

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44526
Docket No. MW-44194
22-3-NRAB-00003-210221**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

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

PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when beginning on July 1, 2015 through and including August 24, 2015, the Carrier split up System Region Gang TDSX 0003 (DS 03) into two (2) separate gangs and assigned four (4) members to perform other work supporting other division gangs working in New Mexico and Arkansas (System File T-D-4754-M/11-15-0507 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, the employees assigned to Gang TDSX 0003 (DS 03) shall' ... each receive all overtime hours of the employees that had been split up working with CG 04 pay to be at their respective overtime rate of pay for that lost work opportunity.”**

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.

Factual Background:

Commencing on July 1, 2015 and continuing through August 24, 2015, the Carrier directed the Claimants to break away from DS 03 and work in New Mexico with Gang CG 04 to perform Maintenance of Way work. For nearly two months, the Claimants remained separated from their gang. During this separation, the Carrier did not change the reporting location for DS 03 to New Mexico, nor were the Claimants assigned to positions on a gang with a designated reporting location or headquarters point in New Mexico. Moreover, the work performed by the Claimants was in no way connected to any programmed DS 03 production work.

RULE 2. SENIORITY RIGHTS AND SUB-DEPARTMENT LIMITS

- A. Rights accruing to employees under their seniority entitles them to consideration for positions in accordance with their relative length of service with the Company, as hereinafter provided.
- B. Seniority rights of all employees are confined to the sub-department in which employed, except as otherwise provided in this Agreement.
* * *

RULE 6. BASIC SENIORITY DISTRICTS

- A. Except as otherwise provided for in this rule, seniority districts for all track, bridge and building, welding and roadway equipment shall be as follows:

[See Appendix K, Paragraph 4X] * * *

**RULE 7. DISTRICT, REGIONAL AND SYSTEMWIDE GANGS
SECTION I. DISTRICT GANGS**

- A. District maintenance and extra gangs will be free to operate over an entire seniority district as described in Rule 6 A, and sectionmen will

be assigned as provided in this rule. This provision shall not apply to gangs which are assigned fixed mile post limits, so long as they are so assigned.

- B. All vacancies and new positions contemplated to exceed thirty (30) calendar days for men on district maintenance and extra gangs shall be bulletined and filled from the senior qualified applicants on sectionmen seniority rosters on the entire seniority district. Such positions and vacancies may be filled pending assignment on bulletin as provided in Rule 19.**
- C. Bulletin procedure for district maintenance and extra gangs shall conform to Rule 21. Bulletins may be posted up to thirty (30) calendar days prior to the approximate commencement of the position, and successful applicants notified later of the definite reporting date.**
- D. Employes assigned to a district gang may bid off the gang onto other bulletined assignments on their seniority district. Sectionmen may return to section crews when forces are increased, subject to agreement rules, without losing the right to displace on the gangs when subsequently furloughed or displaced.**
- E. District mobile gangs, meeting the Regional and System-Wide Production Gang (Sickles) definition, will be provided with an informational notice on the bulletin when established. The informational notice will contain the type of gangs, the anticipated work locations beginning milepost, ending milepost, and start date. It is understood that information provided concerning the anticipated schedule of work for the mobile gangs shall be for information only, shall be subject to change without notice, and shall not constitute a guarantee that the gang will perform the work specified or at the time and place specified. Appendix V contains a typical example of the form of the notice to be provided under this provision. [Seniority Districts Consolidation-Related Agreements 6/10/99, Article H2]**

