

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40217
Docket No. MW-38632
09-3-NRAB-00003-050002
(05-3-2)

The Third Division consisted of the regular members and in addition Referee Brian Clauss 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 Agreement was violated when the Carrier assigned Welding Subdepartment employees, instead of Track Subdepartment, employees to perform track work (remove/replace spikes and anchors, adze and plug wood ties and related work) in connection with correcting defective track gauge repair work in the area of Mile Post 1190, at Curve(s) 1192A, 1188A 1189, 1191B, 1192, 1208B, 1207C, 1183B and various locations between Mile Post 1156 and Mile Post 1164 on May 28, 29, 30 and 31, 2002. [System File B-M-1033-H/11-02-0322, B-M-1034-H/11-02-0323, B-M-1035-H/11-02-0324 and B-M-1036-H/11-02-0325 BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants T. McKay, K. Reed, M. Dector, E. White, J. Rodriguez, R. LaSorte, J. Tafelmeyer and P. Bentley shall now each be compensated for thirty two (32) hours at their respective straight time rates of pay and for nine (9) hours at their respective time and one-half 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.

In four letters dated July 26, 2002, the Organization filed four claims on behalf of "Montana District 200 track Subdepartment section forces" alleging that three welding crews were assigned to perform work belonging to the Track Subdepartment. Specifically, the Organization claimed that seven Welding Subdepartment employees were doing track gauging work and that "[a]t no time on the claimed dates, was a welding device or grinding device used." The Organization's four claims all continued:

"The work of replacement of defective track components is work repairing and maintaining track and roadway. As such that work is reserved for the benefit of Track Department, Roster 1, employees. Claimants assigned to the trackage involved, or adjacent sections, have suffered a loss of work opportunity."

The Carrier responded in four letters dated September 25, 2002, each of which provided:

"Investigation into these allegations finds the Carrier applauding your efforts in being so explicit as to the work being performed on the claimed date but welders did not perform any of the work specified or associated with gauging track as claimed."

The Organization appealed in four letters dated October 24, 2002, maintaining that the gauging work was performed "as cited within the claim letter" and offered the statements of two Welding Subdepartment employees in support. In summary, the Organization maintained that "[t]he Carrier had no contractual authority in removing this work opportunity from the Track Subdepartment only to grant that work to employees of another Subdepartment."

The claims for four days in May 2002 were consolidated in the Carrier response dated December 18, 2002. The Carrier stated, in pertinent part:

“The Organization alleges the Carrier violated the Agreement when various welding crews allegedly gauged curves at various locations from May 28 through May 31, 2002.

In its claim, the Organization has asserted that the work in dispute, gauging track and/or curves, is reserved to Section crews of the Track Sub-department. There is no evidence contractually reserving this work to section crews. In fact other crews have performed this work, and the Organization has not shown otherwise. Enclosed are statements from non-section employees that have performed this disputed work . . .

By definition, this is an intra-craft dispute. Arbitrators in awards on this property are unanimous that certainly as to intra-craft controversies, such as this, the Organization absolutely must prove not merely that the claimants have ‘customarily’ done this work, but that they have performed it on a system-wide basis to the exclusion of others.”

Accordingly, the burden is on the Organization to prove that the disputed work has traditionally, customarily and historically been performed by the Claimants or craft. Prior Awards indicate that “traditionally, customarily and historically” means that the work has been performed on a system-wide basis to the exclusion of others including outside contractors. (See Third Division Award 37618 and Awards cited therein.)

The Board carefully reviewed the record evidence. The Organization points to no specific language in the Agreement reserving the work at issue. Further, there are numerous Awards in support of the proposition that Rule 1 is a general Scope Rule and does not provide an exclusive grant of work to the employees discussed therein. The Organization must prove reservation of work by past performance. The claim made by the Organization in this matter is an intra-craft dispute. Accordingly, the Organization must meet a higher standard – the Organization must show that the Track Sub-

department employees have performed the work of gauging track on an exclusive basis. See, Third Division Award 37280 and the Awards cited therein.

Third Division Award 37280 is instructive. In that matter, both parties “provided statements to support their respective assertions of exclusive past performance and mixed-practice.” Here, as in Award 37280, the Organization’s statements from Track Subdepartment employees support the proposition that they have exclusively performed track gauging work in the past. The Carrier’s statements support a contrary conclusion - that track gauging has been done by Steel Gangs for decades and at least one Relay Gang. There is conflicting evidence regarding the exclusivity of the disputed work.

