

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37823
Docket No. MW-38474
06-3-04-3-451

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(National Railroad Passenger Corporation (Amtrak) –
(Northeast Corridor

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Southern District Bridge Rehabilitation Gang employees to perform Track Department work [involving the removal and installation of two (2) track panels on No. 1 Track at Mile Post 42.5 (Muddy Lane)] on June 25 and 28, 2003, instead of Track Department employees M. Rodden, D. Dziombak, E. Smith, J. Maxwell, R. Harrison, S. Giles, C. Blair, A. Lewis, G. Butz, D. Ewing, E. Romecki, D. Keys, G. Hunter, D. Kellum, L. Dean and R. Searfass (System File NEC-BMWE-SD-4326 AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Claimants M. Rodden, D. Dziombak, E. Smith, J. Maxwell, R. Harrison, S. Giles, C. Blair, A. Lewis, G. Butz, D. Ewing, E. Romecki, D. Keys, G. Hunter, D. Kellum, L. Dean and R. Searfass shall now be compensated ' . . . for all time made by the Southern District Bridge Rehabilitation Gang, while working at M.P. 42.5 (Muddy Lane), to be divided equally among the claimants 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.

This claim involves an allegation that the Carrier violated Rule 90-D, II (c) which restricts Southern District Rehabilitation Gangs (SDRG) to performing only major construction or rehabilitation of bridges and stations, by using them to remove and install two track panels on the claim dates during their involvement with the Muddy Lane concrete ballast bridge deck rehabilitation project. The Claimants are members of the Track Department who, the Organization asserts, ordinarily and customarily perform this type of work which is protected by the Work Classification Rule.

In order to perform the renewal of the bridge structure which was properly assigned to the SDRG, the track and ballast on that bridge had to be removed, and eventually replaced. The record reflects that Track forces first cut the rails enabling removal of the track sections. SDRG employees hooked up slings to the crane which were used to lift and replace the track panels, and operated a backhoe and small loader to clear the ballast from the bridge span and dump new ballast when the replacement of the bridge structure was completed. It is compensation for this work that is sought by this claim. Track forces were used to distribute the ballast, position the panels, weld the rails and surface the track for train operation. The only written statement in the record concerning the amount of time it took for the performance of the disputed work, which was submitted by the Organization to rebut the Carrier's assertion with respect to the time and personnel involved, specifies that the removal of the track panels took two hours for four contractors, a Gang Watchman and a B&B Foreman, and its replacement took four men two hours to complete. The statement also asserts that the removal and dumping of ballast took two B&B operators a total of four hours to perform.

The Organization argues that the Carrier violated Rule 90-D by assigning the SDRG to work outside the express parameters set forth in the Agreement, asserting that the Work Classification Rule protects the work of removing and installing track panels to Trackmen, and there was no showing why track forces were not used as they

had been to saw cut the rails to permit the track panel removal, citing Third Division Awards 31085, 31358, 31360, 31499, 35529 and Special Board of Adjustment No. 1016. The Organization contends that its initial claim protesting the removal and installation of the two track panels encompasses the removal and replacement of the ballast beneath them, there was no improper amendment of the claim on appeal, and the amount of time spent undermines any contention that the work was de minimis. The Organization requests compensation at the overtime rate to be equally shared by all the Claimants.

The Carrier initially contends that the claim should be dismissed based upon it being procedurally defective because it was amended on appeal to add the ballast work and a Work Classification Rule allegation, citing Third Division Awards 15847, 29272, and 36020. It next argues that the Organization has failed to show that the disputed work is reserved exclusively to the Track Department or the BMW E under the Agreement, relying on Third Division Awards 26385, 28263, 28794, 30605, 31254, and 31624. The Carrier argues that track forces did the work associated with the removal and installation of track panels, the hook up to the slings was minimal work which was incidental to the bridge deck replacement project, and, because it was performed by the SDRG continuous to their regular assignment in accordance with Rules 44 and 55, the Claimants would not be entitled to compensation in any event. The Carrier notes that a request for penalty pay is excessive, citing Third Division Awards 31129 and 35863.

Initially we reject the Carrier's argument that the claim has a fatal procedural defect. The Classification of Work Rule was raised by the Organization in rebuttal to the Carrier's statement in its September 11, 2003 denial that the disputed work was not craft specific. The nature of the Rule 90-D violation remained the same. Whether the ballast work is considered part of the track panel removal and installation work encompassed by the claim, as contended by the Organization throughout its processing, is a question of the breadth of the remedy, not an amendment to the claim itself.

A careful review of the record convinces the Board that the Organization sustained its burden of proving a violation of Rule 90-D II (c) in this case. That provision explicitly restricts the performance of work by SDRG to "major construction and rehabilitation of bridges and . . . stations." The preparation work involved, which included not only saw cutting the track but removing the track panels and ballast in order for the SDRG to begin the Muddy Lane bridge renewal project, was ascertainably separate and distinct from the major project itself. Regardless of whether the Carrier considered it to be incidental to, or a necessary part of, the project itself, it failed to show why the Track Department employees who were called to the site

to cut the track, could not have continued to remove the panels and, after completion of the project, replace them. This was work that could have been considered contiguous to their previous saw cutting assignment as much as it could be considered a part of the subsequent work performed by the SDRG. Unlike the situation in the cases relied upon by the Carrier where work assignments between classifications are guided by language in the Scope provisions and the absence of exclusive performance by one classification, the instant case relies upon a violation of Rule 90-D, a specific provision expressly limiting the work that may be assigned to SDRG. The Board finds that the Organization has shown that the disputed work fell outside the permissible bounds of Rule 90-D II(c).

With respect to the appropriate remedy, the Organization did not make clear on the property the amount of time it alleges the disputed work took. In its final appeal of November 13, 2003, it states that "Mr. Rodden's research found that it took approximately (10) hours to perform the work that is in dispute and his statement provides substantive evidence to support our claim." Accordingly, the Carrier shall divide equally among the named Claimants compensation in the total amount of ten hours pay at the pro rata rate, which has been found to be appropriate on this property. See Third Division Award 35863.

AWARD

Claim sustained in accordance with the Findings.

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 21st day of June 2006.