

**BEFORE
PUBLIC BOARD No. 7100**

**Award No. 5
Case No. 5**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES	)	
	)	
	)	
	)	
vs.	)	PARTIES TO
	)	DISPUTE
UNION PACIFIC RAILROAD COMPANY	)	

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

Appeal by the Organization on behalf of C&NW District T-4 employees J.F. Hasler, a foreman; J.D. Franks, an assistant foreman; K. Jilovec, an assistant foreman; T.J. Richeson, a machine operator "B;" M.A. Vaughan, a trackman; K.G. Hart, a trackman; L.A. Rodgers, a trackman; G. Loney, a trackman; R.D. Jacobi, a machine operator "Common;" and W.O. Harrington, a machine operator "Common," hereinafter referred to as "the Claimants," regarding the assignment of track repair work on Sunday, June 15, 2003 to System Switch Gang employees 9071, hereinafter referred to as "the System Gang," at Mile Post 187.0 in Ames, Iowa.

FINDINGS:

The following facts are undisputed: Claimants, CN&W employees who hold seniority on District T-4, are covered by the November 1, 2001 Agreement, hereinafter referred to as "the Agreement," between the Organization and Carrier. On Sunday, June 15, 2003, early in the morning, Carrier had a derailment at MP 187.0 on the Boone Subdivision located in Ames, Iowa. Several cars were derailed. MP 187.0 is located on a Seniority District T-4 territory, where Claimants are regularly assigned to work Monday through Friday on track maintenance pursuant to the terms of the Agreement.

At the time of the derailment, Claimants were working in the Cedar Rapids, IA area. Carrier assigned the repair track work to System Gang forces who were working near Cedar Rapids. The System Gang is covered by the Consolidated System Gang Agreement, which is incorporated into the November 1, 2001 Agreement as Appendix 13.

The Organization argues Claimants should have been assigned to perform the track repair work instead of the System Gang because the work involved “was nothing more than track repair work.” Pursuant to the Scope of the Agreement provision, all work related to the construction, maintenance, repair and dismantling of track is work reserved for district forces. The Organization asserts the work in question has been customarily and historically performed by and is contractually reserved for C&NW Track Subdepartment employees such as the Claimants in accordance with Rules 1, 2, 3, 4, 5, 7, 23 and 31 of the Agreement which states, in part, the following:

RULE-SCOPE

- A. The rules contained herein shall govern the hours of service, working conditions and rates of pay of all employees in any and all subdepartments of the Maintenance of Way and Structures Department, (formerly covered by separate agreements with the C&NW, CStPM&O, CGW, FtDDM&S, DM&CI and MI) represented by the Brotherhood of Maintenance of Way Employees.
- B. Employees included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common carrier service on the operating property. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission.

RULE 2- SUBDEPARTMENTS

The following subdepartments are within the Maintenance of Way and Structures Department.

- C. Bridge and Building Subdepartment
- D. Track Subdepartment
- E. Roadway Equipment Repair Subdepartment
(emphasis added)

* * *

- F. Track Subdepartment
 - 1. Track Supervisors
 - 2. Track Foreman
 - 3. Assistant Track Foreman
 - 4. Truck Drivers
 - 5. Welders
 - 6. Welders Helpers
 - 7. Trackmen and Crossing Watchmen
 - 8. Machine Operators
 - 9. Assistant Machine Operators
 - 10. Track Walkers

(emphasis added)

* * *

RULE 3- CLASSIFICATION OF WORK

* * *

- B. An employee directing the work of employee and reporting to officials of the Company shall be classified as a Foreman.
- C. An employee assigned to assist a Foreman or Track Supervisor in the performance of his duties shall be classified as an Assistant Foreman.
- D. An employee assigned to perform the work of constructing, repairing, maintaining or dismantling of roadway and track and other similar type work shall be classified as a Trackman.

* * *

- I. An employee qualified and assigned to the operation and servicing of machines used in the performance of Maintenance of Way and Structures Department work shall be classified as a Machine Operator.

* * *

RULE 4-SENIORITY

* * *

D. Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the Company.

* * *

RULE 5- SENIORITY DISTRICTS

Seniority Districts are identified as follows:

<u>B&B</u>	<u>Tracks</u>
B-2	T-2
B-3	T-3
B-4	T-4
B-7	T-7
B-8	T-8
B-9	T-9

* * *

RULE 7-SENIORITY LIMITS

A- Separate seniority in the B&B and Track Subdepartments shall be established in the following classes:

* * *

Tracks Subdepartment

1. Track Supervisors
2. Track Foremen (including Classes A, 1,1 and 3)**
3. Assistant Foremen (including Assistant Foremen-Truck Drivers)
4. Truck Drivers*
5. Trackmen and Crossing Watchmen*

* Treated equal in class for promotion purposes.

