PUBLIC LAW BOARD NO. 6538

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)	
	)	AWARD NO. 11
and	)	CASE NO. 11
BNSF RAILWAY COMPANY	)	

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier improperly bulletined and assigned Flagman Position 32010 at Northtown, Minnesota to Mr. M. H. DeRosa beginning on October 25, 1999 and continuing (System File T-D-1896-B/11-00-0021 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Rank Flagman C. L. Rathbun shall now be compensated for eight (8) hours' straight time and for all overtime service performed each day by Mr. M. H. DeRosa in the performance of the aforesaid flagman service beginning October 25, 1999 and continuing until the violation ceases."

FINDINGS:

Public Law Board No. 6538, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employes within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

The instant claim contends that Carrier violated the Agreement by improperly bulletining a Flagman position at Northtown, Minnesota on October 1, 1999 as a Foreman/Flagman and not as a Sectionman/Flagman. [1] Although the Organization cited eighteen rules as the basis for the claim, it relies principally upon Rule 5D, the seniority roster which establishes the position of "Flagman" as a Rank

[1] The Organization initially filed the claim on behalf of all 443 employees listed in the Track Subdepartment Roster 1 Rank C. Carrier objected to this aspect of the claim, arguing that it violated Rule 42 of the Agreement by failing to provide fair notice of the identity of the appropriate Claimant. In its February 5, 2001 letter confirming the parties' conference regarding the instant claim, the Organization responded to the Carrier's objection by naming Flagman C. L. Rathbun as a sole Claimant. We find no basis for a Rule violation based on the amended claim that is now properly before the Board.

C Sectionman position. To the Organization, this language clearly prohibits the Carrier from bulletining a Flagman position as a Foreman.

Tracing the history of the rosters on the predecessor railroads, the Organization argues that the parties expressly agreed during negotiations for the current Agreement to place the title of Flagman within the rank of Roster 1, Rank C. If Carrier possessed the broad latitude it now claims, there would have been no need to negotiate the rosters, the Organization asserts.

In addition, this claim does not involve incidental work. The Organization contends that the instant case concerns the assignment of a position of more than thirty days duration which has consistently been bulletined and assigned to Rank C Flagmen. In support thereof, the Organization proffered copies of Carrier job bulletins advertising Flagmen positions and the statement of M. De Rosa, who indicated that he had flagged as a laborer for more than twenty years at several locations.

Carrier's denial of the claim is based on its assertion that Flagmen positions are not exclusively assigned to Sectionmen. Depending upon the qualifications needed to perform the Flagman duties, the position can and has been assigned to Foremen in the past, as even the bulletins produced by the Organization attest. Indeed, the Carrier points out that the Organization has previously taken the position that only Foremen can perform Flagman duties. Carrier also argues that flagging work is not reserved to nor exclusively performed by Organization employees. However, evidence in support of that latter assertion was not introduced on the property and is therefore not properly before the Board.

Nevertheless, we agree with the Carrier's basic assessment of the claim. The Organization, as the moving party in this contractual dispute, had the burden of proving a violation of the Agreement. In a case such as this, the Organization must show that there is an explicit reservation of work in the Agreement or that the work, by history, tradition and custom, has been exclusively performed by Sectionmen. Based on our review of the record, we find that the Organization's evidentiary burden has not been met.

There is considerable precedent for the proposition that seniority rosters such as Rule 5D do not reserve work. See, e.g., Third Division Award Nos. 36210; 37280; 36207; 36061. Moreover, while the Organization established that the disputed work is at times performed by Sectionmen, it failed to provide evidence that this work has been reserved exclusively to this group of employees. Therefore, we must rule to deny the claim.

AWARD

Claim denied.

Ann S. Kenis

ANN S. KENIS, Neutral Member

William A. Osborn

Carrier Member
William A. Osborn

Roy C. Robinson

Organization Member
Roy C. Robinson

Dated this 28th day of June, 2007.