

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40106
Docket No. MW-38061
09-3-NRAB-00003-030497
(03-3-497)

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

(Brotherhood of Maintenance of Way Employees

PARTIES TO DISPUTE: (

**(BNSF Railway Company (former Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned roadway Equipment Sub-department Machine Operators B. Dufner, T. Miller, D. Helbling, G. Kuntz, R. Ziegler, M. Feist and M. Gerrard to perform Track Sub-department sectionman/extra gang laborer work (hand labor work incidental to replacement of rail on concrete ties) on June 12, 14, 15 and 16, 2000, instead of Sectionmen W. Schmidt, S. Warburton, P. Nyquist, B. Christoffersen, C. Clampitt, W. Waters, H. Robinson and V. Pacheo (System File B-M-793-H/11-00-0500 BNR).
- (2) The Agreement was violated when the Carrier assigned Roadway Equipment Sub-department Machine Operators B. Dufner, T. Miller, D. Helbling, G. Kuntz, R. Ziegler, M. Feist and M. Gerrard to perform Track Sub-department sectionman/extra gang laborer work (hand labor work incidental to replacement of rail on concrete ties) on July 22, 23, 24, 25 and August 28 and 29, 2000, instead of Sectionmen W. Schmidt, S. Warburton, P. Nyquist, B. Christoffersen, C. Clampitt, V. Watters, H. Robinson and V. Pacheo (System File B-M-808-H/11-00-0595).
- (3) The Agreement was violated when the Carrier assigned Roadway Equipment Sub-department Machine Operators B.

Dufner, T. Miller, D. Helbling, G. Kuntz, R. Ziegler, M. Feist and M. Gerrard to perform Track Sub-department sectionman/extra gang laborer work (hand labor work incidental to replacement of rail on concrete ties) on October 16, 17, 20, 23, 24, 26, 27, 31 and November 9, 2000, instead of Sectionmen W. Schmidt, S. Warburton, P. Nyquist, B. Christoffersen, C. Clampitt, V. Waters, H. Robinson and V. Pacheo (System File B-M-840-H/11-01-0080).

- (4) **As a consequence of the violation referred to in Part (1) above, Claimants W. Schmidt, S. Warburton, P. Nyquist, B. Christoffersen, C. Clampitt, V. Waters, H. Robinson and V. Pacheo shall now be compensated for '... thirty-two (32) hours pay, at the straight time sectionman's rate of pay. We are also requesting Claimants receive pay, equal to any and all overtime paid the Group 3 Machine Operators on claimed dates. We further request that Claimants be accredited for any and all benefits, to which they are entitled, had they been properly recalled to perform the claimed work.'**
- (5) **As a consequence of the violation referred to in Part (2) above, Claimants W. Schmidt, S. Warburton, P. Nyquist, B. Christoffersen, C. Clampitt, V. Waters, H. Robinson and V. Pacheo shall now be compensated for '... forty-eight (48) hours pay, at the straight time sectionman's rate of pay. We are also requesting Claimants receive pay, equal to any and all overtime paid the Group 3 Machine Operators on claimed dates. We further request that Claimants be accredited for any and all benefits, to which they are entitled, had they been properly recalled to perform the claimed work.'**
- (6) **As a consequence of the violation referred to in Part (3) above, Claimants W. Schmidt, S. Warburton, P. Nyquist, B. Christoffersen, C. Clampitt, V. Waters, H. Robinson and V. Pacheo shall now be compensated for '... forty-eight (sic) (72) hours pay, at the straight time sectionman's rate of pay. We are also requesting Claimants receive pay, equal to any and all**

overtime paid the Group 3 Machine Operators on claimed dates. We further request that Claimants be accredited for any and all benefits, to which they are entitled, had they been properly recalled to perform the claimed work.””

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.

Three claims were filed following Carrier directives issued to Machine Operators assigned as a part of Montana Seniority District 200 Rail Relay Gang RP-11 to perform the work which is referred to below. The claims were consolidated. The only differences between the claims are the dates of the incidents.

On the dates pertinent to these three claims, W. R. Schmidt, S. E. Warburton, P. J. Nyquist, B. K. Christoffersen, C. C. Clampitt, V. D. Waters, H. E. Robinson and V. P. Pacheo (hereinafter “Claimants” or the “Eight Claimants”) had all established and held seniority as Sectionmen/Trackmen/Laborers within the Track Sub-department on Montana District 200.

On the dates pertinent to these three claims, B. A. Dufner, T. J. Miller, D. J. Helbling, G. Kuntz, R. A. Ziegler, M. A. Feist and M. G. Gerrard (hereinafter “Machine Operators” or the “Seven Machine Operators”) had all established and held seniority as Machine Operators in the Roadway Equipment Sub-department. The seniority of the Seven Machine Operators was confined to the Roadway Equipment Sub-department. On the dates pertinent to these claims, the Seven

Machine Operators were all regularly assigned to Montana District 200 Rail Relay Gang RP-11. None were assigned to the Track Sub-department.