- F. District Mobile gangs or, positions not meeting the Regional and System-Wide Production Gang (Sickles) definition will be provided with an informational notice. The informational notice will be provided at the time of the bulletin. The notice will describe work locations where the mobile position(s) is expected to work and the duration of the project if possible. It is understood that information provided concerning the anticipated schedule of work shall be for information only, shall be subject to change without notice, and shall not constitute a guarantee that the gang or position(s) will perform the work specified or at the time and place specified. [Seniority Districts Consolidation-Related Agreement 6/10/99, Article H3]**
- G. Each employee assigned to any district mobile gang who does not leave the gang voluntarily for a period of at least six (6) months shall be entitled to a lump sum payment annually equal to 5% of his/her compensation earned during the calendar year on that gang. Such compensation shall not exceed \$1,000 and shall be paid within 30 days of the completion of the employee's service on the gang; for mobile gangs not required to be disbanded each year, payment will be made within 30 days of the completion of each calendar year. If the company disbands the gang in less than six months, the company will be responsible for payment of the production incentive earned as of that date. This lump sum payment shall be made in accordance with Appendix FF. [Seniority Districts Consolidation Agreement 8/12/99, Section 5A]**
- H. The Work Force Stabilization (WFS) Program (Appendix U) shall apply to all district mobile gangs, and shall entitle an employee initially assigned to a WFS gang when it starts its work during the production season for the calendar year, six months of WFS work benefits or WFS unemployment benefits, subject to the terms of that Program. [Seniority Districts Consolidation Agreement 8/12/99, Section 58] * * ***

SECTION II. REGIONAL AND SYSTEM-WIDE GANGS

A. Regional and Systemwide Production gang or gangs (RS gang) may be established and work on the combined Burlington Northern and/or ATSF properties* subject to the provisions applicable to such RS gangs. Any such established RS gang working between Burlington Northern and ATSF, or exclusively on either Burlington Northern or ATSF property shall work under the existing BN RS gangs Terms and Conditions, except as amended by this Agreement and the 1996 National Agreement. In consideration of the foregoing, the Carrier will not assert that the common control provision in Article XIII (a) of the 1991 Imposed Agreement survived the 1996 National Agreement. [11/15/96 Letter of Agreement.]

*** The terms Burlington Northern and/or ATSF properties as used in this section refers to territories where employees are represented by one of the General Chairman signing this agreement or his successor.**
*** * ***

C. All new positions and vacancies on each gang shall be bulletined to all of the seniority districts upon which that gang is scheduled to be worked. Bulletins may be issued as far in advance as is consistent with the objectives of full and timely manning of all gangs and to assure the employees of as much choice as is practicable. In order to maximize the manning of these gangs with volunteers and to minimize involuntary assignments, new positions and vacancies for which there are no applicants after the first bulletin may be rebulletined to neighboring (not necessarily adjoining) seniority districts upon which the gang is not scheduled to work, but which have a surplus of manpower. The General Chairman may timely notify the Carrier of any seniority districts to which any particular gang shall not be bulletined due to the short time which the gang is scheduled to work on the territory of that seniority district. The bulletin procedures shall follow those contained in Rule 21, as amended. [Terms and Conditions] * * *

F. Positions bulletined as above provided, will be assigned to the senior qualified applicants eligible to bid on that particular position from the

seniority districts to which bulletined, as if the applicants were all from the same seniority roster. Ties between applicants with identical seniority dates from different seniority districts will be resolved on the basis of chronological age. [Terms and Conditions] * * *

- I. Employees assigned to regional or systemwide production gangs, including recalled furloughed employees and new hires, may exercise seniority to bulletined positions outside their gang after they have been assigned to the gang for thirty (30) calendar days* (the day that the employee reported to the gang is the first day of assignment). After such time, the employee will be entitled to bid for other jobs with the carrier, subject to the limitation that no more than ten percent of a gang may bid off during a one week period. [11/15/96 Agreement, Article IX; 9/26/96 National Agreement, Article XVI, Section 3 (b)]
- Note- Bids will be also accepted from employees working on the current year's Regional/System Gangs for work on the following years' Regional/System Gangs. [11/17/95 Agreement, Appendix K, Paragraph CC] * * *

RULE 26. STARTING POINT

- A. Time of employees will start and end at designated assembling point. Designated assembling or starting point will be interpreted as follows:
 - (1) Section Forces - Tool House. * * *
- B. Paid time for production crews* that work away from home shall start and end at the reporting site designated by the appropriate supervisor by the end of the previous day, provided the reporting site is accessible by automobile and has adequate off-highway parking. If a new highway site is more than 15 minutes travel time via the most direct highway route from the previous reporting site, paid time shall begin after fifteen (15) minutes of travel time to the new reporting site from the carrier designated lodging site for it, and from the new reporting site to the carrier designated lodging site for it, on the first

day only of such change in the reporting site. [7 /29/91 Imposed Agreement, Article VIII]

