

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36590
Docket No. MW-35648
03-3-99-3-580**

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

PARTIES TO DISPUTE: (**(Brotherhood of Maintenance of Way Employees**
(Burlington Northern Santa Fe Railway Company
((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 Machinist K. Craft and one other IAM mechanic to perform routine maintenance and repair of equipment and machines assigned to Gang RP-17 while working on the Grand Forks Subdivision, Line Segments 31 and 32 on July 22, 23, 24, 25, 26, 29, 30, 31, August 1 and 2, 1996, instead of Roadway Equipment Repair Shop Sub-department mechanics (System File T-D-1199-H/MWB 96-11-21AP BNR).**
- (2) The Carrier violated the Agreement when it assigned Machinists J. Swanberg, K. Ryder, J. Eieshoffer and G. Nichols to perform routine maintenance and repair of equipment and machines assigned to Tie Gang TP-03 while working on various subdivisions (Hinckley and Lakes) on Seniority District 12 of the Minnesota Division beginning June 30, 1997 and continuing, instead of Roadway Equipment Repair Shop Sub-department mechanics (System File T-D-1412-B/MWB 97-12-18AA).**
- (3) The Carrier violated the Agreement when it assigned Machinists K. Craft to perform routine maintenance and repair on equipment and machines assigned to Gang RP-17 while working on the K. O., New Rockford and Glasgow Subdivisions, Line Segments 34 and 35 on August 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, September 3, 4, 5 and 6, 1996, instead of Roadway Equipment Repair Shop Sub-department mechanics (System file T-D-1232-H/MWB 96-12-19AQ).**

- (4) As a consequence of the violation referred to in Part (1) above, Roadway Equipment Repair Shop Sub-department Rank B Mechanics T. J. Swalboski and J. L. Swiontek shall now each be compensated for eighty (80) hours at their respective straight time rate of pay and each shall be compensated for twenty (20) hours at their respective time and one-half rate of pay.
- (5) As a consequence of the violation referred to in part (2) above, Roadway Equipment Repair Shop Sub-department Rank B Mechanics D. C. Dahl, S. R. Keil and S. R. Kucharyski shall now each be compensated at their respective rates of pay for ' . . . eight (8) hours straight time, and two (2) hours time and one-half each day beginning on June 30, 1997 and continuing until such time as the Machinist Traveling Mechanics are no longer working with Tie Gang TP-03 on former GN territory.'
- (6) As a consequence of the violation referred to in part (3) above, the Roadway Equipment Repair Shop Sub-department Rank B mechanics* listed below shall each be compensated for eight (8) hours' pay at their respective straight time rate of pay and each shall be compensated for two (2) hours' pay at their respective time and one-half rate of pay.

*R. N. Dusek	B. N. Risty
R. A. Voss	D. A. Wohl
W. F. Bingham	T. J. Swalboski
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. D. 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 and chose to file a Submission with the Board.

On August 26, 1997, the Organization filed a claim on behalf of Rank B Traveling Mechanics assigned to the Roadway Equipment Repair Shop Sub-department who were headquartered on former Great Northern Railway Company (GN) territory. It is the Organization's position that the Carrier violated Rule 1, Rule 78C and Rule 55M of the 1982 Labor Agreement when it assigned Machinist Traveling Mechanics represented by the International Association of Machinists and Aerospace Workers (IAM) to work with Tie Gang TP-03 beginning on June 30, 1997.

The Organization contends that these Machinist Mechanics are repairing roadway equipment which is work exclusively reserved to Traveling Mechanics. It asserts that on the former GN, BMW - represented employees had the exclusive right to repair roadway equipment. The Organization requested that the Claimants be compensated for lost work opportunities until the Machinist Mechanics are removed from Tie Gang TP-03.

Tie Gang TP-03 was a Regional Gang operating on the Twin Cities Region when Machinist Mechanics were assigned to the gang. Therefore, the Carrier contends that the April 6, 1987 Memorandum of Agreement, the so-called "Twin Cities Agreement," was applicable to this Regional Gang. Under that Agreement, the Carrier maintains that it had the right to assign BMW - represented Traveling Mechanics as well as IAM Machinists to the gang.

On September 4, 1996, the Organization filed a similar claim on behalf of Rank B Traveling Equipment Maintainers when the Carrier assigned IAM-represented Machinist Traveling Mechanics to Region Gang RP-17 that was operating on former GN territory. Again, the Carrier claimed that the Twin Cities Agreement allowed it to assign Machinist Traveling Mechanics to this gang.

