

PUBLIC LAW BOARD NO. 7098

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY  
(EMPLOYEES DIVISION  
(  
(UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to assign Albina Section 6663 Foreman J. Clemons the work and overtime of supervising and getting track and time for System Gang 8524 employees working on his regularly assigned section territory on dates beginning June 28, 2004 through August 18, 2004 and continuing and instead assigned Extra Gang 6596 Foreman J. Wright (System File J-0435-63/1409920).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Clemons shall now ‘ . . . be allowed ninety eight (98) hours of time and one-half rate of pay at main line section foreman’s rate of pay as compensation for the inappropriate loss of work opportunity suffered on June 28, 29, 30, July 1, 5, 6, 7, 8, 12, 13, 14, 15, 19, 20, 21, 22, 26, 27, 28, 29, August 2, 3, 4, 5, 9, 10, 11, 12, 16, 17 and 18, 2004. This claim is considered continuous for any and all other overtime work performed by Extra Gang Foreman Wright on the Albina Section.”

FINDINGS:

Public Law Board No. 7098, 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.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On August 18, 2004, the Organization, by its 1<sup>st</sup> Vice General Chairman, submitted a claim in behalf of Oregon Division Section Foreman John H. Clemons (“the Claimant”) alleging that the Carrier violated Rules 1, 8, 19, 20, 20(a), 26(h), and 35 of the Agreement when “it failed to assign the work and overtime of supervising, getting track and time for System Employees on

Gang 8524 on Claimant[']s assigned Section . . . [and] instead . . . assigned said duties to Division Extra Gang Foreman J. Dave Wright . . . thereby denying Claimant of work and compensation he is entitled to by virtue of his established seniority and regular assignment.” The overtime, the claim stated, consisted of Mr. Wright supervising employees on Gang 8524 “who are doing repairs on the Albina Section 6663.” The Claimant, the claim alleged, is the assigned foreman to Section 6663 in Albina, Oregon. “Mr. Wright,” the claim asserted, “is normally assigned the duties of Oregon Division Extra Gang Foreman on Gang 6956, now working at Troutdale[,] Oregon.” The supervisory duties, according to the claim, belonged to the Section Foreman assigned to the section and not to Mr. Wright who was regularly assigned to another location. The claim asserted that the Claimant had preference for overtime assignments over Mr. Wright pursuant to Rule 26(h). Ninety-eight hours’ pay at time and a half was requested as compensation to date for the alleged violation. The Organization asserted that its claim was continuous for all overtime work performed by Mr. Wright on the Albina section.

The Manager Labor Relations answered the claim by letter dated September 30, 2004. She stated that in investigating the claim she was informed by the Manager of Track Maintenance that the work in question was “considered capital project work with a system gang performing such work.” “Mr. Wright,” the answer asserted, “is assigned as a Division Extra Gang Foreman whose gang is assigned to do capital project work. Claimant,” the answer continued, “is a Section Foreman and thus, is not assigned to do capital project work as is Mr. Wright.” With respect to the overtime claim based on Rule 26(h), the answer included Labor Distribution Report sheets for the period in dispute and asserted that they indicated “that Mr. Wright continued to perform the work for which he was the regular assigned employee.” “Therefore,” the Manager Labor Relations stated, “I see no violation of Rule 26(h) since Claimant was not the regular assigned employee to do the work in question.” The Carrier denied the claim in its entirety.

A memo dated 8/30/2004 from the Manager of Track Maintenance was included as part

of the Carrier's submission. It stated as follows:

Subject: Response to Claim # M4-UP263 [Carrier's file number for present claim]

This is a capitol [sic] project with a system gang performing the work, the gang that Mr. Wright is assigned to is for capitol [sic] project work and Ore. Division work. Mr. Wright is not assigned to the Albina section but to the Oregon Division and is running the Form "B" for the system gang providing protection for the gang since he is familiar with the area.

The foregoing memo was not provided to the Organization but is included in this award because it was the source of the Manager Labor Relations's statement that the work was a capital project. It also corroborates the Organization's position that Mr. Wright was not regularly assigned to the Albina section and the Claimant's explanation, quoted below, of why Mr. Wright was assigned to this particular capital project in Albina.

The General Chairman, by letter dated November 22, 2004, appealed the Manager Labor Relations's denial of the claim. The General Chairman noted the Carrier's position that the disputed work was capital project work and declared, "Regardless of what the Carrier considers the work in question to be, it was and is work that is regularly assigned to Claimant Clemons during his regularly assigned hours within his assigned territory." Mr. Wright, the General Chairman asserted, was assigned to Gang 6956, which worked in a different location than where the disputed work in this case was done.

The General Chairman enclosed with his appeal a document containing answers given by the Claimant to questions addressed to him by the Organization concerning his claim. In answer to one of the questions, the Claimant stated that Mr. Wright "worked in Albina with the new construction gang while his equipment sat idle in Troutdale and his men went with the section to work. The only reason Mr. Wright worked with the other gang," the Claimant continued, "is because the other gang didn't know yard in which I worked."

The Carrier's Director Labor Relations replied to the appeal by letter dated January 17, 2005. The reply began by citing Public Law Board and Third Division awards that the Carrier claimed "have addressed" the Organization's "previous jurisdictional claims involving work

between Section Forces and Extra Gang Forces and have been denied.” Although the Organization listed rules in its claim, the Director Labor Relations asserted, no specific contract language was cited that would restrict Extra Gang Foreman from performing the work in question.

