

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42951
Docket No. MW-43570
18-3-NRAB-00003-160263**

The Third Division consisted of the regular members and in addition Referee Sean J. Rogers when the award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(Dakota, Minnesota & Eastern Railroad Corporation

STATEMENT OF CLAIM:

- “(1) The Carrier violated the Agreement when it assigned Managers D. LaGare and J. Boxlighter to perform overtime track work (broken rail repair) on the New Albin section territory at Mile Post 119.4 on October 18, 2014 instead of calling and assigning New Albin Section Foreman J. Jangula and Assistant Foreman M. Farley thereto (System File B-1415D-105/8-0030 DME).**
- (2) As a consequence of the violation referred to Part (1) above, Claimants J. Jangula and M. Farley shall each now be compensated for four (4) 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 record established the following undisputed facts:

“On October 18, 2014, a surfacing machine, operated by the railroad services company R. J. Corman Railroad Group, broke a rail on the New Albin section territory at Mile Post (MP) 119.4. In response, the Carrier sent two mangers, Dennis LaGare and Jack Boxlighter to MP 136.5 to collect the equipment and materials to make a temporary repair to the broken rail. They responded to MP 119.4 where they made a temporary repair to the broken rail with angle bar rails. Later that month the New Albin Section crew put in a new rail and thermite welded it in place.”

LaGare and Boxlighter are members of the labor organization the American Railway and Airway Supervisors Association (ARASA). They are not members of the craft or class represented by the Brotherhood of Maintenance of Way Employees of the International Brotherhood of Teamsters (BMWED or Organization).

The Organization contends that the Carrier violated an array of collective agreement rules when LaGare and Boxlighter made the temporary repair including Rule 1, 2, 4, 6, 15 and 32. However, the Organization argument in support of the claim focuses on Rule 1 – Scope.

The Organization’s argument in support of the claim rests on Rule 1 - Scope which states in pertinent part:

“RULE 1 – SCOPE

The rules in this Agreement shall govern the hours of service, rates of pay and working conditions of DM&E employees represented by BMWED who work in the Engineering Department and who are generally involved in basic inspection, maintenance, and repair of DM&E’s track and certain structures which are located on the right-of-way and used by DM&E to meet its common carrier obligations.”

The Organization asserts that Rule 1 requires the temporary rail repair at MP 119.4 to be assigned to the Claimants and not to non-Agreement ARASA supervisors.

The Organization argues maintenance repair duties of this type are within the scope of the BMWED collective agreement and reserved to BMWED employees by the clear language of Rule 1, citing as well as Rules 2 and 15 language. The Organization argues the arbitral boards have consistently held that it is improper and forbidden for ARASA supervisors and other non-Agreement supervisors to perform scope-covered work.

The Organization refutes the Carrier defenses including that the repair was “as needed” because the broken rail constituted an emergent situation which the Organization says is disingenuous.

The Organization asserts the work to repair the broken rail should have been assigned to the Claimants as overtime and therefore, the claim should be sustained. The Organization concludes as remedy that the Claimants must receive four hours pay at their overtime rate of pay.

The Carrier asserts that having the managers perform the temporary rail repair at MP 119.4 is not a violation of the collective agreement based on the exception language in Rule 1 – Scope, subpart 3. and 4. which states in pertinent part:

- “3. Other employees may perform work on “as needed” temporary basis as long as it does not cause or result in the abolishment of one or more positions under this agreement.**
- 4. It is understood that emergency service may be performed as determined by the company.”**

The Carrier maintains the broken rail repair was both temporary and “as needed” and no BMWED positions were abolished. In support of its argument, the Carrier cites the Organization’s on property submission from Claimant J. Jangula specifically described LaGare and Boxlighter’s repair as a “temporary ‘angle bar rail’” repair and further stated, “[l]ater in the month we came down and put a rail in.”

The Carrier asserts that it required the temporary repair work to be performed in as timely manner as possible to prevent interruption of service. The Carrier argues a broken rail would cease operations and result in an emergent condition.

The facts establish that LaGare and Boxlighter's broken rail repair at MP 119.4 was temporary work which was confirmed in Claimant J. Jangula's on property submission. Moreover, the permanent repair was performed by the regularly assigned crew within the month. No positions were abolished as a result of the repair.

Furthermore, the facts establish that LaGare and Boxlighter are other employees who may perform work on "as needed" temporary basis. Applying these unique facts to the plain language of Rule 1, subpart 3. and 4., the Board finds there was no violation of the collective agreement. The Board concludes that the broken rail repair on October 18, 2014 by LaGare and Boxlighter falls within the exception language of Rule 1 – Scope, subpart 3. and 4. The claim is 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 14th day of February 2018.