

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44009
Docket No. MW-45444
20-3-NRAB-00003-190179**

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

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

PARTIES TO DISPUTE: (

(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The agreement was violated when the Carrier assigned two (2) Railway Carmen employees to perform Maintenance of Way work equipment repairman duties (make repairs on RC-130 Road Crane) in the Waterville Yard on July 25, 26, 27, 28, August 5 and 11, 2017 (Carrier’s File MW-18-01 STR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Conner must be allowed twenty-six (26) hours’ straight time and two (2) hours’ overtime at his work equipment repairman rate of pay and Claimant D. Richardson must be allowed six (6) hours of straight time at the work equipment repairman rate 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 matter involves the assignment of employees represented by the Brotherhood of Railway Carmen ("BRC") to perform maintenance and repair work on the RC-130 road crane on several dates in July and August 2017. Specifically, Carman Brian Kibler was assigned on Tuesday, July 25, 2017 to change an air hose on the RC-130 and to change two tires on a tag; on Wednesday, July 26, 2017, Mr. Kibler and Railway Carman Adam Bolduc were assigned to change wheel seals on the RC-130; on Thursday, July 27, 2017, Mr. Kibler and Mr. Bolduc were assigned to continue working on changing the wheel seals on the RC-130; on Friday, July 28, 2017, Mr. Kibler was assigned to change the hydraulic oil filter and the air filter on the RC-130; on Saturday, August 5, 2017, Mr. Kibler was assigned to repair the PTO engage rod on the RC-130; and on Friday, August 11, 2017, Mr. Kibler was assigned to change the spoke hub studs and replace the hub oiler cover on the RC-130.

The record reflects a handwritten statement from Mr. Kibler stating in relevant part that:

"I have no training on repairing cranes or heavy equipment. I have never worked on cranes or heavy equipment."

The record also contains a handwritten statement from Mr. Bolduc, which states in relevant part that:

"I have never been trained to work on any cranes or heavy equipment nor have I any experience in doing such tasks."

The record contains a statement from Claimant David Conner, a Maintenance of Way employee and a Work Equipment Repairman, which states in relevant part that:

"I David Conner, 919857, want to state the following about the RC 130.

I have worked for Pan Am for over 25 years and myself and my coworkers have customarily and historically made repairs and maintained this road crane (RC 130). Myself, I have been sent on the road to replace coolant hoses, replace starters, fix electrical issues, etc.

Myself and my Work Equipment coworkers have done in house brake jobs, replaced hydraulic hoses and cylinders. . . .”

The record also contains a statement from Paul McCaw, a Maintenance of Way employe and a Work Equipment Repairman, which states in relevant part that:

“My name is Paul D. McCaw. I am employed at Pan Am Railways. I started on 9-25-01. I am a Work Equipment Repairman.

I have been working on cranes since I started. From the grove crane, gallion crane, 250 ton wreck crane, RC130, RC75, and RC110 wreck cranes. As a Work Equipment Repairman I have covered derailments. Our main job on a derailment is to keep all the equipment running, including the cranes. I have been called in on overtime to go to Rumford and change all the U-joints and steady bearings on the RC-75. I have been called in to fix numerous hydraulic leaks on most of the cranes. We have always serviced and made repairs necessary to all the cranes. It is our work. Period.”

(Spelling as in original.)

The record reflects a memorandum, dated June 6, 2018, from Donald T. Silk, Jr., the Carrier’s General Manager of Motive Power, to Anthony F. Lomanto, the Carrier’s Vice President of Human Resources. The memorandum states in relevant part that:

“I have been employed at Pan Am Railways in many different capacities for twenty-four years.

From 1994 to mid-1996 I worked as an auto-unloader at the Ford Facility in Ayer and had little to no exposure to AWE at the time.

From 1996 to 2001 I held a machinist position in Lowell. In that time, we used the AWE shop, other crafts, and outside vendors for repairs when AWE was too busy working equipment and or the job was outside of their expertise. The vehicle that I operated at the time was a 1996 International 4700. This vehicle frequented outside shops such as Taylor and Lloyd in Bedford, Ma and Fletchers Sandblasting in Epping, Nh. In

one such case when the driver's seat was worn out AWE purchased the seat from Simpsons in Lawrence, Ma and I personally changed the seat in the Lowell Yard. In another instance on a Saturday I lost the alternator on my way from Ayer to Lowell, I called the AWE manager at the time, he ordered me the part, opened the AWE shop and I alone changed the alternator.

