

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44425
Docket No. 43577
20-3-NRAB-00003-190614**

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

**(BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION – IBT RAIL CONFERENCE**

PARTIES TO DISPUTE:

**(UNION PACIFIC RAILROAD COMPANY (former
Southern Pacific Western Lines)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned seven (7) System Gang employes from Gang 8547 to perform regular track maintenance duties (repairing and/or replacing a rail defect behind the rail detector) near Mile Post 797 on the Gila Subdivision on December 22, 2014 instead of Claimants J. Turner, M. Murillo, J. DeAnda, A. Baldenegro, A. Guerra, F. Flores and F. Burkhardt (System File T-1505S-901/1620236 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants J. Turner, M. Murillo, J. DeAnda, A. Baldenegro, A. Guerra, F. Flores and F. Burkhardt must now each be paid 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.

On December 22, 2014 the Carrier used employees from Gang 8547 to perform regular track maintenance work including repairing and/or replacing a rail defect behind the rail detector near Mile Post 797 on the Tucson Western District. On January 5, 2015, the Organization filed the instant claim on behalf of 7 Claimants asserting the Carrier violated the Agreement, specifically Rules 1 (Scope), 2 (Sub-Departments), 5 (Seniority) and 25 (Work Limits). The parties were unable to resolve the matter after processing it in the normal and customary manner on property. This dispute is now properly before this Board for final adjudication.

The Organization argues the listed Claimants are regularly assigned to the Tucson Western District and were available, fully qualified and willing to perform the disputed overtime work had they been given an opportunity to do so. The Organization also asserts that the employees assigned (Gang 8547) held no seniority rights to the disputed work under the Agreement.

The Carrier maintains the Organization is claiming a jurisdictional dispute and as such bears a heavy burden to prove the work belongs exclusively to the Claimants. The Carrier argues the Organization failed to meet that burden. The Carrier also points out the Organization consistently misidentified the day on which the disputed work took place. December 22, 2014 was a Monday, not a Saturday, and was a regular workday for the Claimants. The employees who performed the work did so as a part of that week's regular assignment.

The Carrier rejects the Organization's argument that the Claimants possess exclusive rights to work on a territory to which they are assigned based on language in Rule 25. The Carrier argues, the Organization is overlooking section (a) of that Rule which provides: "Except as provided in (b) of this rule, the designation of such limits will not prevent other forces from performing any work within such established limits."

The Board has reviewed the on-property record established for this dispute as well as awards cited by the parties in support of their respective positions. As noted in numerous awards (including Third Division Award 32646), where a jurisdictional dispute exists as is the case here, the Organization bears the burden to establish the merits of the case. The Agreement provisions cited by the Organization do not give the Claimants exclusive rights to the disputed work to the exclusion of all others. Nor is there proof in the record before us establishing the Claimants' rights to the disputed work based on custom, tradition or past practice. Accordingly, the Board finds the Organization failed to sustain its burden and must therefore deny this claim in its entirety.

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 13th day of April 2021.

LABOR MEMBER'S DISSENT
TO
AWARD 44425, DOCKET MW-43577

(Referee Erica Tener)

In this case, I must dissent to the Majority's finding that the Carrier did not violate the Agreement when it utilized Maintenance of Way employees who are governed under the July 1, 2001 Union Pacific Railroad Company/BMWE Agreement (hereinafter the "UP/BMWE Agreement") to perform work reserved to employees under the SPW/BMWE Agreement.

Work that is within the Scope of the SPW/Maintenance of Way Agreement is reserved to employees maintaining seniority under that Agreement, which governs the former Southern Pacific (Western Lines) territory. An exception to this work reservation is that Consolidated System Gangs can be created for specific program work over large geographic regions encompassing the four (4) collective bargaining agreements between the Union Pacific/BMWE. However, because the Consolidated System Gangs infringe significantly on seniority rights of employees, the parties agreed that Consolidated System Gang employees only work in connection with specific production/program work. System Gang forces are limited to performing large projects and program work as outlined by Appendix G, i.e., System Steel Gangs perform steel laying project work, System Switch Gangs perform switch building and laying project work, System Tie and Ballast Gangs perform tie project removal and insertion and ballast dumping, System Surfacing and Lining Gangs surface and line track relating to project work, System Pick-Up and Distribution Gangs pick up and distribute track material for project work, System Curve Gangs perform project curve relaying duties, System Welding/Glue Gangs perform project welding and gluing work, System Rail and Concrete Tie Gangs perform rail laying and concrete tie installation duties and System New Construction Gangs perform work in connection with new construction project work. Arguably, there may be some overlapping of System Gang work and such overlapping is limited to the large project work assigned to System Gangs. **Division forces retain the right to all other work reserved to them by Agreement.**

It is well established that work customarily and traditionally performed by employees covered by an agreement is reserved to them and may not be assigned to others who do not maintain seniority under the agreement. Apropos here is Third Division Award 16531 which, in pertinent part, held:

"It has long been held by this Division (as far back as Award No. 180) that work which has traditionally been that of employees covered by the Agreement cannot be unilaterally removed and given to others outside the scope of the Agreement. For more than half a century Carrier has maintained a Stationery Department at its General Offices in Atlanta. It consisted of office and shipping personnel, and handled purchasing, stocking and distribution of stationery, printed forms and office supplies. Claimants had handled the stocking and shipping operations. Effective February 26, 1965, their positions were abolished and the functions they had performed were taken over by Victor, and unrelated company."

Labor Member's Dissent

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It is unrefuted that the work occurred within the Claimants' designated seniority district but they were not given preference thereto. The principle is well established that where seniority is confined, work is also confined. In this regard, we direct attention to Third Division Award 41149 which, in pertinent part, held:

"The Board follows Third Division Awards 5413, 4667, 24480 and 24576 holding that work accruing to employees within a seniority district must be reserved for employees holding seniority on that district and cannot be assigned to an employee from another district. The Carrier did not assign the disputed work to an employee with seniority on the Northern District."

In addition, Award 10 of Public Law Board (PLB) No. 7099 and Award 5 to PLB No. 7100 have already addressed the issue of Union Pacific assigning Consolidated System Gang employees to perform work reserved to District Gangs and sustained the Organization's position. When these principles are applied to the factual circumstances herein, there can be no doubt that the Carrier violated the Agreement when it assigned Consolidated System Gang employees, who have no seniority on the Tucson Western District to perform the overtime duties on the Tucson Western District on the claim dates, instead of calling the Claimants, who do retain seniority on the Tucson Western District.

For the reasons expressed herein, I must dissent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Z. C. Voegel', written in a cursive style.

Zachary C. Voegel
Labor Member