

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36210
Docket No. MW-35674
02-3-99-3-608

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

PARTIES TO DISPUTE: (**Brotherhood of Maintenance of Way Employes**
(**Burlington Northern Santa Fe Railway**
(**(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 Track Sub-department employes to perform Bridge & Building (B&B) Sub-department work involved in the dismantling of the Gavin Yard Car Shop building on February 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 18, 19, 20, 21, 24, 25, 26, 27, 28, March 3, 4, 5, 6, 7, 10 and 11, 1997 (System File T-D-1323-H/MWB 97-06-18AA BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, B&B Truck Operators E. J. Alexander, T.C. Degenstein, S. D. Guss and M. E. Novack shall each now be compensated for one hundred sixty-two (162) hours' pay at their respective rate 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 facts of this case are not in dispute. Beginning in February 1997, the Carrier began to remove debris that was created when the Gavin Yard Car Shop was demolished. The Carrier assigned Track Subdepartment Truck Drivers to use their large dump trucks to haul the debris to a nearby city landfill.

The Organization thereafter filed the instant claim, contending that this was work that should have been performed by the B&B Subdepartment. In support of its position, the Organization argued that Rules 2, 5 and 55 reserved the work in question to B&B Subdepartment Truck Drivers. Moreover, the Organization asserted that such work had customarily and historically been performed by B&B Subdepartment Truck Drivers.

The Carrier denied the claim. It argued that B&B Truck Drivers do not exclusively load and haul building debris. On the contrary, Track employees also deliver materials and remove debris from bridge and building projects on a regular basis. In addition, the Carrier argued that the same issue was already decided on the property in Public Law Board No. 2206, Award 35.

After careful review, the Board finds that the Organization has not proven that express contract language or past practice reserves the disputed work to the Claimants. As the Carrier correctly points out, Public Law Board No. 2206, Award 35 dismissed a claim in which the Organization argued, as it does here, that the Scope and Classification of Work Rules, as well as the Agreement seniority rosters, provided the contractual foundation for a finding that the certain work was intended to be preserved for the benefit of employees within the B&B Subdepartment. Rejecting that contention, the Board held:

"There is no express language in Rule 1 or in the Salary Schedule which would support an inference that Claimant has a superior claim over the Track Subdepartment Truck Driver to the work at issue. The Organization appears to seek support in the Agreement for this view by recourse to the seniority rules. Rule 2 and 5 thus become the alleged contractual underpinnings for this claim.

The seniority rules clearly confer priority rights to employment and consideration for positions within subdepartments. Also, we note that

separate seniority rosters are established for Track Subdepartment (Roster 2) Truck Drivers and B&B Subdepartment (Roster 3) Truck Drivers. But this does not reach the level of clear and express reservation of the specific work at issue which Claimant must show to prevail in this case. Viewed most favorably to the Organization, the Agreement is ambiguous on the question whether the B&B Subdepartment Truck Driver has an enforceable contractual preference over a Track Subdepartment Truck Driver to haul construction materials. Given the contractual silence or ambiguity on this issue, the Organization was required to show reservation by custom, practice and tradition. There is an absolute paucity of evidence in that regard from the Organization and the Carrier has offered probative evidence to the contrary.

In the absence of express contractual reservation of the work to Claimant or a showing of reservation by custom, practice or tradition, we have no alternative but to dismiss this claim for failure of proof."

The reasoning in the above Award is persuasive on the question of whether there is a contractual reservation of work in the instant matter. As in that case, the Board herein concludes that the provisions of the Agreement do not confer upon the Claimants the express right to perform the work in dispute to the exclusion of Track Subdepartment Truck Drivers.

In the Organization's view, PLB No. 2206, Award 35 is distinguishable from the instant claim because there is probative evidence that the work in question, even if not specifically covered in the Agreement, is nevertheless incidental to B&B work which has customarily and historically been performed by B&B Subdepartment employees. However, in an intra-craft dispute such as this, the Organization has a steep burden of proof. See Third Division Award 19224 and Second Division Award 13427. Based on the statements submitted by the parties during the handling of this case on the property, we are unconvinced that the Organization's evidentiary burden has been met. At best, there are conflicting assertions as to whether or not B&B Subdepartment employees have customarily performed this work to the exclusion of Track Subdepartment employees.

The Board is left with the unavoidable conclusion that the work of hauling debris is not exclusively reserved to B&B Subdepartment employees either by Agreement or practice. Accordingly, the claim must be denied.

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.