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

Award No. 44428
Docket No. 43928
20-3-NRAB-00003-190619

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 six (6) employes from Consolidated System Gang 6050 to perform regular track construction duties (constructing and installing crossing panels) between Mile Posts 746 and 748 on the Brooklyn Subdivision beginning on March 23, 2015 and continuing through May 1, 2015 instead of employes E. McDougall, W. Allen, C. Jones, M. Rabe, L. Delano and J. Roat who were regularly assigned to the territory where the work was performed (System File AE-1505S-114/1628037 SPW).

(2) As a consequence of the violation referred to in Part (1) above, Claimants E. McDougall, W. Allen, C. Jones, M. Rabe, L. Delano and J. Roat must now each be paid seventy (70) hours at their respective straight time rates of pay and for fifty-three (53) 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.

Claimants E. McDougall, W. Allen, C. Jones, M. Rabe, L. Delano and J. Roat established and maintain seniority in the Track Sub-department under the parties' October 1, 1973 Agreement. At all times relevant to this dispute the Claimants were members of the Regional Crossing and Switch Gang (8160) governed by the Union Pacific Railroad (formerly Southern Pacific Transportation Company – Western Lines) and Brotherhood of Maintenance of Way Employes Division – IBT Rail Conference Agreement (SPW/BMWE). The Organization maintains the Carrier violated this Agreement March 23, 2015 through May 1, 2015 when it used Maintenance of Way employes governed under the Union Pacific Railroad Company/BMWE Agreement (UP/BMWE) to construct and install crossing panels between Mile Posts 746 and 748 on the Brooklyn Subdivision near Salem, Oregon, a territory governed by the SPW/BMWE Agreement. The Organization contends the following portions of the SPW/BMWE Agreement control this dispute:

- **1: Scope**
- **2: Sub-Departments**
- **5: Seniority**
- **6: Seniority Rosters**
- **25: Work Limits**
- **56: Regional Mechanized Production Gangs**
- **Appendix G**

The Organization filed the instant claim on May 21, 2015 on behalf of the Claimants named above. 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 provided historical background for this dispute. By way of summary, the Organization asserts in its letter dated August 2, 2016:

> **SPWL Regional Production Gangs are distinct from Consolidated System Production Gangs. SPWL Regional Gangs are made up of employes maintaining seniority under the SPWL Agreement and can only perform work on the SPWL territory. Consolidated System Gangs are made up of employes that maintain seniority under one of three collective bargaining agreements between Unio Pacific Railroad Company (UP, SPWL or CNW) and the Brotherhood of Maintenance of Way employes. The Consolidated System Gang Agreement (or Appendix G) is an exception to the traditional work reservation provisions of the local Agreement in that it allows for the creation of large-scale mechanized production gangs governed under the Union Pacific Agreement to perform certain types of Maintenance of Way work. Consolidated System Gangs work at locations under the jurisdiction of three collective bargaining agreements without regard to the normal seniority boundaries. Because Consolidated System Gangs encroach upon the seniority rights of employes under specific agreement, Consolidated System Gangs are limited in the scope of work they can be created to perform. The claimed work performed in this case was Maintenance of Way work performed at a location under the jurisdiction of the SPWL agreement by employes who were all assigned to positions on Consolidated System Gangs governed under the Union Pacific Agreement, and do not even have an arguable right to work because they have no work rights beyond those provided for in Appendix G.**

The Organization contends the work involved was the removal and construction of crossings and that the Agreement does not permit the Carrier to assign Consolidated System Gangs to do such work. According to the Organization the intent of the parties' Agreement is made clear by examining the language, especially that

which is found in Rule 56. This Rule gives the Carrier permission to establish certain designated gangs as Regional Mechanized Production Gangs and specifically references crossing work as an example of the type of Regional Production Gang that can be established. The parties did not intend to have Consolidated System Gangs created to perform crossing work. This, the Organization contends is evidenced by the omission of crossing work in Appendix G. The Organization rejects that Carrier's assertion this work was incidental to the tie and ballast gang's work.

The Organization takes the position that work must be performed by the employees who have customarily done it and cites PLB 7100 (Award 5) and PLB 7099 (Award 10) as precedents. The Organization provided statements from multiple SPW/BMWE employes to establish they have historically performed crossing work. The Claimants are all part of Crossing Regional Production Gang (509) that was established through Job Bulletins (Attachment No. 1 to EE A-7). Also submitted is evidence that shows the employees who performed the work were part of a Consolidated Switch Gang (6050).

