

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 45062  
Docket No. MW-46569  
24-3-NRAB-00003-210538**

**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: (**  
**(Keolis Commuter Services**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

**(1) The Agreement was violated when the Carrier assigned employees to perform District Unit material distribution duties but failed to properly issue travel allowance payments in accordance with Rule 29 beginning February 1, 2020 and continuing (Carrier's File BMWE 08/2020 KLS).**

**(2) As a consequence of the violation referred to in Part (1) above, Claimants J. Sweeny, A. Picano, V. Nesbitt, R. Goscinak and F. Cogliano shall each be compensated the Per Diem payments of \$34.50 for each work day assigned to work at the capacity of a District Unit.”**

**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:**

Claimants were maintenance employees assigned to distribute bundles of track ties in multiple locations in preparation for tie installation. Material Distribution Gangs are entitled to a *per diem* which Claimants did not receive.

Rule 29 regarding district units states as follows in pertinent part:

**I. DISTRICT UNITS**

AMTRAK may establish one or more of the following District Units not assigned fixed headquarters to work over a Seniority District.

1. Tie Installation Unit
2. Surfacing Unit
3. Mechanical Brush Gang
4. Rail Laying Gang
5. Undercutting Gang
6. Welding/Joint Elimination
7. Switch and Rail Renewal
8. Bridge and Building Construction Unit Auxiliary forces that may work in conjunction with the above units:

1. Crossing Gang
2. Material Distribution Gang

**II. NOTICE TO BE GIVEN**

When AMTRAK intends to establish a district unit, it shall give at least thirty (30) days written notice thereof to the General Chairman, such notice to contain information relative to the following:

1. Type of production unit.
2. Description of territory over which it is programmed to work.
3. Length of time production gang will operate.
4. Number of positions in each classification assigned to the unit.
5. Work week
6. Hours of assignment.

### **III. ASSIGNMENT TO POSITIONS**

1. AMTRAK will bulletin all positions in the unit to the involved seniority district in accordance with the bulletining rules of the Agreement.
2. Assignment will be made in accordance with the assignment and bulletining rules of the Agreement.
3. Vacancies in the units subsequent to its establishment will be advertised to the involved seniority district in accordance with the bulletining rules.

### **IV. INCENTIVE ALLOWANCE**

1. Under the circumstances provided in V.4 an incentive allowance of 65¢ per hour for all hours worked will be applicable to members of District Units. The incentive allowance shall be considered separate and apart from the basic rate of pay and shall not be subject to general wage increases.

#### **Position of Organization:**

The Carrier failed to properly bulletin the positions in question and thereby avoided paying the rate that would otherwise be due. This was in violation of the applicable provisions of the parties' Agreement and warrants remedy as specified in the claim.

#### **Position of Carrier:**

As set forth in Rule 29 of the Agreement, the Carrier has the right to create what is known as a "Material Distribution Gang" to do specific distribution work unfixed from a seniority district. Employees who are part of those Material Distribution Gangs are entitled to a substantial *per diem* pay increment if they are assigned to a Material Distribution Gang. The Carrier does not always create Material Distribution Gangs, but instead uses its business judgement to determine when they are right for the project at hand based upon the level of materials distribution required. There is nothing in either the Agreement or past practice that mandates the creation or permanent maintenance of a Material Distribution Gang. Organization members perform distribution work when there is no Material Distribution Gang for a project and are not paid a *per diem* for that work.

The Organization is seeking to impermissibly expand contractual rights through this grievance. It is well settled that claim arbitration is not the proper venue to gain such new rights and that boards of adjustment are without authority to create such rights. A finding that *per diem* rates apply based on job duties of Claimants rather than on Claimants' placement in a Distribution Crew is contrary to the plain language of the CBA.

**Analysis:**

The language of the Agreement is clear and unambiguous. It allows the Carrier to establish a Material Distribution Gang with no assigned fixed headquarters, to work in conjunction with District Units. Use of the word "may" to express the parties' intent makes it clear that the decision regarding establishment of such gangs is a matter of managerial discretion.

The Organization has not presented any evidence to support its allegations that the Claimants in question worked as a *de facto* Material Distribution Gang. As a result, the Board lacks a factual basis for concluding that management abused its discretion in violation of the parties' Agreement.

**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 31<sup>st</sup> day of October 2023.