

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36207
Docket No. MW-35360
02-3-99-3-232

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Burlington Northern Santa Fe Railway (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned Machinists G. Nichols, K. Rider and J. Eizenhoffer, instead of Roadway Equipment Repair Shop Subdepartment mechanics, to perform routine maintenance on equipment and machines at the roundhouse at Willmar, Minnesota (System File T-D-1329-B/MWB 97-06-25AB BNR).
- (2) As a consequence of the violation referred to in Part (1) above, the Roadway Equipment Repair Shop Sub-department Rank B Mechanics* listed below shall each be allowed pay ‘ . . . for an equal and proportionate share of three hundred thirty-six (336) hours straight time and seventy-four (74) hours time and one-half at the Rank B Traveling Mechanic rate of pay.’

R. N. Dusek	B. N. Risty
R. A. Voss	D. A. Wohl
W. F. Bingham	T. J. Salboski
R. G. DeSchepper	D. D. Morlock
D. C. Dahl	J. L. Swiontek
S. R. Kucharyski	A. A. Frison
D. T. Talaska	A. B. Rohman
G. O. Nikstad	G. R. Piatz
S. R. Keil	T. J. Hoiland
J. P. DeSchepper	G. J. Maloney”

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.

As Third Party in Interest, the International Association of Machinists and Aerospace Workers was advised of the pendency of this dispute, but chose not to file a Submission with the Board.

The Organization filed this claim contending that the Carrier violated Rule 1, Rule 55 (M) and numerous other Rules when it assigned three IAM Mechanics, who are not members of the Organization, to perform "normal and routine maintenance on equipment and machines" at Willmar, Minnesota. The Organization maintains that this work is customarily performed by members of its craft.

The Carrier contends that the Organization cannot meet its evidentiary burden based on the vague, unsupported allegations of record. Even if the specificities of the claim can be fathomed, the Carrier further contends, there is neither specific contractual language reserving the work nor evidence of past practice which shows that Maintenance of Way employees have performed the work to the exclusion of all others.

After careful review of the record, the Board is convinced that the claim must be denied. The Organization advanced shifting theories as the claim was progressed, but viewed in total they are not persuasive. The claim itself did not identify what machine or work was involved but asserted a violation of Rule 1 and Rule 55 (M). In its appeal, the Organization claimed that its members had an exclusive contractual right to perform repairs because they had pre-existing rights on the former Great Northern (GN) territory under Rules 1C and 78 C. These Rules read as follows:

"Rule 1:

- A. These rules govern the hours of service, rates of pay and working conditions of all employees not above the rank of track inspector, track supervisor and foreman, in the Maintenance of Way and Structures Department, including employees in the former GN and SP&S roadway equipment repair shops and welding employees.**
- B. The Maintenance of Way and Structures Department as used herein means the Track Sub-department, the Bridge and Building Sub-department, the Welding Sub-department, the Roadway Equipment Sub-department and the Roadway Machinery Equipment and Automotive Repair Sub-department of the Maintenance of Way Department as constituted on date of consummation of this Agreement.**
- C. This Agreement does not apply to employees in the Signal, Telegraph and Telephone Maintenance Departments nor to clerks. The sole purpose of including employees and sub-departments listed herein is to preserve pre-existing rights accruing to employees covered by agreements as they existed under similar rules in effect on the CB&Q, NP, GN and SP&S railway companies prior the date of merger; and shall not operate to extend jurisdiction or Scope Rule coverage to agreements between another organization and one or more of the merging companies which were in effect prior to the date of merger.**

Rule 55 M provides:

An employee skilled in and assigned to building (if not purchased) repairing, dismantling or adjusting roadway machine equipment and machinery, and on former SP&S certain repairs to automotive equipment.

Rule 78 C states:

It is the intent of this Agreement to preserve pre-existing rights accruing to employees covered by the Agreements as they existed under similar rules

in effect on the CB&Q, NP, GN, and SP&S Railroads prior to the date of merger and shall not operate to extend jurisdiction or Scope Rule coverage to agreements between another organization and one or more of the merging Companies which were in effect prior to the date of merger."

The Board finds that none of the foregoing Rules specifically grants to BMW employees the exclusive right to perform maintenance work at the claimed location. Rule 55 M does not reserve the work to BMW-represented employees, as several cases have already decided. See Public Law Board No. 4104, Award 13 and Public Law Board No. 2206, Award 8. Moreover, Rule 1C and 78C merely preserve to those employees any pre-existing rights that had existed prior to the BN merger. Unfortunately for the Organization, there is no probative evidence in the form of a schedule Agreement demonstrating that BMW-represented employees on the former GN had the exclusive right to perform maintenance work prior to the merger. Absent that proof, there can be no reliance on pre-existing rights to support the current claim.

It was therefore incumbent upon the Organization to establish that its employees had historically performed the disputed work to the exclusion of all other employees. No such evidence was forthcoming. On the contrary, in its appeal, the Organization acknowledged that "IAM-represented Machinists do perform unit repair work within the roundhouse located at Willmar, Minnesota." Because IAM employees have concededly performed certain maintenance work, the Organization cannot meet the exclusivity test.

The Organization's final argument was advanced after conference on the property. Narrowing the claim, the Organization contended that IAM employees should not have been assigned to repair a snow dozer at Willmar, Minnesota. Rule 5G lists four groups of roadway equipment and the machinery assigned to Maintenance of Way and Structures Department employees. Group Four Machines lists the snow dozer, and it is upon this language that the Organization relies.

We conclude that Rule 5G does not support the Organization's claim. Rule 5 is a seniority roster listing of machines operated by BMW-represented employees. It does not establish that BMW-represented employees perform repair or maintenance work on those machines to the exclusion of IAM Machinists. Equally important, the record is devoid of anything beyond mere assertion that any repair work was performed on a snow dozer.

Under these circumstances, the Board is left with no alternative but to conclude that the Organization has not proved the elements of its 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 24th day of September 2002.