

**BEFORE  
PUBLIC BOARD No. 7097**

**Award No. 12  
Case No. 12**

<b>BROTHERHOOD OF MAINTENANCE OF WAY</b>	)	
<b>EMPLOYES</b>	)	
	)	
vs.	)	<b>PARTIES TO</b>
	)	<b>DISPUTE</b>
<b>UNION PACIFIC RAILROAD COMPANY</b>	)	

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed and refused to bulletin a Group 3 B&B Foreman position on B&B Gang 6821 after Group 3 Foreman B. Roberts retired and vacated said position and thereby denied Claimant W. Kernan work and compensation at his Group 3 Foreman’s rate of pay and instead bulletined said B&B foreman vacancy as a Group 1 Steel Erection Foreman position assigned to Mr. S. Burgus on February 7, 2002 (System File C-0220-103/1310873)
- (2) As a consequence of the violation referred to in Part (1) above:
  - (1) The carrier must immediately bulletin the Broup 3 Bridge and Building Foreman position in connection with the Bridge and Building Gang 6821 Foreman’s position.
  - (2) The carrier must compensate Claimant Kernan for all lost work opportunity from February 7, 2002, continuing until such time as the Bridge and Building Group 3 Foreman position is bulletined and assigned. Specifically, Claimant Kernan must receive pay for all straight time and

overtime hours worked by the Steel Erection Foreman assigned in violation to our Agreement until the referred to violation ceases.

**OPINION OF THE BOARD:**

This Board, upon the whole record and all of the evidence, finds and holds that the Employee and Carrier involved in this dispute are respectively Employee and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

Claimant has established and holds seniority as a Group 3 Foreman in the Bridge and Building Subdepartment on the Oregon Division Seniority District dating from May 23, 1975. For many years prior to 1996 he was the regularly assigned foreman of Oregon Division B&B Gang 6821. On February 7, 2002, he held an ARASA position with headquarters at Barnes, Oregon.

According to the Organization, and as indicated by Claimant's assignment prior to 1996, Gang 6821 was historically a B&B gang under the supervision of a Group 3 Foreman. Two steel erection employees were assigned to Gang 6821 beginning in early in 2000, but the Gang continued to work under the supervision of a Group 3 B&B Foreman, working on both wood and steel bridges. In April 2001, a Group 1 Steel Erection Foreman was added to the Gang. The position was filled by an employee with classification seniority of May 23, 1979.

In early 2002, Gang 6821 consisted of three Group 3 employees (two 1<sup>st</sup> Class Carpenters and one Carpenter Truck Operator), and two Group 1 employees (one Bridge Welder - Arc Weld Process and one Steel Erection Truck Operator), all working under a Group 3 B&B Foreman. When that Group 3 Foreman retired in February 2002, the Carrier failed to bulletin a Group 3 B&B Foreman vacancy. Instead the Carrier bulletined a Group 1 Steel Erection Foreman position and, effective February 7, 2002, awarded it to the Group 1 Steel Erection Foreman who had previously been assigned to Gang 6821 in April 2001. There is no evidence that the duties of the position or the work of the Gang changed with the retirement of the Group 3 Foreman.

The Organization contends that the bulletining of the Foreman vacancy as a Group 1 vacancy and awarding it to a Group 1 Foreman changed the payroll classification and rate of pay for the position in violation of Rules 1, 4, 5, 8, 9, 10, 16, 20, 20(a), 23 and 35 of the Agreement and in violation of Claimant's Group 3 seniority. The Gang, despite the inclusion of two Steel Erection employees, remained a Bridge and Building Gang performing primarily Bridge and Building work, doing only incidental Steel Erection work, the Organization asserts. The Organization objects that Rule 13, Section 1(a), relied on by the Carrier, concerns only the assignment of mechanics, not foremen, to composite gangs. The Carrier responds that it has the contractual right under Rule 13, Section 1(a) to create composite gangs, like Gang 6821, with a single foreman supervising employees from the different groups. The Carrier contends that it has the right to determine the type of foreman that is advertised and assigned to a composite gang as part of its managerial rights to determine staffing and gang consists. The Carrier further asserts that the Organization has presented a jurisdictional dispute between employees in the same craft, and therefore bears a heavy burden to substantiate the exclusivity of one group's claim to the work. Finally, the Carrier contends that the Organization has failed to satisfy its burden as the moving party to prove a violation of the Agreement.