The Seven Machine Operators were normally assigned to operate the following seven machines - three spikers, one anchor remover, one spike reclaimer and two tie pluggers. These seven machines were assigned to a "Sickles" Rail Relay Gang RP-11. A "Sickles Gang" is a mechanized, mobile gang, performing major repair and replacement work through the use of machines including those machines listed above. None of the Eight Claimants were assigned to operate the machines described above.

The Carrier assigned the Machine Operators to perform work of replacing rail clips, applying epoxy and replacing rail insulators in preparation for replacement of rail on concrete ties. The Machine Operators performed manual or physical hand labor using hand tools. The seven roadway equipment machines were not turned on or used during the days pertinent to these claims. On those days, the Machine Operators performed no machine work whatsoever. They performed no work incidental to the operation of such machines. The work they did perform on the dates at issue is quintessential Sectionmen/Trackmen/ Laborer work which is assigned to employees of the Track Sub-department.

The Claimants are Sectionmen/Trackmen/Laborers in the Track Sub-department. The work at issue involved Sectionmen/Trackmen/Laborer work which would have been performed by the Claimants but for the decision of the Carrier to assign it to the Machine Operators.

The disputed work did not involve the Machine Operators operating their machines. As a consequence, the work the Machine Operators performed was not incidental to their work using roadway equipment machines.

For the work period of June 12, 14, 15 and 16, 2000 (hereinafter referred to as the "First Work Period") the Machine Operators were instructed by the Carrier to perform the work of removing and replacing rail clips, applying epoxy and removing and replacing rail insulators and other physical hand work incidental to replacement of rail on concrete ties. This is ordinary Sectionmen/Trackmen/Laborer work. During this First Work Period, the workdays of the Machine Operators were devoted to performing Sectionmen/Trackman/Laborer work. All of this work was performed

on the Carrier's property. During this First Work Period, each of the Machine Operators expended 32 straight time hours performing Sectionmen/Trackmen/Laborer work. During this First Work Period, none of the Machine Operators performed Machine Operator work. The machines normally operated by the Machine Operators were idle and not being operated. During this First Work Period, the Claimants were all on furlough. The next week, the Claimants were recalled by the Carrier as Sectionmen/Trackmen/Laborers to work on District Rail Relay Gang RP-11.

For the work period of July 22, 23, 24, 25 and August 28 and 29, 2000 (hereinafter, the "Second Work Period") the Machine Operators were instructed by the Carrier to perform the work of removing and replacing rail clips, applying epoxy and removing and replacing rail insulators and other physical hand work related to replacement of rail on concrete ties. This is ordinary Sectionmen/Trackmen/Laborer work. During this Second Work Period, the workdays of the Machine Operators were devoted to performing Sectionmen/Trackmen/Laborer work. All of this work was performed on the Carrier's property. During this Second Work Period, each of the Machine Operators expended 48 straight time hours performing Sectionmen/Trackmen/Laborer work. During this Second Work Period, none of the Machine Operators performed Machine Operator work. The machines normally operated by the Machine Operators were idle and not being operated. During this Second Work Period, none of the Claimants were on furlough.

For the work period of October 16, 17, 20, 23, 24, 26, 27, 31 and November 9, 2000 (hereinafter, the "Third Work Period") the Machine Operators were instructed by the Carrier to perform the work of removing and replacing rail clips, applying epoxy and removing and replacing rail insulators and other physical hand work related to replacement of rail on concrete ties. This is ordinary Sectionmen/Trackmen/Laborer work. During this Third Work Period, the workdays of the Machine Operators were devoted to performing Sectionmen/Trackmen/Laborer work. All of this work was performed on the Carrier's property. During this Third Work Period, each of the Machine Operators expended 72 straight time hours performing Sectionmen/Trackmen/ Laborer work. During this Third Work Period, none of the Machine Operators performed Machine Operator work. The machines normally operated by the Machine Operators were idle and not being operated. During this Third Work Period, none of the Claimants were on furlough.

The Organization submitted a timely claim for each of the three incidents protesting the Carrier's assignment of work in each instance as a violation of Rules 1, 2, 5 and 55 of the Agreement. The Board finds that the claims were timely filed and properly presented and handled by the Organization at all stages of appeal up to and including the Carrier's Highest Designated Officer. The disputes were progressed on the property in the usual manner but without resolution. The claims were combined for presentation to the Board for resolution.

The Agreement between the Parties effective September 1, 1982, together with supplements, amendments and interpretations thereto, was incorporated by reference into and made a part of the Organization's Statement of Facts.

