NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 52
and	)
	) Award No. 52
UNION PACIFIC RAILROAD COMPANY	)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: March 23, 2004

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier used Section Gangs 4757 and 4164 to perform B&B carpenter work of removing and installing plank crossings on June 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, 1995 from Mile Posts 93.50 to 110 on Kansas Division instead of assigning Carpenters R. L. Hull and J. A. Hintz (System File N-207/950541).

2. As a consequence of the violation referred to in Part (1) above, Carpenters R. L. Hull and J. A. Hintz shall each be allowed an equal proportionate share of the six hundred and forty (640) straight time hours and two hundred forty-one (241) overtime hours worked by section forces on the claim dates.

FINDINGS:

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On the dates in question, Track Department employees were engaged in rehabilitating the track structure at a number of road crossings. As part of that process, members of Section Gangs 4757 and 4164 removed plank crossings to enable the rehabilitation work to proceed and reinstalled plank crossings after the track in the crossings had been re-tied, surfaced and aligned. The Organization filed a claim on behalf of the two named Claimants contending that the work of removing and reinstalling the plank crossings was work reserved to employees in the B & B

Department.

This case turns on interpretation and application of Article XI of the Imposed Agreement of February 6, 1992. Article XI provides:

> Employees will be allowed to perform incidental tasks which are directly related to the service being performed and which they are capable of performing, provided the tasks are within the jurisdiction of the BMWE. Compensation shall be at the applicable rate for the employee performing the service and shall not constitute a basis for any time claims by other employees. This provision is not intended to alter the establishment and manning of work forces accomplished in accordance with existing assignment, seniority, scope and classification rules.

The Imposed Agreement resulted from the recommendations of Presidential Emergency Board 219, imposed following the procedures established in Public Law 102-29. Article XI is word-for-word the recommendation of PLB 219 with respect to Intra-Craft Work Jurisdiction. The record of PLB 219's proceedings reflects that the carriers proposed to eliminate all contractual barriers to assigning any member of the maintenance of way craft capable of performing the assignment, subject only to a requirement that employees performing work outside of their pay rate or seniority classification be paid according to the provisions for combination service. In other words, the carriers sought to obliterate the traditional divisions between the B & B and Track Departments. In support of their positions, the carriers cited, among other things, the assignment of work on the Union Pacific when rehabilitating track at a road crossing. The carriers argued:

> The artificial division between B&B and track work substantially increases costs and delay on many projects. For example, on the old Union Pacific lines of the Union Pacific Railroad, B&B gangs claim to "own" the work of removing and replacing the pads, planks and other materials that allow vehicles to cross track smoothly at vehicular road crossings, but only where the length of track crossing the road is more than 16 feet. If the length of track crossing the road is 16 feet or less, the rules allow track gangs to do the work. Obviously, the track gangs are fully capable of doing the work with regard to the longer as well as the shorter crossings. Nonetheless, when a track gang replacing rail comes to a crossing longer than 16 feet, a B&B gang must be called in to do the work at the crossing, work that the track gang does on its own at shorter crossing sites.

PLB 219 did not recommend the carriers' proposal that they be allowed to cross intra-craft jurisdictional lines at will. However, it did respond to the carriers' arguments and the examples carriers' cited by recommending that carriers' be allowed to cross intra-craft jurisdictional lines when assigning "incidental tasks which are directly related to the service being performed and which [the employees assigned] are capable of performing, provided the tasks are within the jurisdiction of the BMWE." There is no question that the tasks of removing and reinstalling the plank crossings was work within the jurisdiction of the Organization and there is no question that the employees who performed the work were capable to of doing so.

The critical question is whether the work was an "incidental task[] . . . directly related to the service being performed."

The Organization cites, in its submission, Black's Law Dictionary's definition of "incidental,' as "Depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose. . . ."

We agree with this definition. Applying it to the instant case reveals that the removal and reinstallation of the crossing planks was not the principal or primary purpose of the work. Rather, the principal service being performed was the rehabilitation of the track at the crossings. The removal and reinstallation of the crossing planks was necessary to enable the track rehabilitation to take place. Had there been no need to re-tie, smooth and align the track, there would have been no need to remove and reinstall the crossing planks. In other words, the removal and reinstallation of the crossing planks was dependent upon the primary service of track rehabilitation.

In arguing that Article XI does not apply, the Organization cites SBA 1110, Award No. 30 and NRAB Third Division Award No. 35961. Award No. 35961 sustained a claim that the carrier assigned members of a welding gang to perform track work instead of assigning track department employees. In sustaining the claim, the Board noted, "In closing, we note that the claim dates preceded the effective date of the so-called imposed Agreement of July 29, 1991 and so neither the Contract Interpretation Committee nor PEB 219 determinations played any role in this decision." Thus, Award No. 35961 provides no authority for interpreting Article XI of the Imposed Agreement.

SBA 1110 sustained a claim against CSX Corporation where the carrier assigned welders to perform Track Department work. The Board relied on Appendix 34 of the applicable Agreement which provided that "when field welds are being made, a track repairman will be assigned to work with the welding gang to perform the track work unless the ties have already been spread to permit the field weld." The Board rejected the carrier's reliance on Article XI, stating, "The Board is not persuaded that Article XI's general provision relating to 'incidental' work trumps the specific provisions of Appendix No. 34."

SBA 1110, Award No. 30 does not control the instant case for two reasons. First, the Organization has pointed to no rule as specific as Appendix 34. Second, the record establishes that Article XI was PEB 219's specific recommendation in response to concerns raised by the carriers that included this Carrier's specific issue with having to call in B & B employees to remove and reinstall plank crossings when rehabilitating the underlying track. In other words, the record reflects that PEB 219 intended what became Article XI to trump Carrier's prior contractual obligation to call in B & B employees to remove and reinstall plank crossings in cases such as the instant case.

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AWARD

Claim denied.

Martin H. Malin, Chairman

D. A. Ring,
Carrier Member

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, July 23, 2004