* * Class A-Foremen on track gangs of 18 or more

Class 1- Foremen on track games of less than 18

Class 2-Section Foremen, Headquartered Maintenance Foremen, and B&B Foremen

Class 3-Flagging

(emphasis added)

B. Supplemental rosters, where applicable, shall be maintained separately for the

following classification for the Seniority Districts identified in Rule 5:

1. Track Machine Operators divided by classes and Assistant Machine Operators
2. Track-B&B Machine Operators and Assistant Machine Operators
3. Scale Inspectors
4. Welders including Helpers
5. Structural Iron Workers
6. Work Equipment Mechanic
7. Track Walkers.

(emphasis added)

* * *

RULE 23- WORK WEEK

* * *

L. Work on unassigned days-Where work is required 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 shall otherwise not have 40 hours of work that week; in all other cases by the regular employee.

(emphasis added)

* * *

RULE 31- CALLS

A. Employees called to perform work not continuous with regular work period shall be allowed a minimum of two hours and forty minutes at rate and one-half, and if held on duty in excess of two hours and forty minutes shall be compensated on a minute basis for all time worked. When necessary to call employees under this rule, the senior available employees in the gang shall be called

The Organization also argues the System Gang's contractually reserved work involves large projects assigned without regard to district boundaries, which generally involves extensive timbering and surfacing track and switches, new track construction, rail renewal projects and reballasting tracks. System Gang work is covered by the Consolidated System Gang Agreement, Section 1, provides, in pertinent part, the following:

Effective January 1, 1998 all system gang operations listed hereinafter were combined on UPRR, WPRR, SPRR and D&RGW territories and have been subject to the Collective bargaining Agreement between UPRR and BMWG;

SYSTEM OPERATIONS

System Steel Gang Work	System Curve Gang Work
System Switch Gang Work	System Welding/Glue Gang Work
System Tie and Ballast Gang Work	System Rail and Concrete Tie Gang Work
System Surfacing & Lining Gang Work	System New Construction Gang Work
System Pick-Up and Distribution Gang Work	

Effective June 1, 1998, the territory and employees of the (C&NW) will be added to and made part of these consolidated system gang operations.¹

The Organization argues a derailment, in and of itself, does not constitute an emergency. It asserts the derailment on June 15, 2003, did not create an emergency situation, as alleged by Carrier. It claims Carrier failed to meet its burden of proof to establish that an emergency situation occurred. According to the Organization, the track involved in the derailment is a double mainline, i.e., there are two tracks. The derailment occurred on only one main track and it was cleared before the System Gang arrived to perform the track repair work. Furthermore, according to the Organization, the trains continued to operate while the System Gang performed their work.

Even if there was an emergency situation, the Organization argues, Carrier had a contractual obligation to call Claimants for overtime work before assigning the work to the System Gang. The Organization asserts all the Claimants are qualified and were

¹ 'SPRR' refers only to the 'Western Lines' of the Southern Pacific Transportation Company.

available to perform the work in dispute.

Therefore, the Organization requests for the Claimants to be compensated 15 and one-half hours (15.5 hours) of work performed by the System Gang.

In response to the Carrier's defense the remedy sought is excessive, the Organization asserts Carrier had in its possession all relevant payroll records to disprove the Organization's claim and it failed or refused to produce any of the relevant records during the on property handling of the grievance. The Organization also asserts the payroll record submitted to the Board should not be considered because they were not previously introduced on property.

Carrier, on the other hand, argues the Organization failed to establish a *prima facie* case the Agreement was violated. Carrier urges it is undisputed that a derailment occurred and asserts that "a derailment is an emergency situation." It also alleges in an emergency situation Carrier is accorded great latitude in assigning work on the restoration of the tracks.

Carrier urges in the absent of any restriction imposed by Agreement or law, it retains the managerial right to assign work as it deems fit. The System Gang was utilized to restore and repair the track to service due to a derailment. Accordingly, Carrier argues, the above-cited rules by the Organization do not apply to the repair track work in dispute.

Carrier also contends there was no crossing of seniority lines because the System Gang was working in Ames, near Cedar Rapids, which is a territory where the System Gang has a contractual right to perform work. According to Carrier, the Organization failed to establish Claimants were available for work or in the immediate area.

With regard to the remedy sought by the Organization, Carrier asserts it is excessive because not all members of the Switch Gang worked 15.5 hours performing the work in dispute.

