

## Public Law Board No. 6204

### Parties to Dispute

Brotherhood of Maintenance of Way	)	
Employees	)	
	)	
vs	)	Case 30/Award 30
	)	
Burlington Northern Santa Fe	)	

### Statement of Claim

1. The Agreement was violated when the Carrier assigned Seniority District 4 Bridge and Building (B&B) employees to perform work on Bridge # 1.03 on Seniority District 7 in the vicinity of Ashland, Nebraska on October 15-19, 1998 to the exclusion of District 7 B&B Foreman R. A. Larimer, First Class Mechanic - Carpenters S. E. Zimbelman, T. J. Schutz, and L.A. Watson and Truck Driver K. B. Rempel.
2. As a consequence of the violations referred to in Part (1) above, Claimants R. A. Larimer, S. E. Zimbelman, T. J. Schutz, L. A. Watson and K. B. Rempel shall now each be compensated for an equal and proportionate share of the total straight time, overtime and double time man-hours expended by the District 4 employees in the performance of the aforesaid work beginning October 15, 1998 at their respective and applicable rates of pay.

### Background

A claim was filed on October 30, 1998 on behalf of the Claimants cited in the Statement of Claim because of the alleged violations outlined in the same. Response by the manager of maintenance support in denying the claim is that the work in question was done under emergency conditions because of heavy rains which caused a pier on a bridge to shift. The Claimant's gang was assigned to do minor repairs on the bridge but the problem became more acute when a pier shifted upstream. This all happened at bridge

No. 1.03. The shift of the pier required that steel pilings be driven to support the pier. The latter was done by another gang that had the expertise to do this work in order to make Bridge 1.03 safe for train movement, according to the Carrier.

Absent settlement of this claim on property it was docketed before this Board for final and binding adjudication.

### Discussion

The claim submitted on October 30, 1998 requests remedy for the seniority district No. 7 employees named in the Statement of Claimant on grounds that the labor agreement was violated because a mobile B&B crew from seniority district No. 4 was used to do work on bridge No. 1.03 which is on the Carrier's Sioux City subdivision main line near Ashland, Nebraska. According to the claim the district No. 7 crew was located only a short distance from the bridge in question near Ashland, Nebraska. The district No. 7 crew was used for the repairs at the beginning but were then "...called off the project after a couple days..." and a mobile B&B crew off seniority district No. 4 was called in to replace them.

The amount of time worked by the B&B mobile crew from the wrong seniority district, according to the claim, is as follows: twenty (20) straight time hours, fifty-six (56) overtime hours (1.5 time) and thirty (30) double time (2.0) hours. The work took place on Thursday October 15, 1998 through the "...close of the regular shift..." on October 19, 1998. The remedy requested is payment for this work to be divided

proportionately among the B&B employees on district No. 7 because of lost work opportunity.

In denying the claim the manager of maintenance support states that a pier at bridge 1.03 shifted because of heavy rains and an emergency was created. This was discovered after repair work had started on the bridge by the district No. 7 B&B gang. After the shifting pier was discovered it was necessary to drive steel piling to make bridge 1.03 safe. To do this it was necessary to bring in another B&B crew, from seniority district No. 4, to do this work because that crew had the expertise needed.

Response by the union is that when the crew from district No. 4 was brought in there was a violation of Rule 2 of the labor agreement which states the following, in pertinent part:

#### **Rule 2**

Right 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.

According to the claim, the seniority rights that the Claimant established in their district No. 7 entitled them to "...perform work of this class (regular, temporary, overtime) in preference to employees from other seniority districts...". The union cites numerous arbitration Awards that it argues support its position in this case.

In denying the claim the Carrier states that it used the B&B crew from district No. 4 to do the bridge repairs because the crew from district No. 7 "...did not have the equipment necessary to drive the piling (to repair bridge 1.03) so another crew from

district No. 7 was dispatched to the site and a crew from district No. 4 also worked at the bridge...". According to the Carrier, "...this was an emergency that had an entire subdivision shut down. The Carrier cannot sit idly by when customers are without their shipments, therefore, the repairs needed to be made as quickly as possible...". Further, "...once the district No. 4 crew arrived they worked around the clock until the bridge was stabilized and then returned to district No. 4...". According to the Carrier there is arbitral precedent permitting a Carrier to use available employees to respond to an emergency situation as long as such employees are not used to do anything outside the perimeters of the emergency which would be contrary to seniority provisions of a labor agreement.

### **Findings**

At issue in this case is whether the Carrier has the right to use employees across seniority lines to bring in qualified employees to do work in the case of an emergency. There is discussion on this matter in the record, but it is clear that an emergency existed.

A piling on a bridge had given way because of flooding and the tracks were shut down until the piling and the bridge could be repaired.