"* Note: Production crews include all supporting BMW employees who are assigned to work with, or as a part of, a production crew. [7/29/91 Imposed Agreement, Article VIII] In order that there shall be no duplication, time paid for in accordance with this provision shall not be included in determining compensation that may otherwise be due an employee for travel time under the Award of Arbitration Board No. 298, as amended, or similar provisions. [7/29/91 Imposed Agreement, Article VIII] Any unpaid time traveling between the carrier-designated lodging site and the work site is restricted to no more than thirty (30) minutes each way at the beginning and end of the work day. [9/26/96 National Agreement, Article XVII]"

Position of Organization:

The Carrier extracted the Claimants from their regularly assigned positions on Gang DS03 and required them to report and work at a location that was not their gang's designated reporting location. The record establishes that in July and August 2015, the Carrier directed the Claimants to separate from their assigned gang to perform work. In the Organization's assessment, this constitutes a violation the clear provisions of the Agreement and the obvious intent of the parties.

The inarguable intent of the parties in drafting Rule 7 was that while the Carrier may create system gangs to perform specific production work, local and/or section forces are protected and will perform their traditional maintenance work. It is also clear that the parties did not create Rule 7 with the understanding that the Carrier could create a system gang only to break it apart, assigning the smaller segments of the gang across its system to perform individual assignments.

The parties plainly understood that system gangs would remain a unified entity; all members of a gang are to report to a specific individual. The parties would not and did not intend the absurd result of having employees report to a foreman across several thousand miles of separation.

Rule 26 establishes the workday starts and ends for system gang employees at the reporting site designated by the appropriate supervisor. This rule is extremely

relevant as it recognizes the designated reporting location for the gang. This is consistent with Rule 7 which speaks to system gangs rather than individual employees on a system gang.

In this case, the Carrier simply rendered all of those negotiated and imposed conditions meaningless simply by directing 20% of the gang employees, along with over 50% of the gang's machinery consist, to perform work other than that work programmed for, and performed by RSG Gang DS03. Had the Carrier originally attempted to create a gang with less than twenty (20) employees and only three (3) machines, the gang as a whole could not have been created as a RSG gang, due to a lack of the mandated minimal number of employees and machinery consist. The Organization concludes that Carrier has effectively circumvented clear and specific negotiated restrictions of the Agreement.

As to the Carrier's defense that the work changed from wood ties to concrete, this assertion must fail. Carrier should have, and would have known that the types of ties involved would be both wood and concrete in October of 2014, or earlier, when the work program was compiled. Rule 7 allows the Carrier to exchange assigned machines within a gang, from those capable of working on concrete ties, to machines capable of performing the work on wood ties, without the necessity of the re-bulletining of the machine operator positions. That was imposed, pursuant to Carrier demands, as the means to resolve such differing work requirements. It is of interest to note, that the applicable job bulletin failed to disclose any such identifying notation, or perceived need.

Carrier documents establish that DS03 was never created as a gang in support of any other Region/System Gang. The reporting site is provided for. The Carrier's position could ultimately lead to the Carrier completely breaking down the seniority divisions of Rule 6 (and the traditional headquartered local and/or section forces) and replacing them with system gangs. The Board is not permitted to rewrite the contract in this way. Had the Claimants been properly called and assigned the subject work in dispute, the Claimants would have received compensation at the overtime rate of pay. Reimbursement for this overtime is the proper remedy in the Organization's view.

Position of Carrier:

BNSF issued a notice of its intent to establish Region/System gangs for the 2015 work season on October 21, 2014 and included the work programs for 52

Region/System gangs, including DS03. The notice was reissued on October 29, 2014 due to a change in the production rail gang work programs, and revised work programs were included. The parties met on November 5, 2014 to review and discuss the 2015 Region/System gang work programs. During this discussion, the Company advised that both DS02 and DS03 would perform distress work behind the various construction gangs.

