

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40375
Docket No. MW-38627
10-3-NRAB-00003-040560
(04-3-560)**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig 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 failed and refused to bulletin the position of curve gang foreman position within the consist of Gang 9056 and instead assigned the duties of said position to a welding foreman and during the same period required the assistant foreman to perform the welding foreman duties (System File D-0320-05/1382408).**
- (2) As a consequence of the violation referred to in Part (1) above, as set forth within the General Chairman's letter dated September 26, 2003 ‘. . . this Organization has no alternative but to submit this claim on behalf of all Foremen within Group 26 Curve Gang qualifications claiming they must be allowed compensation equal to the amount they would have been allowed absent the violation of the Agreement. That is any Group 26 Curve Gang Foreman who is deprived of bidding on or displacing to Gang 9056 must be allowed compensation at the Curve Gang Foreman's rate of pay for all hours worked by Welding Foreman Giuliano or Hathaway in performing the duties of the Curve Gang Foreman on Gang 9056. 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 who is deprived of displacing on this position because they are not qualified as a Welding Gang Foreman 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 Claimants 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.

This claim involves allegations by the Organization that the Carrier failed to bulletin a Curve Gang Foreman position on Gang 9056, thereby depriving all Curve Gang Foremen employment opportunities.

The Organization alleged that the Carrier improperly assigned a Welding Gang Foreman to perform the work of a Curve Gang Foreman and an Assistant Foreman to perform the work of the Welding Foreman on Gang 9056. The Organization claimed that this Carrier violation prevented Curve Gang Foremen from bidding on and exercising seniority to the open position on Gang 9056. It further categorized this alleged Agreement violation as ongoing, thereby allowing

the Organization to bring this claim regardless of the 60-day time limit on filing claims as set forth in Rule 49.

The Organization further 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, the Organization asks that any Curve Gang Foreman who was deprived of bidding on or displacing to Gang 9056 must be allowed compensation at the Curve Gang Foreman's rate of pay for all hours worked by Welding Foremen Giuliano or Hathaway in performing the duties of the Curve Gang Foreman on Gang 9056. This compensation and this claim must continue until the Curve Gang Foreman position is appropriately bulletined in accordance with the terms of the Agreement. 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 to Gang 9056. According to the Carrier, the Organization failed to present any evidence to substantiate its assertion that Gang 9056 was a Curve Gang rather than a System Gang. Therefore, there was no need to assign a Curve Gang Foreman to Gang 9056. According to the Carrier, there is no evidence that Curve Gang work was being performed by Gang 9056. The Carrier contends that it was acting within its managerial rights when it made the relevant work assignments. Thus, the Organization has been unable to prove that any Agreement provisions were violated.

After a review of the record evidence, as well as the positions of the parties, the Board concludes that the Organization failed to meet its burden of proof. The record evidence shows that Gang 9056 was a System New Construction Gang and not a Curve Gang. Therefore, there was no need to assign a Curve Gang Foreman to Gang 9056. Accordingly, the claim must be denied.

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 25th day of March 2010.