

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 39707  
Docket No. MW-38753  
09-3-NRAB-00003-050161  
(05-3-161)**

**The Third Division consisted of the regular members and in addition Referee Jacalyn J. Zimmerman when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(Union Pacific Railroad Company (former Chicago &  
( North Western Transportation Company)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier assigned System New Construction Gang employees to perform district maintenance work (changing/repairing rail) on Track #1 at Mile Posts 247.2 and 245.85 on January 6, 2004, instead of District T-4 Section Gang 3446 employees S. Fehring, C. Olney and R. Van Cannon (System File 4RM-9532T/1394002 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants S. Fehring, C. Olney and R. Van Cannon shall now ‘\*\*\* be compensated for the twenty-seven (27) hours of work performed by the 9049 System Gang, at their applicable 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.

On January 6, 2004, the Carrier assigned employees of System New Construction Gang 9049 to change broken rails on Track No. 1 at Mile Posts 247.3 and 245.85 between Ralston and Glidden, Iowa. The Carrier asserts that it experienced numerous broken rails and joints in this area due to extremely harsh weather conditions, and the track was directional main line which required quick and immediate repairs so as not to hinder the Carrier's operations in this high traffic location. Thus, the Carrier contends, it was faced with an emergency situation. On February 6, 2004, the Organization filed the instant claim, contending that the Carrier improperly utilized System forces, rather than Division section forces, to perform this work.

The Organization's claim is based upon its assertions that the work in question was outside the permissible range of System work and was, therefore, reserved to the local, Division forces. The Organization asserts that System gangs are limited to performing large-project work associated with their particular gang descriptions. Division forces, the Organization asserts, retain the right to all other scope-covered work. It also disputes the Carrier's contention that this was an emergency situation.

The Carrier points out that it is undisputed that both groups of employees involved herein have seniority to work in the territory involved. Therefore, it states, the claim raises a jurisdictional issue, not a seniority district conflict. The Carrier asserts that the Organization failed to meet its heavy burden of proving that the welding and rail repair work at issue was exclusively reserved to the Claimants, members of the Division gang. The Board, the Carrier notes, has specifically ruled that system gang employees may perform work similar to the disputed work herein,

and there is no Agreement or other provision reserving the work exclusively to Division employees. The Carrier also asserts that it had greater latitude in making assignments in this situation because it did establish the existence of an emergency. Finally, the Carrier states, it was necessary to use the System forces to restore service because all Division forces, including the Claimants, were already working on the situation.

As in Third Division Award 38087, this case is controlled by the parties' Implementing Agreement providing for the use of System gangs to perform scope-covered work across the territories of the various railroads that were merged or consolidated into the present Carrier, including the C&NW. Section 1 of the Implementing Agreement lists titles for nine different types of system gangs. However, beyond the general labels, such as "Steel," "Switch," "Tie and Ballast," the Agreement does not describe, limit, or reserve any specific work. Unlike the situations in the cases cited by the Organization, the instant Agreement contains no specific language reserving certain types of work to Division forces or specifying the circumstances in which System forces may be used. The Organization presented no probative evidence to prove its assertions concerning the apportionment of functions between the Division and System gangs. We find Third Division Awards 37847 and 38087 dispositive of the issues presented in this case and, as in those Awards, conclude that the Organization failed to meet its burden of proof.

In light of the foregoing, we need not address the Carrier's contention that it was faced with an emergency situation which allowed it greater latitude in the assignment of work.

**AWARD**

**Claim denied.**

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**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 26th day of May 2009.**