On September 24, 1996, a similar claim was filed on behalf of Rank B Traveling Equipment Maintainers account the Carrier assigned IAM-represented Machinist Traveling Mechanics to Region Gang RP-17 in August and September 1996.

The three claims were combined into a single Submission that the Organization appealed to the Board. It is undisputed that on the dates of claim all three gangs operated on former GN territory on the erstwhile Twin Cities Region of the Burlington Northern Railroad Company (BN).

The central issue in this dispute is whether the Twin Cities Agreement was still in effect in 1996 and 1997 when these claims were filed. That Memorandum of Agreement was a tri-partite understanding between the IAM, the BMW and the BN whose purpose was:

“ . . . to provide more stable work opportunities and for more effective and productive utilization of Traveling Mechanics responsible for repairing roadway equipment on the Twin Cities Region while at the same time eliminating work jurisdiction disputes between Maintenance of Way and Machinist Traveling Mechanics over the repair of roadway equipment assigned to Regional Gangs on the Twin Cities Region”

For the 1987 work season, three Machinist and five Maintenance of Way Traveling Mechanic positions were bulletined to work with a Regional Gang on the Twin Cities Region. This 3:5 ratio was subject to adjustment **“ . . . based on work program requirements which may change during the course of the work season”**

The Twin Cities Agreement provided that:

“This agreement shall remain in effect for the next work season and for each work season thereafter, unless written notice of cancellation of the same is given by one of the parties to the other two parties prior to March 1, 1988 and March 1 of all succeeding years. Upon receipt of notice of cancellation, the Agreement shall automatically cancel at the end of the 10th day after receipt of written notice from the party to the Agreement of its desire to terminate. On or before March 1 the parties will meet in conference to discuss the work program for the upcoming work season and to determine the respective allocation of Traveling Mechanics between the two crafts based thereon.”

Neither the IAM, the BMW nor the BN ever served written notice to cancel the Memorandum of Agreement.

The Organization avers that the Twin Cities Agreement was constructively terminated by the 1991 Agreement imposed on the BMW and the Carrier, but this Board respectfully disagrees. The Organization's argument ignores the clear, precise and mandatory language of the Memorandum of Agreement which states that:

"This agreement shall remain in effect for the next [1988] work season and for each work season thereafter, unless written notice of cancellation of the same is given by one of the parties to the two other parties prior to March 1, 1988 and March 1 of all succeeding years."

At no time subsequent to the 1991 Imposed Agreement did any party serve written notice on the other two parties to cancel the April 6, 1987 Memorandum of Agreement. It is noteworthy that the IAM was not a party to the 1991 Imposed Agreement. In 1997, the IAM advised the Carrier that it considered the Agreement to be in effect because none of the parties had canceled it in writing.

The Organization further argues that the Twin Cities Agreement is not in effect because there are no longer any Twin Cities Regional Gangs. In our view, the Organization has misapplied the Agreement. On its face, it applies to Regional Gangs on the Twin Cities Region, not to Twin Cities Regional Gangs. Thus, so long as Regional Gangs are operating on the Twin Cities Region the Carrier has the right to assign IAM-represented Machinists to these gangs.

The Organization also contends that the Twin Cities Agreement has been constructively canceled because the parties thereto never met in conference to discuss the work program for the upcoming work seasons as the Agreement mandates. There is no evidence that the Organization ever requested to meet in conference to discuss the work program for the upcoming season since the Memorandum of Agreement was signed on April 6, 1987. Moreover, failure to meet in conference to discuss the work program for the upcoming season would not vitiate the Agreement. As noted above, the Twin Cities Agreement can only be cancelled by one of the parties giving written notice of cancellation to the other parties to the Agreement and this was never done.

The Organization additionally asserts that Rule 78C of the 1982 Labor Agreement preserved the pre-existing rights of Traveling Maintainers and Maintainer Mechanics to repair roadway machine equipment and machinery.

There is no evidence in the record before the Board that the Maintenance of Way craft exclusively repaired roadway machine equipment and machinery prior to the 1982

Agreement. Indeed, the 1987 Twin Cities Agreement was negotiated, in part, to end jurisdictional disputes between the IAM and the BMWWE over the repair of roadway equipment assigned to Regional Gangs on the Twin Cities Region. And in any event, Third Division Award 36207 involving the same parties addressed this precise issue. The Board held that:

“... there is no probative evidence ... that BMWWE 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.”

For all the foregoing reasons, the Board finds that when the instant claims were filed the April 6, 1987 Memorandum of Agreement was still in effect. That Agreement gave the Carrier the right to assign IAM-represented Machinist Traveling Mechanics to Regional Gangs operating on the Twin Cities Region. The claims are denied as a result.

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 16th day of June 2003.