Four DS03 lag machine operators were left in New Mexico to finish concrete tie work while the remaining crew members moved on to the next work project in Kansas City (which happened to be on wood ties). Four DS03 lag machine operators were left in New Mexico to finish concrete tie work while the remaining crew members moved on to the next work project in Kansas City, which was on wood ties. Clearly there was no reason for the whole gang to stay behind when only lag machine operators were needed.

The Carrier maintains that the locations of concern in this case shifted from a location with wood ties to one with concrete ties, it to split the gang. Four members to were redirected to perform DS03 programmed work in New Mexico and Arkansas. Doing this maximized efficiency, allowing Regional systems gangs and crews have an outline of where they will be. De-stress work behind construction gangs was done in 2014. Different equipment is used for wood versus concrete ties. The work was planned for and done by DS03; it overlapped so there was no rule violation. Though we separated the two functions, the employees remained the same gang. Four volunteered to stay behind and complete the work. The next work location was Minneapolis and others went ahead to start there. The involved employees never went outside their anticipated work; they stayed within the confines of the 2015 work program.

Neither the Organization nor Claimants have presented any evidence that the Claimants suffered any monetary loss, nor has there been any showing of damages made part of this record. The Claimants were fully employed during the claim period and suffered no loss of earnings. The damages as claimed are excessive and an attempt to gain a windfall profit for the Claimants.

Analysis

The parties to the Agreement have pains-takingly negotiated provisions addressing the creation of region/system gangs. This was done in recognition of the

Carrier's need for flexibility in the utilization of these gangs and in recognition of the Organization's desire to protect both seniority and predictability in bulletined work. Rule 7, Section 1(A) assures that District maintenance and extra gangs will be free to operate over an entire seniority district. Section 1(E) gives the Carrier the right to change the schedule of work without notice: "It is understood that information provided concerning the anticipated schedule of work for the mobile gangs shall be for information only, shall be subject to change without notice, and shall not constitute a guarantee that the gang will perform the work specified or at the time and place specified." Section 1(F) reserves the same flexibility to the Carrier for gangs which do not meet the Sickles definition. It can be readily seen that the parties undertook to expressly articulate areas where the Carrier's flexibility would be protected.

The Organization has correctly pointed out that the provisions negotiated between the parties envision a single location from which the gang operates. Rule 26(B) refers to "the reporting site" in the single tense. This is an express contract term articulating the intent of the parties. Had they anticipated multiple contemporaneous locations, they would have referenced plural locations. They did not. Instead, Rule 26(B) very plainly refers to a single location.

Likewise, Rule 26(B) also envisions only one designated lodging site in support of the single reporting site, and distinguishes a new lodging site from a previous one. This language is properly interpreted to provide for a single lodging site which is moved when the reporting site is relocated.

The Carrier has argued that splitting the gang was needed for efficient use of the workforce when the gang's work changed from wood ties to concrete. The Organization points out that the Carrier should have, and would have known that the two types of ties would be involved back in October of 2014, or earlier, when the work program was compiled. Rule 7 permits the Carrier to exchange assigned machines within a gang, without the need to re-bulletin the machine operator positions. The Organization asserts this flexibility was included at the request of the Carrier, as the proper means to address differing work requirements. This argument is persuasive. If gangs are to be subject to splitting as needed, the parties would have said so. Instead, their selected language clearly and expressly anticipates the existence of a single location for gangs, which is moved when the gang moves.

Though the Organization has established a violation of the Agreement, it has not established the requested remedy as reasonably related to any damages suffered. It

follows that the Carrier will be ordered to cease and desist from splitting gangs into multiple locations. In the event of violation of this Order, a monetary remedy may become appropriate.

Claim granted in part. The Carrier shall cease and desist from splitting regional system gangs into multiple locations.

AWARD

Claim sustained in accordance with the Findings.

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 8th day of October 2021.