

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41590
Docket No. MW-41765
13-3-NRAB-00003-110385**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers 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 to call and assign Utah Division Section Gang Foreman K. Christensen and Utah Division Section Gang Foreman Brentin Campbell, Utah Division Sectionman Truck Driver J. Bagshaw and TMO D. Archuleta to monitor the progression of and perform the necessary work associated with the Herzog Ballast Train working between Mile Post 650.1, East Soldier Summit and Mile Post 685.0, Castilla Cross-overs on April 7, 2010 and instead called and assigned Track Inspector G. Badura (System File D-10-39/1537342).**
- (2) The claim referenced in part (1) above, as appealed by General Chairman C. M. Morgan on August 12, 2010 shall be allowed as presented because said claim was not disallowed by Director Labor Relations B. W. Hanquist in accordance with Rule 49.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants K. Christensen, B. Campbell, J. Bagshaw and D. Archuleta shall now each be compensated for eight (8) hours at their respective 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.

The Organization filed the instant claim on behalf of the Claimants, alleging that the Carrier violated the parties' Agreement when it failed to call and assign them to perform certain work associated with the Herzog Ballast Train, and instead assigned a Track Inspector to perform the work. The Organization further alleges that the Carrier failed to disallow the original claim in accordance with Rule 49.

The Organization contends that the claim should be sustained in its entirety because (1) the Carrier failed to disallow the appeal in accordance with the time limits set forth in Rule 49 (2) the Carrier violated the Agreement when it failed to call and assign the Claimants to perform the work at issue and instead called and assigned a Track Inspector to perform the work, and (3) there is no merit to the Carrier's defenses. The Carrier counters that the claim should be denied in its entirety because (1) stare decisis warrants dismissing the claim in that a prior Award specifically held that monitoring the dumping of ballast by a ballast train is neither scope-covered work nor exclusively reserved to BMWE-represented employees (2) the Organization failed to satisfy its burden of proof in this jurisdiction of work dispute (3) the Carrier did not violate Rule 49 in its handling of the claim, and (4) the remedy sought by the Organization is improper.

The Board reviewed the procedural argument raised by the Organization, and finds it to be without merit. The Organization contends that the Carrier failed to notify former General Chairman Morgan of its disallowance of the appeal within the stipulated 60-day time period as required by Rule 49. A thorough review of the record makes clear that General Chairman Morgan filed the original claim on June 1, 2010.

The Carrier denied the claim with a letter to General Chairman Morgan on July 23, 2010, in total compliance with the requirements of Rule 49. General Chairman Morgan, on September 8, 2010, appealed the denial. The Carrier timely responded to that appeal with a letter to General Chairman Morgan in Colorado Springs on November 5, 2010. We find that the Carrier complied with the contractual requirements of Rule 49 and, therefore, there is no basis on which to sustain the Organization's procedural argument.

With respect to the merits, we find that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it failed to call and assign the Claimants to monitor the progression of and perform the necessary work associated with the Herzog Ballast Train on April 7, 2010. The Board finds that the Carrier had the right to utilize the person that was assigned to monitor the dumping of the ballast by a ballast train. (See Third Division Award 40895 and Second Division Award 3630.)

It is fundamental that the Organization bears the burden of proof in cases of this kind. The Organization failed to meet that burden in this case. Therefore, the claim must be 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 18th day of March 2013.