

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38145
Docket No. MW-37388
07-3-02-3-423

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(BNSF 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 J. Eizenhoffer, J. Swanberg and R. Friebohl to perform Maintenance of Way work (repair roadway work equipment) on District Tie Gang TP-01 working on the Marshall Subdivision on April 20, 21, 24, 25, 26, 27, 28, May 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16 and 17, 2000 instead of Roadway Equipment Repair Shop Subdepartment Traveling Mechanic R. DeSchepper (System File T-D-2087-B/11-00-0404 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. DeSchepper shall now be compensated for eight (8) hours' pay at his respective straight time rate of pay and for two (2) hours' pay at his respective time and one-half rate of pay for each date of April 20, 21, 24, 25, 26, 27, 28, May 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16 and 17, 2000.”**

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 the above claim on June 15, 2000. It alleged that IAM-represented employees, who did not have seniority under the scope of the Agreement between the Carrier and the BMW, were permitted to work with Tie Gang TP-01 on various dates. The Organization contended that Rule 1 of its Agreement reserves the work in question to Maintenance of Way employees, and that Machinists did not have jurisdiction for Traveling Mechanic work on the former Great Northern Railroad. It further insisted that the April 6, 1987 Memorandum of Agreement between the Burlington Northern, the BMW and the IAM covered regional gangs only. The Organization asserted that RP-01 is not a regional gang.

The Carrier denied the claim on July 10, 2000. The Carrier cited the April 6, 1987 Memorandum of Agreement and contended that it provided for "the use of a mix of Maintenance of Way and IAM mechanics at a specified ratio on Region Gangs." In its appeal of that denial, the Organization asserted that no Twin Cities region gangs exist and, therefore, the April 6, 1987 provisions were inapplicable to the situation in dispute.

The Carrier denied the Organization's appeal on October 30, 2000. In its lengthy denial the Carrier reiterated its position that the April 6, 1987 Memorandum of Agreement applied. It also contended that no distinction was made between former Northern Pacific Railroad track and former Great Northern Railroad track; nor was such a distinction normally possible, given the rate at which

crews normally travel between former component lines' tracks. The Carrier also pointed out that the instant claim was the first it received when mechanics were assigned to perform work on the former Northern Pacific Railroad trackage, despite the fact that they have done so since the inception of the 1987 Agreement. Finally, the Carrier insisted that the Organization had the burden of proving that the work at issue had been performed exclusively by BMW-represented employees on a system-wide basis.

In its final response, following conference on the property, the Organization disputed the Carrier's contention that previous ownership of trackage was essentially impossible to ascertain. The Organization also insisted that the April 6, 1987 Memorandum of Agreement was not applicable to any gang assigned to the confines of a single seniority district. It maintained that District Gang TP-01 is just such a gang and, therefore, the terms of the April 6, 1987 Memorandum of Agreement do not apply. In further support of its position, the Organization cited the Note to Rule 55, which states in part:

"Employees included within the scope of this Agreement – in the Maintenance of Way and Structures Department, including employees in former GN and SP&S Roadway Equipment Repair Shops and welding employees – perform work in connection with the construction and maintenance or repairs in connection with the dismantling of tracks, structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service and work performed by employees of named Repair Shops."

This is certainly not a case of first impression. It is essentially similar in facts and arguments to Third Division Awards 36590, 36591, and 36207. In those cases the Board found that the April 6, 1987 Memorandum of Agreement continued to apply to Regional Gangs on the Twin Cities Region. Specifically, in Award 36590, the Board held that "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. Because there is no evidence in this record that either party gave the other written notice of cancellation of the April 6, 1987 Memorandum of Agreement, it remains in effect. Further, the Organization has not proven exclusive rights to the

work at issue prior to the April 6, 1987 Memorandum of Agreement. Accordingly, we concur with the findings in Award 36590 that:

“ . . . when the instant claims were filed, the April 6, 1987 Memorandum of Agreement was . . . 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.”

Thus, the instant claim is 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 23rd day of April 2007.