Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 43431
Docket No. MW-43496
19-3-NRAB-00003-160209

The Third Division consisted of the regular members and in addition Referee Paul Betts when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned ARASA Supervisor B. Campbell to perform Maintenance of Way work (flagging for road crossings) in conjunction with track repair work being performed by Gang 6133 between Mile Posts 228.42 and 241.79 on the Pocatello Subdivision beginning on December 9, 2014 through December 17, 2014 instead of assigning employe R. Rodriquez thereto (System File MK-1404U-901/1619241 UPS).¬

(2) As a consequence of the violation referred to in Part (1) above, Claimant R. Rodriquez shall now be compensated for '* all hours worked by managerial staff December 9, 2014 and continuing until December 17, 2014. A total of 60 hours of strait (sic) time and 10 hours of time and a half. ***'"**

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 case presented to the Board involves the Organization's claim that the Carrier violated the Agreement when it assigned a non-Agreement ARASA supervisor to perform flagging duties it asserts are reserved to employees maintaining seniority under the Maintenance of Way Agreement. The Organization maintains ARASA Supervisor B. Campbell performed the flagging duties beginning on December 9, 2014 and continuing through December 17, 2014.

The Organization argues a) Gang 6133 was performing surfacing track work on the dates in question and the flagging duties associated with that work constitutes scope covered work, b) Rule 9 mandates that construction and maintenance of track and other work incidental thereto will be performed by forces in the Track Subdepartment, c) Maintenance of Way employees routinely and customarily perform the claimed duties, d) Supervisor Campbell is not covered under the Maintenance of Way Agreement, and e) the Claimant is entitled to the remedy requested as a result of the Carrier assigning scope covered work to a non-agreement ARASA supervisor.

The Carrier argues a) the Organization offered no evidence that flagging duties were reserved to the Claimant under the scope rule, which is general in nature and has been held as such, b) arbitral precedent supports the fact that flagging can be performed by any qualified employee whether they are agreement or non-agreement, c) flagging is not specifically reserved to Track Subdepartment employees, and ARASA supervisors and non-agreement managers have performed the work in the past, d) although the Organization claims the grieved work was in connection with Gang 6133, the grieved work was in conjunction with Gangs 4005 and 4009 and lasted two days, and e) stare decisis dictates the claim should be denied.

After careful consideration of the record, the Board finds the Organization failed to meet its burden. First, the Board has previously found that flagging is not exclusive to a specific craft, and arbitral precedent supports the Carrier's position. Both sides here presented employee / supervisor statements in support of their respective positions,

which also lends support to the Carrier's claim that flagging is not scope covered work and can be performed by any qualified employee. Furthermore, the Board was not convinced that the flagging duties here were associated with the work of surfacing road crossings being performed by Maintenance of Way Gang 6133. In Supervisor Campbell's statement, he maintains the flagging was associated with Gangs 4005 and 4409, who were working on crossings at the time. According to Supervisor Campbell, he "ran the Form B to ensure the employees of Gangs 4005 and 4009 were safe and protected from trains and equipment." Based upon the totality of the record, the Board finds the Organization failed to meet its burden. Therefore, the claim must be denied.

Although the Board may not have repeated every item of documentary evidence nor all the arguments presented, we have considered all the relevant evidence and arguments presented in rendering this Award.

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 1st day of March 2019.

LABOR MEMBER'S DISSENT
TO
AWARD 43431, DOCKET MW-43496
(Referee Paul Betts)

The Majority's decision has multiple flaws in its reasoning requiring a dissent.

The Flagging Was In Connection With Gang 6133

The Majority's finding that it "was not convinced" that the work was in connection with Surfacing Gang 6133 is not supported by the record in this case. The Carrier never denied that the flagging work was in connection with Gang 6133. Rather, the Carrier asserted that Gangs 4005 and 4409 were being protected. The fact remains that the supervisor was performing Maintenance of Way flagging protection for Surfacing Gang 6133 in addition to Gangs 4005 and 4409. Under these facts, filing another claim for Gangs 4005 and 4409 would have been duplicative. The Carrier would have been the first to point out that the flagging duties were already claimed when the Organization filed the claim for flagging duties for Surfacing Gang 6133 as all three (3) gangs were working together. Unfortunately, this was not the only mistake made by the Majority. The Majority further erred in its findings that Carrier statements weakened the scope coverage of this work. The pertinent part of Award 43431 held:

> "Both sides here presented employee/supervisor statements in support of their respective positions, which also lends support to the Carrier's claim that flagging is not scope covered work and can be performed by any qualified employee."

