

PUBLIC LAW BOARD NO. 7099

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES, DIVISION OF I.B.T.**

CASE No. 12

-And-

**UNION PACIFIC RAILROAD
COMPANY**

STATEMENT OF CLAIM:

The Claim, as described by the Petitioner, reads as follows:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned System Gang 9071 employees to perform district maintenance work (repair FRA defects) in Proviso Yard on April 3, 4, 5, 6, 7, 8 and 9, 2002, instead of Seniority District T-9 employees assigned to District T-9 positions on the dates of claim (System File 9KB-6779T/1324895 CNW).
- (2) The Carrier violated the Agreement when it assigned System Gang 8570 employees to perform district maintenance work (repair FRA defects) in Proviso Yard at Northlake, Illinois on the Milwaukee Subdivision on April 10, 2002 and continuing, instead of Seniority District T-9 employees assigned to District T-9 positions on the dates of claim (System File 9KB-6782T/1324896).
- (3) As a consequence of the violation referenced to in Part (1) above, the Seniority District T-9 Claimants shall now ‘ . . . be compensated an equal and proportionate share of the eight hundred thirty and one half (830.5) man-hours, for their loss of work opportunity.
- (4) As a consequence of the violation referenced to in Part (2) above, the Seniority District T-9 Claimants shall now ‘*** .be compensated an equal and proportionate share all man-hours worked by System Gang 8570 from April 10, 2002 to the date they cease repairing FRA defects.’”

The Carrier has declined this claim.”

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

AWARD

After thoroughly reviewing and considering the record of this case together with the parties' presentation, the Board finds that the claim should be disposed of as follows:

System Gangs 9071 and 8570 was assigned to rehabilitate the Proviso Yard at Northlake, Illinois. In order to perform this work, the Carrier assigned consolidated system gangs to replace a majority of ties.

The basic facts giving rise to the foregoing claims are not in dispute, and mirror numerous claims between these same parties wherein the Organization has maintained that the Agreement exclusively assigns the rehabilitation of yard tracks to BMW District seniority employees. Thus, as decided innumerable times by various and noted referees, the facts at issue reflect the existence of a jurisdictional dispute between these parties. On one end of this dispute, the Carrier asserts that it has the managerial prerogative to assign the disputed work to Consolidated system gangs, while on the other end of the dispute, the Organization asserts that the Agreement exclusively assigns such work to BMW District seniority employees. Under such circumstances, it is well established that not only does the Organization bear the burden of proving the merits of its case by presenting substantial evidence in support of its position, but in doing so, given the jurisdictional nature of this dispute, the Organization is faced with an even greater burden. (See, e.g., Third Division Awards 32646, 38087).

The Carrier and the Organization have an Implementing Agreement with an effective date of January 1, 1998 that provides for the use of system gangs to perform scope work across the territories of various railroads that were merged and/or consolidated into the present Carrier. On June 1, 1998, the territory and employees of the C&NW were added to this agreement and made part of the system gang operations. Section I of the Implementing Agreement lists nine titles for different kinds of system gangs, including the "System Rail/Concrete Tie Gang Work", and "System Tie and Ballast Gang Work." While listing these titles, the Agreement does not provide a detailed description of the specific work associated with each gang which can or cannot be performed.

The basic facts giving rise to the disputes before us are briefly stated as follows:

On or about May 14, 2002, the Vice General Chairman filed a claim wherein he maintained that the Agreement was violated when the Carrier assigned System Gang 9071 to perform district maintenance work in the Proviso Yard. The Vice General Chairman maintained that the work performed amounted to repairing FRA defects. No claimants were identified. The grievance was appealed by the General Chairman in his letter dated September 5, 2002, wherein he maintained that Gang 9071 was a system gang that was involved with a concrete tie gang and as a result, they could only install concrete ties.

On or about May 21, 2002, the Vice General Chairman filed a second claim wherein he maintained that the Agreement was violated when the Carrier assigned System Gang 8570 to perform district maintenance work in the area of the Proviso Yard. Again, the Vice General Chairman characterized the work performed amounted to repairing FRA defects, and no claimants were identified. By letter dated September 5, 2002, the General Chairman appealed the grievance, asserting that these FRA defects were as a result of a "general deterioration", and asserting that Gang 8570 was a system gang that was involved with construction work and accordingly, could only perform construction duties.

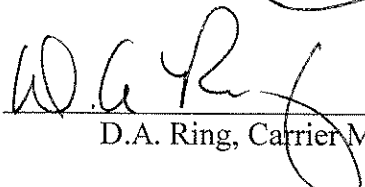
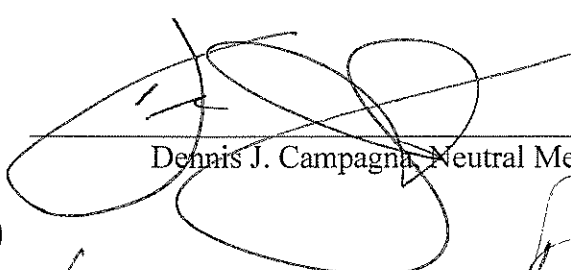
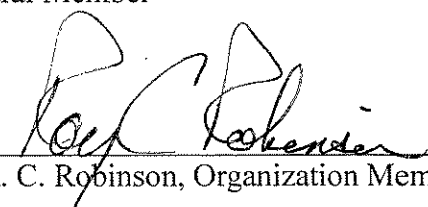
Both appeals were denied by the Carrier on October 28, 2002.

As this Board has reviewed the record in these cases, it has become apparent that the work of yard rehabilitation can be performed by various BMWSE seniority groups of employees in the track sub-department. It is also apparent that there has been a long and consistent practice of utilizing both Consolidated System Gangs to perform the work at issue as well as District employees. Accordingly, where, as here, the Carrier has assigned work between two seniority groups in the same craft, unless otherwise demonstrated by the Organization through substantive proof, the Carrier retains the managerial right to assign the work to whichever group it deems appropriate. In the instant matter, the record is simply devoid of any such evidence. Indeed, our review of the language of the Implementing Agreement leads us to conclude that nothing in this Agreement explicitly limits the scope of work that can be performed by any of the nine listed

system gangs. Moreover, none of the Agreement Rules relied upon by the Organization clearly and unambiguously assign to the employees the work at issue in either of the two grievances before us. Accordingly, given the jurisdictional nature of this dispute, the Organization's inability to provide exclusive rights to the work at issue is fatal to their claims. Accordingly, under the facts contained in the record, we find that the Agreement was not violated.

AWARD

Claim denied.

 _____ D.A. Ring, Carrier Member	 _____ Dennis J. Campagna, Neutral Member	 _____ R. C. Robinson, Organization Member
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Dated: October 31, 2008

Buffalo, New York