

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39712
Docket No. MW-38907
09-3-NRAB-00003-050327
(05-3-327)**

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**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Missouri Pacific Seniority District Employees R. Smith and R. Garrison to perform work (operate undercutter) on Union Pacific and former C&NW seniority district territory between Mile Posts 189.3 and 163.5 on the Boone Subdivision beginning on April 14, 2004 and continuing through May 20, 2004 (System File UPRM-9564T/1399853).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants T. Felder, Jr. and R. Sullender shall now “*** each be compensated for 190 hours of straight time and 122 hours of overtime for work that the Missouri Pacific employees performed work (sic) on the Boone Subdivision, at the applicable REO 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.

The underlying facts of this case are not in dispute. The Claimants have established and hold seniority in various classifications within the Carrier's Maintenance of Way and Structures Department. At the time of the relevant events, Claimant Felder was working a ballast regulator position on System Gang 9066 and Claimant Sullender was working a Laborer position on System Gang 9048. From April 14 through May 20, 2004, two Missouri Pacific (MP) seniority district employees operated an undercutter on the Union Pacific and former C&NW seniority district territory between Mile Posts 189.3 and 163.5 on the Boone Subdivision.

The Organization asserts that this case presents a simple seniority boundary violation, because the Carrier assigned MP employees to perform work on the former C&NW territory where they hold no seniority. The Carrier counters that it was training those employees in the operation of a newly acquired Ballast Under Cutter (BUC) machine, a point the Organization did not refute, and no Agreement provision restricts management's right to conduct such training.

Further, the Carrier asserts, the training took no work from the Claimants, because employees from the Claimants' seniority territory operated the machine at all times to provide the training, another point the Organization did not refute. Thus, the Carrier states, the machine was operated only when it would have been had the trainers operated it themselves, so the MP employees were not used instead of CN&W seniority district employees.

The Organization portrays this dispute as a seniority district violation, but to prevail it must prove more than that the MP employees were physically present and

operating equipment in the Claimants' district; it must demonstrate that the MP employees actually performed productive work which should have accrued to the Claimants. The Organization failed to make that showing.

The Organization does not dispute that the MP employees were being trained on the equipment at issue and, as the Carrier notes, it points to no Agreement language prohibiting the Carrier from exercising its managerial right to conduct such training. More importantly, the Organization also does not dispute that seniority district employees were present and operating the machines at all times in dispute. The Organization does not identify the work that should have accrued to the Claimants, or explain how they lost a work opportunity. It has therefore failed to meet its burden of proof.

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 26th day of May 2009.