In his reply the Director took the position that “since Extra Gang Foreman Wright was working with another extra gang and routine maintenance was not being performed the Section Foreman has absolutely no claim to the work.” On-property Third Division Award No. 36542 was cited as supporting that position. The work involved, the Director asserted, was a capital project involving the upgrading of the main line through Albina Yard between MP 1.45 and MP 4.0 and not the routine maintenance work normally performed by section forces. Such work, the Director averred, “may be assigned as the Carrier deems fit under its managerial prerogative.”

There was no basis for claiming that the work belonged exclusively to section gangs as opposed to extra gangs, the Director argued, and, if the Organization contended that it was exclusively section gang work, it had to satisfy a heavier burden of proof than substantial evidence. Nothing in the Agreement, the Director asserted, restricted the Carrier’s right to have Extra Gang 6956 perform the work in dispute. The Director Labor Relations stated that Mr. Wright worked with the System Extra Gang each and every day of the workweek and that, consistent with Rule 26(h), any overtime he worked flowed to him as part of his normal assignment. The Director Labor Relations denied the claim on appeal.

The claim was discussed in conference on June 22, 2005. Following the conference, the General Chairman wrote to the Director Labor Relations reiterating the Organization’s position that it was a contract violation for the Carrier to take Foreman Wright from his Extra Gang Foreman’s position in Troutdale, Oregon, to perform work in the Claimant’s Section position in Albina, Oregon. The Organization maintained that the work should have been assigned to the Claimant.

The Organization also took issue with the assertion in the Director Labor Relations’s

letter of January 17, 2005, that Gang 6956 performed the work in question. "This assertion," the General Chairman stated, "is in error as you will note, upon review of the statements from Claimant Clemons, that the Gang to which Foreman Wright was assigned did not work with Foreman Wright but instead was sent to work with the section at Troutdale. Only Foreman Wright," the General Chairman continued, "was taken from his assignment, and not the entire Gang, to work in Albina performing work that should have been assigned to Claimant Clemons."

It was not disputed on the property that the work in question was not routine maintenance work. The Manager Labor Relations, in answering the claim, stated that the work was "considered capital project work." Her assertion was not disputed on the property by the Organization. Referring to the disputed work, the Director Labor Relations, in denying the appeal, referred to the work as "a capital project involving the upgrading of the main line through Albina Yard between MP 1.45 and MP 4.0 and is not the routine maintenance work normally performed by section forces." That assertion was not disputed or challenged by the Organization.

In addition, the Claimant himself, in reply to certain questions put to him by the Organization, wrote that Mr. Wright "worked in Albina with the new construction gang while his equipment sat idle in Troutdale and his men went with the section to work." (emphasis added). The Board finds that the record establishes that the work in question was not routine maintenance work but was capital project work akin to new construction.

The Carrier cites Third Division Award No. 36542 in support of its position. The case involved a claim that the Agreement was violated when the Carrier assigned employees belonging to Extra Gang 6602 to perform (as the Board there found) tie renewal work instead of assigning the work to Sectionmen. After reviewing the language of Rules 9 and 13 of the Agreement, the Board there stated:

From the above, it seems that the parties intended that regular section gangs should perform routine maintenance work while the extra gangs should undertake construction work and work not customarily done by section gangs. The Rules also

provide that Sectionmen will perform work customarily recognized as Sectionman's work and that Extra Gang Laborers will perform work other than that customarily recognized as Sectionman's work. . . .

Rule 9(x) of the Agreement expressly provides that new construction is Track Laborer Extra Gang work:

Rule 9 - TRACK SUBDEPARTMENT

\* \* \*

(x) TRACK LABORER EXTRA GANG - Employee assigned on an extra gang engaged in new construction or work not customarily done by section gangs such as reballasting, rail relay, tie renewals, bank widening, grade and line changes, or emergency work occasioned by inclement weather, derailments, or other natural disasters.

As noted above, it was not disputed on the property that the work in question was capital project work and that the Claimant himself said in his written statement that Mr. Wright "worked in Albina with the new construction gang. . . ."

According to the Board's interpretation of Rules 9 and 13 in Third Division Award No. 36542, "it seems that the parties intended that regular section gangs should perform routine maintenance work while the extra gangs should undertake construction work and work not customarily done by section gangs." The evidence shows that the work here in dispute was not routine maintenance work but was capital project work normally done by extra gangs and not by section gangs. The work was therefore properly assigned to Foreman Wright both under the language of Rule 9(x) and the Board's reasoning in Third Division Award No. 36542.

The Organization also argued that the assignment of overtime to Foreman Wright violated Rule 26(h) of the Agreement. That provision states:

RULE 26 - WORK WEEK

\* \* \*

(h) WORK ON UNASSIGNED DAYS - Where work is required by the Company to be

performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employee.

The documentary evidence produced by the Carrier of Foreman Wright's work history shows that on his unassigned days that he performed the work in question on overtime, he was the regular employee who performed the work earlier in the week. Nor did the evidence show that the Claimant did not have 40 hours of work in those weeks. The record fails to establish a violation of Rule 26(h) or any other provision of the Agreement by the assignment of the work in question to Foreman Wright. The claim will be denied.


### A W A R D

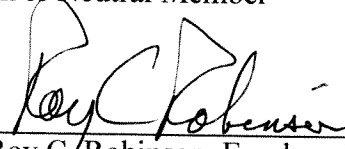
Claim denied.

### O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimants not be made.

  
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Sinclair Kossoff, Chairman & Neutral Member

  
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Dominic A. Ring, Carrier Member

  
\_\_\_\_\_  
Roy C. Robinson, Employee Member

Chicago, Illinois  
Dated: February 12, 2009

2/26/2009