

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40872
Docket No. MW-40988
11-3-NRAB-00003-090285**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Federated Craft Welding Gang 4442 (consisting of a welder and track welder-thermite) to perform Maintenance of Way and Structures Department work (change/rail repair and related work) at Mile Posts 235 and 231 on the Powder River Subdivision on December 16, 17, 19, 2007 and on January 3, 8, 9, 2008, instead of Maintenance of Way Section Gang 5042 employees L. Hathorn, M. Fitzwater and W. Wasserburger (System File R-0826U-304/1495211).
- (2) As a consequence of the violation referred to in Part (1) above, Claimants L. Hathorn, M. Fitzwater and W. Wasserburger shall now “*** each be compensated for an appropriate share of thirteen (13) hours of overtime for work that the Welding Gang employees performed Section work, at the applicable overtime 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.

This dispute concerns the Carrier's use of Federated Craft Welding Gang 4442 to change broken rails instead of Section Gang 5042, and involves Rule 9 of the UP-BMWE Agreement and the Note in the Implementing Agreement between the Carrier, the Organization and the International Brotherhood of Boilermakers, Blacksmiths, Iron Ship Builders, Forgers and Helpers (IBB), which provide, in pertinent part:

"RULE 9 - TRACK SUBDEPARTMENT

Construction and maintenance of roadway and track, such as rail laying, . . . and handling of track material and other work incidental thereto will be performed by forces in the Track Subdepartment.

IMPLEMENTING AGREEMENT

NOTE: Heating, shaping, bending, grinding, and welding necessary in welding or building up of damaged, battered, chipped and worn rail frogs, switch points or other track material and other work customarily performed by welding employees, by use of. . . ."

The Claimants were assigned to Section Gang 5042 in December 2007 and January 2008 when the Carrier used Federated Craft Welding Gang 4442 to replace broken rails at various locations on the Powder River Subdivision. The Organization argues that this is routine track maintenance work reserved to Track Sub-department employees under Rule 9, and that no welding or other work listed in the Implementing Agreement was performed on these dates, citing Third Division Award 36933. The Carrier contends that the Organization did not meet the heavy burden of proof required in a jurisdictional dispute case, relying on Third Division Award 32646. It asserts that the broken rails constituted "emergency" situations, permitting it to utilize qualified employees available on their assigned shift rather than being obliged to call employees on overtime, citing Third Division Awards 22129, 22855, 22920 and 37550, and that the functions performed were part of the retained rights of the Federated Craft Welders. The Organization maintains that the Carrier's defenses are without merit because broken rails, which commonly occur, do not constitute an emergency, and no welding work was performed on these occasions.

A careful review of the record convinces the Board that, as in Third Division Award 40869, the Organization established that the disputed work was the routine track maintenance function of replacing broken rails which is reserved to Track Sub-department employees within the scope of the Agreement, and that no welding work was involved. In the absence of the Carrier establishing that the need to change out broken rails created "emergency" situations when they occurred, or that the actual work performed fell within the listed functions of the Welders in the Note to the Implementing Agreement, the claim must succeed. Despite the Carrier's argument that there was no loss of earnings established because the Claimants were fully employed, the Claimants are entitled to compensation for the lost work opportunity involving the hours worked by Federated Craft Welding Gang 4442 replacing broken rails on the Powder River Subdivision on the claim dates in December 2007 and January 2008. The initial claim on the property appears to list 60 hours of work, while the claim progressed to the Board requests 13 hours at the overtime rate. In the absence of an explanation for the discrepancy, it is the claim progressed to the Board that will be 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 7th day of February 2011.