Scrutiny of the record by the Board shows that at times the parties get into a bit of an "he said, she said" argument over whether the employees from seniority district No. 7 were capable of doing the repairs once the piling problem was discovered. In denying the claim at the second level the Carrier states that "...the Claimant's crew did not have the

necessary equipment necessary to drive the piling, so another crew from district No. 7 was dispatched to the site....". So it was, at this point in the handling of this claim at least, a question of equipment, not a question of know-how by the B&B crew members in district No. 7.

Only later, when the case was conferenced, did the Carrier argue, with a supporting document, that the "...Claimants had never driving piling and therefore could not have performed the work in question...".<sup>1</sup>

The union disputes these facts by providing documents to the contrary. According to the union, two of the Claimants, truck driver K.B. Rempel, and first class mechanic Schutz, had done exactly this kind of work before and they provided statements to that effect. Further, foreman R.A. Larimer had supervised exactly this kind of work in the past, according to the union.<sup>2</sup>

The burden of proof in this case lies with the union as moving party.

The Board observes that the main argument by the Carrier is that it has the right to cross seniority lines in order to respond to emergencies. That is true: but with this proviso. It is not permitted to do so if it can do the work with employees in the seniority district where the emergency takes place.

The structures supervisor writes a note which is in the record wherein he states

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<sup>1</sup>Carrier's exhibit 9.

<sup>2</sup>Organization Exhibit A-8 pp. 1 & 2 wherein Schutz and Rempel both outline, in detail, what would be considered considerable experience in doing the kind of repair work done on bridge 1.03. Both state that they worked under Larimar doing this work as well as under other foremen.

that the foreman and the employees in "...Larimer's (seniority district No. 7) gang (had) not driven steel piling, which was required to make bridge No. 1.03 safe for normal speed...". The Carrier argues that this statement is persuasive even in view of statements by two members of the B&B gang off seniority district No. 7 wherein they state that they had experience in doing the kind of work done by the mobile B&B crew off district No. 4. Why? Because, according to the Carrier, the two B&B members from seniority district No. 7 never state that they have had pile driving experience as a gang. Their written statements only reference experience by three out of five members of the district No. 7 B&B gang.

There are some nuances of logic here by the Carrier, in denying the claim in this case, that the Board finds esoteric. How many members of a gang have to be experienced in doing something in order to have a gang that knows how to do something? This may mean: 100%. But common sense suggests that it must often be less than that. Otherwise how would those who have no experience ever get experience? Certainly a gang who knows how to do something would be in fairly good shape if members of the gang in all applicable classifications had experience. And this held for the five members of B&B gang in district No. 7 on the days in question. The foreman, one of the first class mechanic-carpenters, and the truck driver all had the requisite experience. Two of the first class mechanic-carpenters did not as far as we know. But again, how were they to ever learn if they would not have done the work in question a first time? Clearly, the B&B gang in district No. 7 had the requisite experience.

The Carrier further argues that arguendo (apparently) even if the gang members from seniority district No. 7 might have had sufficient experience, that experience was dated by a few years.

On the other side of the coin, the Board will observe that it is not clear in the record if all of the members from the B&B mobile gang off district No. 4, nor if all of the members off any of the other gangs called in which participated in the repairs on bridge # 1.03, had the requisite experience to do the pile driving work. So they very well could have projected the same profile of experience that the Carrier states characterized the gang made up of the Claimants to this case. It is not denied anywhere in the record that the pile driving experience of the foreman, truck driver and the one first class mechanic-carpenter may not have gone back a few years, although the details on what that actually means is not really clear. But again there is no data that the mobile B&B gang from district No. 4 may not have suffered from the same malaise if that is what it is.

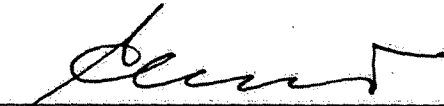
Upon the full record before it the Board is sufficiently persuaded that the union has borne its burden of proof in this case despite a last proviso, which is the claim by the Carrier, that the B&B gang from district No. 7, which includes the Claimants, did not have the equipment necessary to do the work on the days of October 15-19, 1999. About the only thing to be said about this is that the equipment was readily available and the record shows that the members of the gang including the Claimants would have known how to use it. So it could have been imported and it could have been imported quickly. Proof of that is that it was. The members of the B&B mobile gang off seniority district

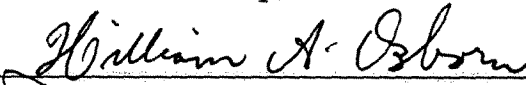
No. 4 arrived with the equipment at the job site without delay.


In view of these considerations the Board will sustain the claim in full.

**Award**

The claim is sustained. Compensation for the hours worked as outlined in the claim shall be divided up proportionally and paid to the Claimants to this case at the rate of pay in place in October of 1998, without the addition of interest. Implementation of this Award shall be within thirty (30) days of its date..

  
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Edward L. Suntrup, Neutral Member

  
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Thomas M. Rohling, Carrier Member

  
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Roy C. Robinson, Employee Member

Date: 10/31/06