Rule 13, "Use and Assignment" states that "The assignment of composite gangs consisting of one or two mechanics from any of the classifications in the Bridge and Building Subdepartment in Bridge and Building, Paint, and Steel Erection gangs working under the supervision of the respective foreman is permitted." The parties agree that under this provision, the Carrier has the right to establish composite gangs.

It is undisputed that Gang 6821 began as a B&B Gang, with a B&B foreman. However, two Steel Erection employees were added in 2000, making it a composite gang. A Steel Erection Foreman was added in 2001, so that Gang 6821 operated for some time with both a Group 1 and a Group 3 foreman. Nonetheless, the Carrier did not refute the Organization's description of Gang 6821 as continuing "to primarily perform work recognized as Bridge and Building duties/work with incidental Steel Erection duties/work being performed in connection thereto," nor the Organization's assertion that the duties and work of Gang 6821 did not change with the retirement of the previous Group 3 foreman. Although the Carrier objects that the Organization made these assertions without any evidentiary support, the only evidence of Gang

6821's work during the relevant period came from the Organization, in the form of a report by the Claimant itself. The Carrier contends that the addition of a Group 1 Foreman in 2001 proves that the nature of the gang had changed.

After careful consideration of the parties' submissions, the Board concludes that the Organization has failed to prove that the supervisor of a composite gang must come from the same Seniority Group as the majority of employees on the Gang. Rule 13(a) provides that when a composite gang is formed, all members of the gang may be required to report to the gang's single ("respective") foreman, regardless of what Seniority Group they, and the foreman, are in. But Rule 13 says nothing one way or the other about the Carrier's right to change the Seniority Group from which the gang's foreman will be assigned. In essence, the Organization's position is that a gang retains its original identity as a B&B, Paint, or Steel Erection gang even after it has become a composite gang under Rule 13(a), and that the type of foreman on a composite gang cannot be changed as long as the bulk of the gang's work remains unchanged, but the Organization cites no provision of the Agreement or past practice that imposes this restriction.

The Organization contends the Carrier violated Rule 20 (a), which states, "All new positions or vacancies that are to be filled, . . . , will be bulletined to all employees holding seniority on the district in the class in which the new position is created or vacancy occurs." However, after full consideration of the parties' arguments and supporting authority, this Board concludes Rule 20(a) did not bar the Carrier from eliminating the Group 3 vacancy and creating and filling a new Group 1 foreman position, as long as the position to be filled was bulletined to all employees holding seniority on the same district and in the same class as the position to be filled. The Board finds that the Carrier's managerial prerogative to determine staffing levels and assign its workforce entitled it both to eliminate the Group 3 vacancy and to create and bulletin the new Group 1 foreman position.

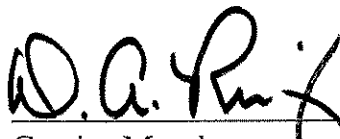
Finally, the Organization asserted that management acted out of bias against the Claimant. We recognize that the Carrier must not abuse its managerial rights. However, the Organization bore the burden of proof on this point, and failed to present sufficient evidence or argument to sustain this aspect of the claim.

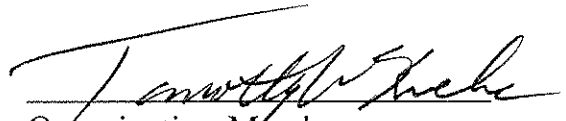
For all of these reasons, based on the record presented, the Board denies the claim.

**AWARD**

Claim denied.

  
Lisa Salkovitz Kohn  
Neutral Member

  
Carrier Member  
Dated: June 27, 2008

  
Organization Member