

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40206
Docket No. MW-38504
09-3-NRAB-00003-040476
(04-3-476)

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

PARTIES TO DISPUTE: (**(Brotherhood of Maintenance of Way Employees**
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to bulletin the position of curve gang foreman within the consist of Gang 9070 and instead assigned the duties of said position to Welding Foreman G. Hellbusch and during the same period assigned a welding assistant foreman to perform said welding foreman duties (System File D-0320-03/1377054).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Linford shall “*** be allowed compensation at the Curve Gang Foreman’s rate of pay for all hours worked by Welding Foreman Hellbusch in performing the duties of the Curve Gang Foreman on Gang 9070. This compensation and this claim must continue until this Curve Gang Foreman position is appropriately bulletined in accordance with the terms of our Current Working Agreement. Further, any Group 26 Foreman which is deprived of displacing on this position because they are not qualified as a Welding Gang must be allowed the appropriate compensation for the loss of work opportunity. Since this is an ongoing violation that is occurring each and every day this claim must be considered retroactive sixty (60) days pursuant to the terms of Rule 49 of our Agreement. Further the hours of compensation for Claimant Linford must be contemplated for straight time and**

overtime hours as outlined in our Collective Bargaining Agreement.””

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.

Claimant J. R. Linford established and holds seniority as a System Gang Foreman. He was regularly assigned to a lower rated position on the date giving rise to this claim. In the instant case, Gang 9070 was building switches and welding track with a track-laying machine. The Organization filed the instant claim alleging that the Agreement requires that a System Curve Foreman position must be bulletined and assigned in conjunction with System New Construction Gang work.

The Organization claims that the Carrier violated the Agreement when it failed and allegedly refused to bulletin the position of Curve Gang Foreman within Gang 9070 and instead assigned the duties of said position to Welding Foreman G. Helbusch. The Organization contends that a bona fide Curve Gang Foreman position existed on the dates involved in this case, but that no such Foreman was selected. As a remedy, it request that Claimant J. Linford be allowed compensation at the Curve Gang Foreman's rate of pay for all hours worked by Welding Foreman Hellbusch when he performed the alleged duties of the Curve Gang Foreman on Gang 9070 until the Curve Gang Foreman position is appropriately bulletined in accordance with the terms of the Agreement. Further, any Group 26 Foreman who is deprived of the right to displace onto this position because he/she is not qualified as a Curve Gang Foreman must be allowed the appropriate compensation for the loss of work opportunity. Because this is

an ongoing violation, the claim must be considered retroactive 60 days pursuant to the terms of Rule 49.

Conversely, the Carrier contends that the burden is on the Organization to prove that a Curve Gang Foreman should have been assigned at the instant location. According to the Carrier, the Organization failed to provide any evidence that Gang 9070 was a Curve Gang rather than a System Gang. Therefore, there was no need to assign a Curve Gang Foreman to Gang 9070. According to the Carrier, there is no evidence that Curve Gang work was being performed by Gang 9070. The Carrier contends that it was acting within its managerial right when it made the relevant work assignments. Thus, the Organization has been unable to prove that any sections of the Agreement were violated.

After a review of the record evidence and positions of the parties, the Board agrees with the Carrier that the Organization failed to meet its burden of proof. The record evidence demonstrates that Gang 9070 was a System New Construction Gang and not a Curve Gang. Therefore, there was no need to assign a Curve Gang Foreman to Gang 9070. According, the 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 21st day of December 2009.