The Carrier's Statements Were Vague and Unverifiable

The Majority's reliance upon the Carrier's vague and unverifiable statements allowed the Carrier to erode the reservation of work under the Agreement and is in serious error. In support of its position, the Organization provided eight (8) detailed statements from Maintenance of Way employes with verifiable facts which the Carrier had the data to refute but did not do so. On the other hand, the Carrier provided four (4) vague, unspecific and thus unverifiable statements. We will hereinafter address the statements provided by the Carrier.

The first statement was from Supervisor Campbell who was the supervisor that performed the Maintenance of Way work. The statement does not contain a reference to a specific flagging event performed by supervisors in the past that the Organization could investigate. After all, circumstances change, the Organization is not always aware of the Carrier's actions and has historically challenged similar violations when it has been aware of them. The manager's assertion of past practice was nothing more than: *"I have also performed this same work as a Supervisor"* **(Organization's Submission, Attachment No. 1 to Employes' Exhibit "A-7")**. Such a vague statement would never be sufficient for the Organization to establish any practice under any

standard of review. Accordingly, the Majority's reliance on this statement was improper. Ironically, Supervisor Campbell tacitly acknowledges this as bargaining unit work because he admits that he initially offered the work to Maintenance of Way employes, but he contended that no one from the gang was comfortable doing it. Of course, the Carrier could have easily found a Maintenance of Way employe to perform the work, but it was more convenient to violate the Agreement. In this connection, the Claimant could have performed this work. Ultimately, Supervisor Campbell's statement supports the Organization's position more than the Carrier's if the Majority had only carefully analyzed the details of the statement and not simply used it to rubber stamp the Carrier's position.

The second and third Carrier statements are from Manager Curt Nystrom. Of his two (2) statements, only one (1) describes a specific event and, when he describes that event, he acknowledges a Maintenance of Way bridge flagman runs the Form B's but then goes on to describe an event that required him to perform Form B work. Again, the Organization cannot investigate vague unspecific claims and it was more than likely that the Organization would have filed a claim had it known about a supervisor performing Maintenance of Way flagging like it has dozens, if not hundreds, of times. The fourth and final statement contains information about the Signalmen Department obtaining Form B's for signalmen work. Just like flagging for work that has the possibly of disturbing the integrity of the track or a bridge structure belongs to Maintenance of Way, signalmen have the right to perform flagging for their work. Similarly, flagging for Carmen work belongs to Carmen. There is a huge distinction between these types of work and the Organization provided eight (8) detailed statements providing verifiable facts that this type of flagging has been customarily performed by Maintenance of Way employes. Another remarkable element of this case is that in addition to the two (2) Carrier's statements which tacitly acknowledge this as Maintenance of Way work, this same referee sustained Third Division Award 43429 for the Carrier's failure to bulletin a flagging assignment under the Maintenance of Way Agreement because the assignment lasted more than thirty (30) days.

Furthermore, even if the <u>one (1)</u> specific event outlined by the Carrier management statement was true and accurate where a supervisor allegedly performed flagging duties because the Maintenance of Way bridge flagman had worked sixteen (16) hours were true, it is very possible that the Organization was not aware of this event, or that instance represents a highly extraordinary circumstance and would do nothing to remove the work reservation under normal circumstances such as there were in this claim. Cited in the Organization's submission is Third Division Award 24435, which held:

> "*** Track supervisor Thomas was not contractually authorized to perform the work herein in dispute. This Board has ruled on numerous occasions that work which belongs to those covered by a collective bargaining Agreement cannot be

> "given away to others who are not covered by said Agreement **except in extraordinary circumstances** (Third Division Award 19263 inter alia). No evidence of a substantial nature has been presented to this Board to suggest that such circumstances herein hold." (Emphasis in bold added)

The above award is perfectly harmonious with other awards that reject exclusive performance standard of review when supervisors are performing bargaining unit work. This is because there may have been extraordinary circumstances in the past where a supervisor performed work or instances where the Organization was aware and filed claims.