The Carrier argues this dispute is jurisdictional and, as such means the Organization has a higher burden of proof. The Carrier maintains the Organization has failed to establish that the Claimants have an exclusive right to perform the disputed work over all other employees. Nor is there Agreement language, historical practice or arbitral precedent to support the Organization's claim. The Carrier directs attention to Third Division Award 38087 as precedent for jurisdictional disputes. It held:

> **With the jurisdiction of work issue thus joined, it was incumbent upon the Organization to provide probative evidence in support of the allegations of the claim. The record is devoid of such evidence. No citations to language of the Implementing Agreement were referenced that explicitly limited the scope of work that can be performed by the nine types of system gangs. Moreover, the record contains the statement of a Carrier official who had some 30 years of knowledge about the use of system gangs. The statement effectively undermined the Organization's position.**

Contrary to the Organization's argument, the Carrier maintains the work of constructing crossing panels and installing crossing pads is not independent of the system projects that were performing tie and ballast work on the Brooklyn Subdivision during the disputed time period. The Carrier argues system tie renewal projects frequently include the removal and replacement of ties and/or the entire crossing panels and rail, and that the crossing work performed was incidental to the overall capital improvement project. The Carrier refers to the following language in Rule 25:

> **(a) DESIGNATED LIMITS – Employees assigned to track gangs having fixed headquarters location will be assigned designated limits within which they are to perform work, and such limits will be provided in advertisement and assignment notices.**
>
> **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. (emphasis added)**

This language, the Carrier argues, provides a designation of work limits for headquartered work gangs but does not preclude other forces from performing work within those limits.

The Carrier rejects the notion that it broke down the work into individual components to make it fit into aspects of Appendix G and maintains that Gang 6050 performed the disputed work as part of a system renewal project taking place in the same area. The Carrier contends statements from the project manager (James Curtiss) establish that this kind of work has regularly been performed by both system and regional work groups in his thirty (35) years of employment with the Carrier. Additional evidence (written statements) of the historical practice of this work being performed by local or system forces was provided by Director Track Programs Jay Farrar, Director Maintenance of Way Thomas Luksan and Director of Track Maintenance Greg Lemmerman. The Carrier rejects the statements provided by the Organization based on their lack of any specific proof that only regional employees performed the disputed work to the exclusion of all others. In contrast, the Carrier

argues the statements it provided, came from managers and directors with vast employment history who have seen this work performed by both consolidated system employees and local forces.

The Carrier challenges the Organization's argument that the work in question is not identified in Appendix G and maintains that it is. Whether the work was replacing one tie or rail at a time, or replacing the components in one step, at its root, the work was rail, tie and ballast replacement work which is listed in Appendix G. If the parties intended to provide a more detailed framework or restrictions to the nine (9) types of work listed for system gangs in Appendix G it would have done so. As an example, the Carrier cites Side Letter No. 1, which demonstrates an instance where the parties carved out gauging work and gave limitations to who could perform such work. Appendix G does not contain such a restriction or limitation similar to Side Letter No. 1 that restricted the Carrier in the manner suggested.

Finally, the Carrier argues the remedy sought is improper and is not supported by any language in the Agreement. The Claimants in this case were fully employed at all times relevant to the dispute and are therefore not entitled to any further compensation.

The Board conducted an exhaustive review of the on-property record and awards cited in support of the parties' respective positions. There can be no doubt that this case involves a jurisdictional dispute. Longstanding arbitral precedent establishes that the Organization has a greater burden to prove the Claimants are entitled to the disputed work on the basis of specific language in the Agreement or on the basis of past practice. The Board finds that Organization failed to meet that burden.

While the Organization has shown, through employee statements, that work similar to that which is disputed here has been performed by the Claimants, it has not established they performed the work exclusively. Statements provided by the management employees establish the work has historically been performed by a mixed variety of work gangs. Appendix G lists various types of gangs that perform work that is considered system operations. Included in that list are System Tie and Ballast Gangs and System Rail and Concrete Gangs. The work as it has been described involves working with ties, ballasts and rails. It is the Board's opinion that the Agreement

grants the Carrier the right to assign this work to a Consolidated System Gang as it done in this case. Rule 25 is also clear in its meaning. Even when designated limits have been created, the Carrier is not prevented from assigning other work forces to the established limits. The Board need not consider the parties' intent when there is clear language such as found in Rule 25 and Appendix G.

Based on the foregoing and arbitral precedent including, but not limited to, Third Division Award 40211, 37847 and 38087, the Board finds the Carrier acted properly when it assigned the relevant work to Consolidated System Gang 6050. We 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 44426, DOCKET MW-43648,
AWARD 44427, DOCKET MW-43649,
AWARD 44428, DOCKET MW-43928

(Referee Erica Tener)

In these cases, I must dissent to the Majority's finding that the Carrier did not violate the Agreement when it utilized Maintenance of Way employes who are governed under the July 1, 2001 Union Pacific Railroad Company/BMWE Agreement (hereinafter the "UP/BMWE Agreement") to construct and install crossing panels. The location where the work was performed is located on territory governed by the SPW/BMWE Agreement.