After reviewing the record facts, we find that the grievance must be sustained. We find that the record evidence shows the repair track work performed by the System Gang on Sunday, June 15, 003, has been historically performed by and is contractually reserved for district forces such as Claimants. Therefore, absent an emergency situation, the work should have been performed by Claimants. Carrier's assertion the work in dispute was assigned to the System Gang due to an emergency situation is an affirmative defense. It is well established the burden of proof to establish the validity of an affirmative defense rests with the party asserting it. (Third Division Awards 30456, 30928 and 32414).

A review of the record in this case shows Carrier failed to meet its burden of proof. An emergency situation as "a sudden, unforeseeable and uncontrollable nature of the event that interrupts operations and brings them to an immediate halt." (Third Division Award 24440). It is fundamental in an emergency situation Carrier is afforded great latitude in assigning work than under normal circumstances. Thus, in an emergency, Carrier may assign employees as its judgment deems appropriate and is not compelled to follow normal Agreement procedures. (Third Division Award 36982). Notwithstanding, a mere assertion that an emergency occurred is not sufficient to establish the existence of an emergency.

Here, Carrier has failed to cite any legal authority to support its contention that a

derailment is per se an emergency situation. The Organization has refuted all assertions that an emergency existed. As part of its *prima facie* case, the Organization has shown there was no interruption of service due to the derailment. Specifically, the Organization has shown that the trains continued to operate on one main track while gangs and maintenance crews performed their work. The Organization has also shown by the time the System Gang arrived to perform the work in dispute *after* the derailment was cleared.

Stated simply, in the instant case, the record is void of any probative evidence to show the derailment disrupted operations or to show that the “emergency” conditions were still applicable when the System Gang arrived to perform the track repair work in dispute. In this regard, we note the line of authority in an emergency situation does not apply to “a longer period of corrective action” needed after the emergency situation has passed.

Similarly, we find that Carrier failed to meet its burden to show it attempted to contact Claimants before assigning the work to the System Gang. They were entitled to be called for the overtime work assigned to the System Gang pursuant to Rule 31 of the effective Agreement. We reject the Carrier’s assertion the Organization bears the burden to establish that the Claimants were available to work or were in the immediate area. It is the Carrier’s bears the burden to show Claimants were called in accordance with the Agreement.

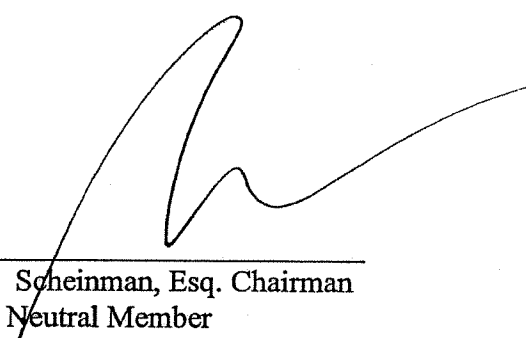
We also find without merits Carrier’s contention the Agreement was not violated because the System Gang was assigned to work in a territory where the Gang has the contractual right to work and thus there was no crossing of seniority lines. As stated

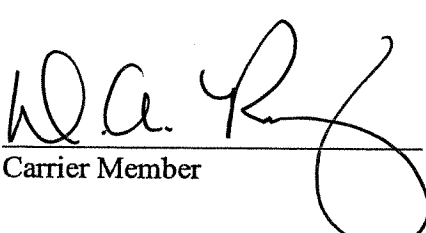
above, the work performed by the System Gang was contractually reserved for Claimants. Under these circumstances, the Agreement was violated even if there was no crossing of district boundaries.

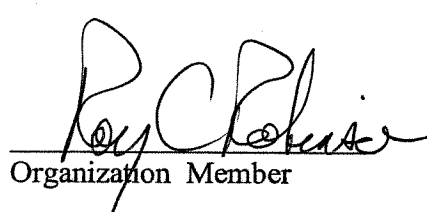
Accordingly, this Board shall direct Carrier to pay the fifteen and a half hours (15.5 hours) for the performance of overtime work that should have been assigned to Claimants. The Board considered the Carrier's assertion the remedy sought is excessive because it as argued not all members of the System Gang worked fifteen and a half hour (15.5 hours), but since Carrier did not submit any of the relevant payroll records on property during the handling of the instant grievance. There is nothing in the record to disprove the Organization's claim regarding the overtime worked by the System Gang. Evidence not submitted on the property is not properly before the Board for consideration. Thus, we are bound to accept the claim made by the Organization as factually correct.

AWARD

Claim sustained. Carrier is directed to pay Claimants for the overtime work performed by the System Gang on Sunday, June 15, 2003, that should have been assigned to the Claimants. We shall retain jurisdiction to resolve disputes over implementation of this Award.



Martin F. Scheinman, Esq. Chairman
Neutral Member

Carrier Member

Organization Member

Dated: November 24, 2008

Brotherhood Case Sawd