From 2001-2004 I was employed as an AWE mechanic and had first hand exposure to the department. In my time as an AWE mechanic I can personally attest to the fact that we used outside vendors as well as other crafts quite frequently to perform repairs for the carrier.

From 2004 on I have been in Management and have many times used outside vendors and or other crafts. More often than not we would send our cranes out for major work. The RC130 spent months in NJ having the hydraulic system rebuilt from the ground up. The RC75 has had extensive engine work done at Mahoney & Sons in Brentwood, Nh. The Waterville car shop and back shop have historically performed repairs for the carrier as well. AWE frequently uses the car shop Fabricator when they need something straightened and welded and the engine house electricians have many times repaired the electrical components on the cranes.

As you can see from the above information outsourcing/cross crafting this work has been common practice during my career. I have personally done it as a craft employee and it continues today. This is a necessary act to keep the railroad fluent.”

(Spelling as in original.)

The record further reflects a memorandum, dated June 3, 2003, from William Mayo, former Superintendent of the Carrier's Waterville facility, to Kurt W. Bruce, then Personnel Officer for the Carrier. The memorandum, which appears to have been prompted by a claim filed in April 2003, states in relevant part that:

“Kurt, Mr. Conner claims that the type of work that Machinist Michaud performed has been historically, traditionally, and customarily done by Work Equipment Maintainers. Actually, it has historically been

performed by the Shop Crafts here in Waterville long before there was a Work Equipment Shop in the Mechanical Facility (circa 1992).

Different crafts has worked repairs they were capable of performing on equipment assigned to them (forklifts, cranes etc.)

The BMW contract gives Work Equipment Maintainers all repairs to 'work equipment' which is equipment used for track maintenance - not shop equipment. They have been used to make repairs to shop equipment, but really only to the extent that employees in the shop either did not have the time or tooling to complete them. . . ."

(Spelling as in original.)

Article 1, Scope, of the Agreement states in relevant part that:

- "1.1 The rules contained herein shall govern the hours of service, working conditions, and rates of pay of Engineering and Mechanical Department "employees represented by the Brotherhood of Maintenance of Way Employes (BMW) who are working on Track, Bridges and Buildings, Work Equipment Maintenance, or Welding Plant.
- 1.2 These rules do not apply to supervisory forces above the rank of foreman nor do they apply to employees covered by other agreements. . . ."

Article 5, Seniority Classes, of the Agreement states in relevant part that:

"The seniority class and primary duties of each class.

....

5.3 Work Equipment Sub-Department

1. Work Equipment Repairmen:
Repair tools, machinery, and equipment. . . ."

The claim was discussed by the Parties in conference on April 12, 2018.

The Organization asserts that work of a class belongs to those for whose benefit the contract was made, such that a delegation of such work to other employees not covered by the Agreement here is a violation of the Agreement.

The Organization contends that the RC-130 crane is a road crane owned by the Carrier and that it is, therefore, “equipment” and/or “machinery” for purposes of Article 5.3 of the Agreement. The Organization further notes that the record – including statements from both Maintenance of Way employees and Railway Carmen – reflects that the work of repairing the RC-130 crane has historically and customarily been performed by Maintenance of Way employees and not by Carmen; the Organization need not show that the work has been exclusively performed by Maintenance of Way forces. See, e.g., Third Division Award No. 39736. The Organization argues that, for these reasons, this work therefore belongs to the Maintenance of Way forces. The Organization points out that the Carrier has not disputed that Maintenance of Way forces have performed this work and other similar work in the past.

The Organization asserts that the fact that the Carrier has contracted out certain major repairs of the RC-130 crane is irrelevant here, as the issue here relates to whether repair work on the RC-130 crane that is performed in-house is performed by Maintenance of Way forces or Railway Carmen. None of the evidence adduced by the Carrier addresses that question.

