMWE Agreement of July 28, 1992 definitions set forth in arbitral gloss emanating from Section 11 of the NRLC/BMWE Imposed Agreement of April 17, 1991, which arose out of PEB 219, is a persuasive showing that such was the mutual intent of PEB 221 and/or the Parties to the latter Agreement. An interpretive leap of such magnitude cannot be made solely on the basis of intuition or appeals to logic, consistency or administrative convenience. The contract under consideration is silent regarding the definition of ‘production gangs.’ Likewise, the evidentiary record in the present case simply is insufficient to support a conclusion concerning mutual intent. The instant claim, therefore, must be denied for insufficiency of proof. See Third Division Award 35435.”

Upon review of the record before us in the instant case, the Board finds the conclusions reached in Award 35964 are equally applicable here. For the reasons stated therein, we must similarly 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 21st day of May, 2002.