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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40504
Docket No. MW-40099
10-3-NRAB-00003-070276
(07-3-276)**

The Third Division consisted of the regular members and in addition Referee Michael D. Gordon when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
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 failed and refused to compensate Messrs. J. Waggoner, J. L’Heureux, D. Acton, J. Morgan and W. Coffman at the appropriate Bridge and Building Steel Erection rates of pay for their work (disassemble steel floor beams and reassemble them for steel spans) on a steel bridge at Mile Post 10.17, near Oreapolis, Nebraska on June 5 and 9, 2003 [System File C-03-P016-1/10-03-0398(MW) BNR].**
- (2) The Agreement was violated when the Carrier failed and refused to compensate Messrs. J. Waggoner, J. L’Heureux, D. Acton, J. Morgan and W. Coffman at the appropriate Bridge and Building Steel Erection rates of pay for their work (reinforcing steel hangers and shrinking of I-bars) on a steel bridge at Mile Post 19.94, near Beatrice, Nebraska beginning on August 11, 2003 and continuing through October 2, 2003 [System File C-03-P016-2/10-03-0567(MW)].**
- (3) As a consequence of the violation referred to in Part (1) above, Claimants J. Waggoner, J. L’Heureux, D. Acton, J. Morgan and**

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W. Coffman shall now ‘. . . be paid the difference in pay from the rate he was compensated at and the steel erection rate of pay for twenty (20) straight time hours. . . .’”

- (4) As a consequence of the violation referred to in Part (1) above, Claimants J. Waggoner, J. L’Heureux, D. Acton, J. Morgan and W. Coffman shall now ‘. . . be paid the difference in pay from the rate he was compensated at and the steel erection rate of pay for thirty-two (32) days, ten (10) hours per (sic) for three hundred and twenty (320) straight time hours. . . .’”

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 dispute combines two claims involving the same five Claimants and virtually identical claims arising on different dates at separate locations. The Claimants hold seniority in various classifications in the B&B Subdepartment of the Maintenance of Way and Structures Department.

For years prior to this dispute, the Carrier did not maintain Steel Erection Crews due to technological advances, new skill requirements, and seniority consolidations. However, the classification and its pay rates remained in the Rules. According to first-hand employee statements, Steel Erection rates were received by lower paid classifications in other geographic areas when and after Steel Erection crews were staffed.

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On June 5 and 9, 2003, the Claimants were assigned to a District 400 B&B Gang without objection from them or the Organization. For 20 straight time hours each Claimant performed certain bridge work (disassemble steel floor beams and reassemble them for steel spans) at the Mile Post 10.17 bridge. From August 11 through October 2, 2003, they were assigned, and for 320 straight time hours each performed work (reinforcing steel hangers and stringing I-bars) on the Mile Post 19.94 bridge. Each Claimant was paid at his normal B&B gang rate rather than the higher B&B Steel Erection rate.

Citing Rules 1, 2, 5, 44, 55 and Appendix Y, the Organization grieved that the Claimants were not properly compensated at steel bridge erection rates for Steel Erection Crews while performing steel bridge work. It reasons (1) the Claimants were assigned and performed steel erection work described in and covered by Rule 55I (2) Rule 55F does not reference or contemplate such work (3) Rule 44 requires compensation at the higher rate for time assigned (4) Systems Bridge and Building Gang work and pay rates exist and have been paid to lower classifications even after seniority district consolidation (5) this is a pay dispute not a dispute about work assignments and, because Bridge Building Gangs no longer exist, there can be no intra-craft dispute and (6) arbitral precedent supports the Organization, including rejection of the Carrier's "fully employed" defense to the requested remedy.

The Carrier answers (1) the Organization did not oppose initial assignment of a B&B crew instead of Steel Erection employees (2) the Claimants performed normal, Structures Building and Bridge Gang duties and are entitled only to the B&B gang pay rate (3) Claimants' positions were bulletined for B&B gangs (4) Steel Erection employee pay rates are reserved to those bulletined and working on highly specialized Steel Erection crews (5) the Organization's written statements and other evidence are inadequate to prove a practice in this specific territory and some Supervisors may have made mistakes in approving pay rates (6) Rule 44 is moot because it was superseded by Article XI but, at most, it applies only to skills beyond those normally assigned to B&B crews (7) the pay claim is unproven, inconsistent and exorbitant; and (8) arbitral precedent supports the Carrier.

This is a dispute about pay rates, not a disagreement over work assignments. Therefore, the Carrier's discussion about assignments and intra-craft conflicts are

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irrelevant. The question is not if the Claimants should have done the work, but whether they received proper pay for it.

Rule 55I describes the work of Steel Bridge and Building Mechanic to include “general structural erection, replacement, maintaining, or dismantling of steel in bridges . . . [and] performance of related bridge . . . work. . . .” A specific pay rate is provided. Rule 44 - COMPOSITE SERVICE states:

“An employee assigned by proper authority to perform service on a higher rated position for one (1) hour or more shall be paid the higher rate for the time assigned thereto; except that when the time so engaged exceeds four (4) hours on one day will be allowed the higher rate for the entire day. . . .”

Consequently, the written Rules strongly support these particular claims. The language seems to express a clear intent. The key is not the crew name, but the duties assigned and performed. If higher rated work that is designated Steel and Bridge Mechanic work lasts more than one hour, it is to be paid for at the Steel and Bridge Mechanic pay rate.

To the extent any ambiguity may exist, the Organization presents substantial direct evidence that the requested pay rates were consistently and repeatedly paid under comparable circumstances. The Carrier counters with no specific contrary evidence. It broadly questions the time and geographic scope of the Organization's written witness statements. It suggests that some Organization evidence may have resulted from supervisory mistakes. This scattershot speculation cannot outweigh the prima facie showing established by Agreement language and practice.

Likewise, this record does not warrant the Carrier's invitation to nullify, or substantially restrict, Rules 44 and 55I and to ignore an existing, specific wage scale. Mutually agreed language cannot be ignored absent clear evidence both parties no longer wish it to be effective.

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The requested remedy is appropriate because it compensates the Claimants for the amount they would have earned had the assignments been paid appropriately.

Accordingly, the claim is sustained.

AWARD

Claim sustained.

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 15th day of June 2010.