Rules 1, 2, 5, and 55 of the Agreement reads, in pertinent part, as follows:

"RULE 1. SCOPE

- A. These rules govern the hours of service, rates of pay and working conditions of all employees not above the rank of Track Inspector, Track Supervisor and Foreman, in the Maintenance of Way and Structures Department, including employees in the former GN and SP&S roadway equipment repair shops and welding employees.**
- B. The Maintenance of Way and Structures Department as used herein means the Track Sub-department, the Bridge and Building Sub-department, the Welding Sub-department, the Roadway Equipment Sub-department, the Roadway Machinery Equipment and Automotive Repair Sub-department of the Maintenance of Way Department as constituted on date of consummation of this Agreement.**
- C. This Agreement does not apply to employees in the Signal, Telegraph and Telephone Maintenance Departments, nor to clerks. The sole purpose of including employees and sub-departments listed herein is to preserve pre-existing rights accruing to employees covered by agreements as they existed under similar rules in effect on the CB&Q, NP, GN and SP&S**

railway companies prior to date of merger; and shall not operate to extend jurisdiction or Scope Rule Coverage to agreements between another organization and one or more of the merging companies which were in effect prior to the date of merger.

RULE 2. SENIORITY RIGHTS AND SUB-DEPARTMENT LIMITS

- A. Rights accruing to employees under their seniority entitles them to consideration for positions in accordance with their relative length of service with the Company, as hereinafter provided.**
- B. Seniority rights of all Employees are confined to the sub-department in which employed, except as otherwise provided in this Agreement.**

* * *

RULE 5. SENIORITY ROSTERS

- A. Seniority rosters of employees of each sub-department by seniority districts and rank will be complied. Two (2) copies will be furnished foremen and employees' representatives, and foremen will post a copy in tool house and outfit cars, or at convenient places for inspection of employees affected. Copies will also be made available to employees not working under the supervision of a foreman.**

* * *

- D. On each seniority district as indicated in Rule 6A, three (3) separate seniority rosters shall be maintained for Track sub-department employees as indicated below, with separate seniority dates only for each rank contained on the roster.**

TRACK SUB-DEPARTMENT

Roster 1

Rank A Track Inspector

Foreman-General Section Foreman, Maintenance Crew Foreman, Section Foreman, Grouting Crew Foreman, Cropping Crew Foreman, Extra Gang Foreman.

Rank B Assistant Foreman

Rank C Sectionman, Fire Patrolman, Track Watchman, Track Patrolman, Track Lubricator Maintainer, Tunnel Watchman, Fence and Tile, Gang Laborer, Stock Yard Laborer, Lampman, Yard Cleaner, Car Cleaner, Crossing Watchman, Gateman and Flagman, Extra Gang Man.

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RULE 55. CLASSIFICATION OF WORK

* * *

Q. Sectionmen.

Employees assigned to constructing, repairing and maintaining roadway and track and other work incident thereto.

* * *

R. Extra Gang Men.

Employees assigned to out of face rail relaying, out of face tie plating (one (1) mile or more), out of face reballasting, bank widening, grade and line changes and construction of new or removal of old track. Extra gangs may be used for the purpose of removing snow, slides, and work in connection with wrecks or washouts but not to the

exclusion of section or district gang laborers. This rule will not prohibit the performance of any of the foregoing work by section or district maintenance gangs."

Rule 55Q of the Agreement indicates that the Organization and the Carrier have previously agreed in writing in the Agreement that the Carrier will assign Sectionmen to constructing, repairing and maintaining roadway and track and other related work.

Rule 55R indicates that the Organization and the Carrier have previously agreed in writing in the Agreement that the Carrier will assign extra gang men to out of face rail relaying, out of face tie plating (one (1) mile or more) out of face reballasting, bank widening, grade and line changes and construction of new or removal of old track.

The principle of Rule 55 is that the Carrier will assign work to employees who have customarily been assigned to perform that work pursuant to the Agreement's terms. As applied to the facts in these claims, Rules 1, 2, 5 and 55 effectively reserve the work at issue to the Claimants. Rule 55 defines work of Trackmen and Machine Operators. There is a clear line of demarcation between the work of the two positions.

In the situation at issue, the Machine Operators were assigned by the Carrier to certain roadway equipment machines. As indicated, the record establishes that these Machine Operators did not start their machines and did not operate their machines on the dates pertinent to these three claims.