Whether track gauging is performed exclusively by the Track Subdepartment is a material fact. Given the Board’s appellate review authority, there is no method for resolving disputes of material fact when those material facts are at issue. Therefore, the Board has no choice but to deny the claims for failing to satisfy the burden of establishing the exclusive past performance of the track gauging.

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.

**LABOR MEMBER'S DISSENT
TO
AWARD 40217, DOCKET MW-38632
(Referee Clauss)**

This dispute involved the Carrier's decision to assign the fundamental Track Sub-department maintenance work of gauging track to employees assigned and working in the Welding Sub-department. Rule 1B clearly establishes separate and distinct sub-departments within the Maintenance of Way and Structures Department, including the Track Sub-department and the Welding Sub-department. Rules 2, 5 and 55, clearly reserve work of the character involved here to Track Sub-department employees. Rule 2A provides that rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the Company. Rule 2B provides that seniority rights of all employees are confined to the sub-department in which employed, except as otherwise provided in this Agreement. Rule 5 specifies separate seniority and distinct rosters for Track Sub-department employees and Welding Sub-department employees. Rule 55-CLASSIFICATION OF WORK sets forth the various classifications within the Maintenance of Way and Structures Department, including foremen, truck drivers and sectionmen. Rule 55Q stipulates that sectionmen are employees assigned to constructing, repairing and maintaining roadway and track and other work incident thereto. Rule 55K stipulates that a welder is an employee assigned to the operation of any welding device used in the performance of such work as repairing, tempering and cutting rails, frogs and switches, welding and cutting in connection with construction, maintenance and dismantling of bridges, buildings and other structures, and any other welding and cutting in the Maintenance of Way and Structures Department. As if the Agreement was not clear enough to establish that gauging track is reserved to the employees of the Track Sub-department, the Organization presented more than one hundred sixty-five (165) written statements into the record of this case. Each of those statements established that welding gangs have never customarily performed track gauging work. Our position in this regard was supported by Third Division Award 35961, which held:

“In this instance, the work project performed by Welding Gang Nos. 2 and 34 was to completely remove and replace rail in switches, requiring the removal and reinstallation of rail, spikes and anchors; spacing of ties and tamping of track. This cannot be deemed ‘incidental’ because it did not happen by chance or as an undesigned feature of their primary assignment (welding rail ends), it was not ‘casual’ work and it entailed the expenditure of 32 man-hours. Given the state of the

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present record, it is clear that the Organization carried its burden of proof and the Carrier's 'incidental work' defense was not persuasively established. In the facts presented in this record, the Carrier simply used the Welders 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. See Third Division Awards 7958, 17982 and 28236. See also Awards 30 and 43 of Special Board of Adjustment No. 1110. In closing, we note that the claim dates preceded the effective date of the so-called imposed Agreement of July 29, 1991 and so neither Contract Interpretation Committee nor PEB 219 determinations played any role in this decision.

AWARD

Claim sustained."

A review of the above on-property award, involving the identical work at issue here, reveals that the Board completely overlooked this established precedent and instead attempt to plough new ground where there is no need. In fact, the Majority's findings are completely without any sense at all. Evidence of such is found within the award itself, wherein the Board held:

"* Here, as in Award 37280, the Organization's statements from Track Subdepartment employees support that proposition that they have exclusively performed gauging work in the past. The Carrier's statement support a contrary conclusion - that gauging has been done by Steel Gangs for decades and at least one Relay Gang. There is conflicting evidence regarding the exclusivity of the disputed work."**

Based on this reasoning, the Board denied the Organization's claim. It has been said more than once that the precedential effect of an award is only as good as the reasoning found therein.

Because the Organization proved that such work was reserved to Track Subdepartment employees by Rule 55 and because the work was not 'incidental' to work of the Welding Subdepartment, the Organization was not required to prove an

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exclusive past performance by Track Subdepartment employees. Moreover, there is simply no doubt but that Steel Gangs and Relay Gangs are in the Track Subdepartment. Hence, even the Carrier's alleged evidence supports the Organization's position in this case. Therefore, I Dissent

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy C. Robinson", with a stylized flourish at the end.

**Roy C. Robinson
Labor Member**