The Organization notes that the question of who uses, rather than repairs, the RC-130 crane is similarly irrelevant; the fact that Carmen use the crane is not dispositive as to the question of which group owns the work of repairing the crane. The Organization further notes that the BRC has not disputed that the work of repairing the RC-130 crane is properly that of Maintenance of Way employees; rather, Railway Carmen have provided statements supporting the Organization’s position in this case. The Organization points out that, were the BRC to have believed that such work belonged to its members, in whole or in part, one would have expected the BRC or its members to have taken a different position in this matter.

The Organization maintains that the Carrier’s reference to PLB No. 5606 Award No. 85 as reflecting some acquiescence by the Organization is inapposite, as the

Parties jointly requested that that claim be withdrawn without prejudice to the Organization's right to advance a claim of like nature in the future.

The Organization argues that the Board should not accept the Carrier's invitation to limit Article 5.3(1) to on-track vehicles, as there is no basis to modify the Agreement to provide for such a limitation.

The Organization contends that the Carrier's reference to the "tug" vehicle is inapposite, as the Organization has never claimed that repair or maintenance work on the "tug" is properly the work of Maintenance of Way employees.

The Organization asserts that, because the Maintenance of Way employees were improperly denied the opportunity to perform the work at issue here, the appropriate remedy is to compensate the Claimants for the same straight time and overtime hours worked by the Carmen on the claimed work.

The Carrier asserts that the Organization, which has the burden of proof here, is attempting to expand the language of the Agreement beyond what the Parties intended the language of the Agreement to mean; it is inconceivable that the Parties would have agreed to permit Maintenance of Way employees to repair equipment that Maintenance of Way employees do not use as part of their scope of work. The Carrier notes that the RC-130 crane is used exclusively by Carmen in their own scope of work. The Carrier is concerned that the Organization may subsequently seek to claim the right to repair other vehicles used exclusively by other crafts, such as the "tug" used by the Carmen, despite never having previously claimed such vehicles as "equipment" as to which Work Equipment Repairmen have a contractual right to repair.

The Board carefully reviewed the record, the Submissions, and the arguments of the Parties at the Hearing.

The Board finds that the Carrier violated the Agreement when it assigned the repair of the RC-130 crane to Railway Carmen rather than to Maintenance of Way employees. The work of repairing the RC-130 equipment was not shown to be inconsistent with the description, set forth in Article 5 of the Agreement, of the work performed by Work Equipment Repairmen.

The record developed on the property does not establish that any crafts or classes of employees other than the Work Equipment Repairmen represented by the

Organization have performed maintenance or repair work on the RC-130 crane. The record contains statements from Work Equipment Repairmen, who asserted that they had performed maintenance and repairs on the RC-130 crane, as well as statements from the same Carmen who were assigned the repair work in dispute here; the Carmen asserted that they had never before performed such work on the RC-130 crane. The Carrier would be expected to have full knowledge of when, where, and by whom such work has been historically assigned. The Carrier, however, provided no specifics as to those matters; had records of other crafts or classes of employees performing maintenance or repair work on the RC-130 crane existed, one would have expected the Carrier to have provided that documentation as part of the record here.

While the record does reflect that contractors have performed repairs on the RC-130 crane, that evidence relates to the contracting out of work to third parties, rather than the issue of work jurisdiction among the Carrier's forces that is raised here. Moreover, the subcontracted work, as described in the statements supplied by the Carrier, appears on this record to relate to major overhauls and repairs, rather than the more routine maintenance and repair work at issue here.

For these reasons, the Board finds that the Carrier violated the Agreement when it assigned the repair of the RC-130 crane to Railway Carmen rather than to Maintenance of Way employees.

With regard to remedy, no basis was shown to find that the total number of hours sought by the Claimants was improper. The Board, however, finds that no persuasive showing was made as to why any of the hours sought by the Claimants should have been paid at overtime rates of pay rather than at the applicable straight time rate. The fact that the Railway Carmen performed a portion of the disputed work on overtime is not dispositive as to whether the Work Equipment Repairmen would also have performed the work on overtime. The Board, therefore, directs that the Claimants be compensated for the total number of hours claimed, with all hours paid at the applicable straight time rates of pay.

AWARD

Claim sustained in accordance with the Findings.

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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 28th day of April 2020.