The Organization Does Not Have To Establish Exclusivity

This brings up the third issue we are compelled to address which is the Majority's reference to exclusivity. The Majority held in part:

> "The Board finds the Organization failed to meet its burden. First, the Board has previously found that flagging is not exclusive to a specific craft, and arbitral precedent supports the Carrier's position."

The Majority is outright wrong with its reference to exclusive performance. While it refers to unnamed Carrier referenced awards, it completely ignores the above points, as well as the awards cited within the Organization's submission for this dispute rejecting exclusivity when the work involves supervisor performing agreement covered work. These awards including Third Division Award 33852 (citing Awards 25991 and 28349) and Third Division Award 41353. The relevant part of Third Division Award 33852 reads:

> "**Carrier's exclusivity argument is misplaced. The Board has held on several occasions that the Organization need not establish that Agreement-covered employees exclusively performed the work in question when the claim involves work performed by Supervisors**. See, e.g., Third Division Awards 25991 and 28349. As the Board observed in Award 28349:
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> > 'The Carrier also bases its defense on the alleged non-exclusivity of supervisory work, not resting solely with B&B Foremen. This argument is not persuasive here .... [T]his is not an appropriate instance for the exclusivity test. This is not a dispute as to which craft, subdivision of craft, or classification is appropriate; rather, it is a Claim concerning the performance of Agreement work by a non-represented supervisory employee.'

> "We see no reason to deviate from past decisions of the Board. Accordingly, we reject Carrier's defense based on the allegation that the Organization cannot establish its exclusive right to perform the work at issue." (Emphasis in bold and underscoring added)

The Majority just ignored these awards and provided a finding opposite to well-settled precedent of the Third Division without any explanation whatsoever. The Majority's failure to acknowledge or distinguish these awards is troubling and leaves us with no explanation regarding its logic or thought process. These awards (along with the many other on this issue) represented decades of precedent that exclusive performance is an improper test when the claim is against supervisors performing agreement covered work.

The Majority refers to unnamed Carrier awards in support of its findings on past practice, but only one (1) on-property award was cited by the Carrier on this record (Award 8 of Public Law Board No. 4219) and it had nothing to do with flagging work. In fact, one (1) of the Carrier's main arguments in its submission was that Third Division Award 41101 dealt with the same issue and stare decisis should apply. However, Award 41101, while involving this Carrier, was decided under a different agreement. Moreover, Award 41101 actually supports the Organization's position that the work should be performed by Maintenance of Way employes as it was a claim between two (2) BMWED represented employes over the proper assignment of the work. So to follow the Carrier's logic, under Award 41101, the work should have been assigned to a Maintenance of Way employe. The Carrier also cited Awards 37959 and 40327. It should be noted that both of the awards were interpreting different collective bargaining agreements than the one involved herein. However, both awards dealt with a dispute between two (2) BMWED represented employes over the proper assignment of flagging work.

Moreover, none of the awards cited by the Carrier involved work that has the potential to disrupt the integrity of the track or a bridge structure or work customarily performed by Maintenance of Way forces. The Carrier's attempt to generalize flagging work as something everyone performs, knowing full well that specific crafts perform specific flagging duties in connection with the work they perform, was unfortunately successful with the Majority. What is even more unfortunate is that the Majority based its logic on a set of awards that do not even support the Carrier's position and completely ignored the Organization's awards.

Conclusion

The findings in this award are not well reasoned. They are based on assertions not supported by the record. Moreover, the Carrier's vague statements were used to establish a practice without any details whatsoever. Finally, the awards cited to the Board were ignored or

misused to rubber stamp the Carrier's position without any analysis as to the specific awards being cited. A review of the content of the awards shows that the only on-point awards were those cited by the Organization. Arbitral decisions like this shake the very foundation of the Section 3 process by undermining agreement rights that were obtained over decades of negotiations. In fact, not only do Maintenance of Way employes customarily perform certain types of flagging, its core foreman work and arbitration awards like this have the ability to rewrite agreements and remove work forever. For all of the above-mentioned reasons, I must respectfully dissent.

Respectfully submitted,

Zachary C. Voegel
Labor Member