As background, there are two (2) types of production gangs involved in this dispute. The Claimants are part of a Regional Production Gang under Rule 56 of the Southern Pacific (Western Lines) Agreement, which reads, in pertinent part:

"RULE 56 - REGIONAL MECHANIZED PRODUCTION GANGS

(a) The Company may establish certain designated gangs as Regional Mechanized Production Gangs (i.e. Tie, Rail, Surface, Switch and/or **Crossing**) to be referred to as 'Regional Gangs' working within the following four (4) designated mileage and geographical limits:" (underlining and bolding for emphasis)

The claimed against employes were working on a Consolidated System Gang. The pertinent Agreement language (Appendix G) is as follows:

"**Section 1.**

Effective January 1, 1998 all system gang operations listed hereinafter were combined on UPRR, WPRR, SPRR[2] and D&RGW territories and have been subject to the Collective Bargaining Agreement between UPRR and BMWE;

SYSTEM OPERATIONS (See Side Letter No. 1)

System Steel Gang Work
System Switch Gang Work
System Tie and Ballast Gang Work
System Surfacing & Lining Gang Work
System Pick-Up and Distribution Gang Work"
System Curve Gang Work
System Welding/Glue Gang Work
System Rail and Concrete Tie Gang Work
System New Construction Gang Work

There is a significant difference between a production gang created to perform work across multiple seniority districts under Rule 56 of the SPW Agreement (such as the Claimants' Regional Switch and Crossing Gang) on the former Southern Pacific (Western Lines) territory and a production gang created under the Consolidated System Gang Agreement which are gangs that are made up from employes under multiple agreements and can perform work across the entire Union Pacific Railroad, which contains four (4) separate BMWE/Union Pacific Collective Bargaining Agreements.

The creation of Consolidated System Gangs infringes significantly on the well-established seniority rights of employes under a local agreement and to limit those intrusions the parties were specific in the types of work that could be performed by these gangs as outlined in Appendix G. The work involved herein was the complete construction and installation of crossing panels which is not listed in Appendix G. Based on this fact alone, the Carrier's defense that it assigned System Gang employes to perform crossing work must be rejected because the Carrier cannot assign Consolidated System Gang employes to perform work not outlined in Appendix G. In agreeing to the language of Appendix G, the parties were specific in not including crossing work under the types of work that may be performed by a Consolidated System Gang and this Board must not accept the Carrier's invitation to rewrite Appendix G and add additional types of work not specifically referenced by the parties when they drafted and agreed to the provision. We direct attention to Third Division Award 36969 which upheld the principal of "*inclusion unius ist exclusio alterius*". Moreover, crossing work is not minor or incidental to the tie and ballast gang's work.

Notwithstanding, we established that crossing gangs are created to perform crossing renewal work under the Southern Pacific (Western Lines) Agreement. This shows that crossing renewal work is a substantial category of work. In fact, the Rule 56 Regional Gang that the Claimants were assigned to was bulletined as a Regional Switch and Crossing Gang doing this exact work on the claimed territory. Moreover, there is overwhelming evidence in the record that the employes under the SP Agreement have historically performed the crossing work involved herein.

- LOU dated May 3, 1985
- Job Bulletins for Crossing Regional Production Gang
- Statements of customary performance

The use of Consolidated System Gangs performing work outside of Appendix G has already been addressed by arbitral boards. Specifically, Award 5 of Public Law Board (PLB) No. 7100 held:

> "After reviewing the record facts, we find that the grievance must be sustained. We find that the record evidence shows the repair track work performed by the System Gang on Sunday, June 15, 003 (sic), has been historically performed by and is contractually reserved for district forces such as Claimants. Therefore, absent an emergency situation, the work should have been performed by Claimants."

In addition to the above, Award 10 of PLB No. 7099 also addressed Union Pacific's use of Consolidated System Gang employes to perform work reserved to CNW/BMWE Agreement employes and the claim was sustained in the Organization's favor.

The Majority's reference to exclusive performance as the appropriate standard is also in error. Specifically, work that is customarily performed by employes governed under an agreement is reserved to those employes as held by Award 5 of PLB No. 7100. We also point out that the Third Division (Award 37823) has rejected the Carrier's attempt to bootstrap exclusivity onto provisions limiting the types of work production gangs may perform. That award clearly rejected that Carrier's attempt to argue exclusivity in connection with a provision where the parties specifically agreed to the types of work that would be performed by its production gangs.

For the reasons expressed herein, I must dissent.

Respectfully submitted,

Zachary C. Voegel
Labor Member