The written statement by Machine Operator M. Feist states that on the days RP-11 Gang performed work on concrete, they would leave the unneeded machines parked. "The operators of those machines were asked to work as laborers." The written statement by Machine Operator R. Ziegler describes the practice of doing Laborer work while doing concrete repair work is true. He added that he did not operate his machine on those dates in question. The written statement by Machine Operator T. J. Miller states that on July 22, 23, 24, 25 and August 28 and 29, 2000 his machine was left in the siding because Gang RP-11 was doing concrete ties. He was told to replace rail insulators which he said was done by hand. When finished with this work, Miller stated he went back to do clean-up work. The written statement by

Machine Operator G. Kuntz reiterates that on July 22, 23, 24, 25 and August 28 and 29, 2000 while working as a Machine Operator on Gang RP-11, he was required to work as a Laborer. The written statement by Machine Operator D. J. Helbling states that on June 12, 14, 15, 16, July 22, 23, 24, 25 and August 28 and 29, October 16, 17, 20, 23, 24, 26, 27, 31, and November 9, 2000 he and Machine Operators B. Dufner and M. Gerrard were directed to leave their spike driver machines parked on side tracks and to perform hand labor work on concrete ties. He stated that on those dates their machines were not used.

The record before the Board establishes that work at issue in these claims involved physical hand labor on rails, tracks and ties without the use or maintenance of machines. The evidence of record indicates that no Machine Operator work occurred. This was not a matter of the Machine Operators dismounting their respective machines while those machines were running, doing work and then getting back on the machines. The evidence indicates that the machines were not started or operated during the dates at issue, but were, instead, parked and the status of the Machine Operators was thereby transformed to Sectionmen/Trackmen/Laborers.

The evidence clearly establishes that no Machine Operator work was involved or performed by the Machine Operators on the dates at issue. The primary duties of Machine Operators are to operate their assigned roadway equipment machines. The machines normally operated by the Machine Operators were idle and not being operated. Because no Machine Operator work was performed by the Machine Operators on the days at issue, there could be no work "incidental" to that non-existent Machine Operator work, as was claimed by the Carrier. Therefore the Board finds that the work assigned by the Carrier was not "incidental" to the type of work normally performed by Machine Operators and was not "incidental" to the type of work actually performed by the Machine Operators involved in this instance.

The track work to which the Carrier assigned these particular Machine Operators involved removing and replacing rail clips, applying epoxy and removing and replacing rail insulators and other hand work related to replacement of rail on concrete ties. That work is contractually reserved to employees holding seniority in the Track Sub-department. The work the Carrier assigned these Machine Operators was substantial, and not de minimus or casual work. As indicated, it was not "incidental" to their Machine Operator duties.

The Machine Operators, whose work jurisdiction is at issue, normally worked in the Roadway Equipment Sub-department. The Sectionmen/Trackmen/Laborer Claimants normally worked in the Track Sub-department. The evidence is that the two Sub-departments are separate and distinct Sub-departments within the Maintenance of Way Department. As noted in Third Division Awards 25282 and 29088, Machine Operators and Trackmen have seniority on two separate rosters; and the industry practice is for these groups to perform separate functions. Award 25282 involved a Machine Operator who was used as a Trackman for several consecutive days. It held that “The assignment of work belonging to employees holding seniority in the Track Sub-department to one not holding such seniority is violative of the Agreement.” On-property Award 29088 states that “... it is an Agreement violation to have Machine Equipment Operators perform Trackmen’s work when their machines were inoperable.”

The record indicates that there were entire days when the Machine Operators performed Trackmen’s work. The Board concludes that when the Carrier assigned work of the Track Sub-department to employees within the Roadway Equipment Sub-department, it excluded employees of the Track Sub-department and therefore violated the terms of the Agreement.

Contrary to the position set forth by the Carrier, because the disputed work is covered by Rule 55, and is not “incidental” to the work of the Machine Operators, the Organization need not show the exclusive past performance by its members.

The Organization met its burden of proving that the work was contractually reserved to the Claimants pursuant to the Agreement. The Carrier does not have a contractual right to remove work from one class of employees or employees of one Sub-department and give it to another class or other Sub-department. The Carrier’s “incidental work” defense was not persuasively established. The Machine Operators were used to perform large scale track work of a magnitude to which the Claimants were contractually entitled by custom, practice and tradition under Rules 1, 2, 5 and 55 of the Agreement.

Each Claimant who was not fully employed on any of the dates in question suffered a loss of work opportunity and is entitled to a monetary claim. The Board directs the Carrier to review its records; any Claimant who was actively employed on the claim dates and suffered no loss of compensation shall receive no monetary

remedy. To the extent that a Claimant was not so employed, his claims shall be sustained. For the work period of June 12, 14, 15 and 16, 2000, the record indicates that the Claimants were all on furlough. Consequently the "fully employed" defense is inapplicable for those dates. For the remaining claim dates, the Parties shall jointly review the Carrier's records and determine whether the Claimants lost compensation and make employees whole for any such losses.

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 19th day of November 2009.