

**BEFORE
PUBLIC BOARD No. 7100**

**Award No. 10
Case No. 10**

**BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES**

VS.

UNION PACIFIC RAILROAD COMPANY

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)
)
)
) **PARTIES TO**
) **DISPUTE**
)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

Appeal by the Organization on behalf of B. Flesher, K. Meduna and D. Zulkoski ("the Claimants") regarding the Carrier's decision on November 14, 2004¹, to assign overtime work to repair tracks damaged by a derailment at Mile Post 44.55 to 44.85 on the Columbus Subdivision of the Nebraska Division, to System Gang 9015 instead of assigning the overtime work to the Claimants. As a remedy, the Organization asks the Board to compensate the Claimants for sixteen (16) hours of overtime and eight (8) hours of double time at their respective rates of pay.

FINDINGS:

The Claimants hold seniority on the Nebraska Division. During the time in question, all of the Claimants worked and were assigned to a regular section crew, Gang 4792, on Fremont, Nebraska. They all worked Monday through Friday, as their assigned work week. The Claimants' job classifications were as follows: B. Flesher, a foreman, K. Meduna, a sectionman truck operator and Zulkoski, a roadway equipment operator. On Sunday, November 14, a derailment occurred at MP 44.55-44.85 on the

¹ All dates hereinafter refer to the year 2004 unless otherwise specified.

Columbus Subdivision. The track repair work for the derailment began on November 14 and concluded in or about mid-morning on Sunday, November 15.

The Organization argues the overtime work assigned to the System Gangs was track repair work which has been historically, traditionally and customarily assigned to and performed by the Track Subdepartment Division forces in the classifications of foremen, section foremen truck operators and district roadway equipment operators. It asserts Carrier violated Rules 1, 2, 3, 4, 5, 6, 9, 10 and 26 of the July 1, 2001 Agreement, when it assigned overtime to employees in the System Gangs 9012 to perform the track repair after the derailment at MP 44.55 to 44.85.

RULE 1- SCOPE OF THE AGREEMENT

This Agreement will govern the wages and working conditions of employees in the Maintenance of Way and Structures Department listed in Rule 4 represented by the Brotherhood of Maintenance of Way Employees Organization.

RULE 2- DEPARTMENT

The Maintenance of Way and Structure Department as used herein means the Bridge and Building Subdepartment, the Track Subdepartment, Roadway Equipment Subdepartment and Miscellaneous Subdepartment as constituted as of the effective date of this Agreement.

RULE 3- SUBDEPARTMENTS

The following subdepartments are hereby established within the Maintenance of Way and Structures Department covered by this Agreement:

Bridge and Building Subdepartment
Track Subdepartment
Roadway Equipment Subdepartment
Miscellaneous Subdepartment

Any subdepartment hereafter established, including Groups and Classes within such Subdepartment, will be by negotiations and agreement between the parties to this Agreement.

**RULE 4- SENIORITY GROUPS AND CLASSES WILL BE
AS FOLLOWS:**

TRACK SUBDEPARTMENT

- Group 8 (a) Section, Track Maintenance, Extra Gang,
Rock Patrol, Fire Patrol, and Track Patrol
Foreman

ROADWAY EQUIPMENT SUBDEPARTMENT DISTRICT:

- Group 19 (a) Roadway Equipment Operator
 (b) Apprentice Equipment Operator
 (c) Roadway Equipment Helper

- Group 28 (a) Sectionman Truck Operator
(Employee assigned to a section gang to drive any non-
semi truck with a gross vehicle weight of 10, 000
pounds or more)

RULE 5- CLASSIFICATION OF WORK

Positions will be classified and paid in accordance with work performed in conformity with the classification listed in Rule 6 through 12, and as established by Agreement, rules, and/or traditional practice.

RULE 6- FOREMEN-ALL CLASSIFICATIONS

An employee who is assigned to the duties and responsibilities of supervising, instructing or assisting in the work of employees assigned under their jurisdiction. Since it is recognized that all supervisory employees are authorized to perform clerical work such as making out the necessary reports and payrolls as well as studying prints and standards during the regular hours of assignment, such employees will not be compensated for performing such duties during recognized overtime hours.

RULE 9- TRACK SUBDEPARTMENT

Construction and maintenance of roadway and track, such as rail laying, tie renewals, ballasting, surfacing and lining track, fabrication of track panels, maintaining and renewing frogs, switches, railroad crossing, etc., repairing existing right of way fences. Construction of

new fences up to one continuous mile, ordinary "individual repair or replacement of signs, mowing and cleaning right of way, loading, unloading and handling of track material and other work incidental hereto will be performed by forces in the Track Subdepartment.

(w) SECTIONMAN TRUCK OPERATOR

An employee assigned to operate a truck and to perform work which has customarily been recognized as Sectionman Truck Operator's Work. Must be competent to make running repairs and service, and maintain unit. Carrier will reimburse employee for the acquisition or renewal of costs of any required licenses in connection with the operation of company vehicles.

RULE 10- ROADWAY EQUIPMENT SUBDEPARTMENT

(a) Work in connection with the operation, care, maintenance (running repairs) and servicing of roadway equipment (including attachments thereon) assigned to work in the Roadway Equipment Subdepartment will be classified as work of Roadway Equipment Operators.

RULE 26- WORK WEEK

(h) WORK ON UNASSIGNED DAYS-

Here 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 Organization asserts the overtime work in dispute should have been assigned to Division forces rather than System Gang forces because the nature of the track repair work performed during the overtime falls within "the construction, maintenance, repair and dismantling of tracks" work included in the Scope of the Agreement. It further contends the work is contractually reserved to Division forces in the C&NW Nebraska Division. According to the Organization, System Gangs (who were part of the forces utilized to perform the overtime work) were formed to undertake large project without

regard to district boundaries, i.e., extensive timbering and surfacing track and switches, new tracks construction, renewal projects, which is work *not* customarily performed by Division/Section Gangs such as the Claimants. System Gangs are covered by the Consolidated System Gang Agreement, which states, in pertinent parts, as follows:

Section 1

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 BMWE:

SYSTEM OPERATIONS (Side Letter No. 1)

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 gangs operations.

While the Organization concedes System Gangs are allowed to cross seniority district lines, it argues the Agreement restricts the work which may be performed by System Gangs. For example, it maintains, System Gangs are limited to perform work associated with their gang description, i.e., system steel gangs are limited to performing steel laying work; system switch gangs are limited to perform switch building and laying work, etc. Therefore, the Organization argues to determine if Carrier violated the Agreement one only needs to review the character of the work in dispute. In this regard,

it insists the repair of tracks because of a derailment or any other reason, is maintenance track work assigned to district forces on a division and not programmable work assigned to System Gang.

The Organization refutes Carrier's contention the overtime assignment of work to System Gang forces was necessary because of the emergency created by the derailment. The Organization denies an emergency existed and asserts the Carrier failed to meet its burden to establish its affirmative defense. Further, it asserts, even if an emergency existed, Carrier contractual obligation was to make every reasonable effort to call and use the District forces as provided in the Agreement. The Organization submitted a written statement signed by B. Flesher stating on Sunday, November 14, he went to the site where the derailment occurred and saw Ron Callaway, Manager of Track Maintenance ("MTM Callaway"). Flesher states MTM Callaway asked him if he was going to be at his home because he may need him to work overtime. Flesher states he told MTM Callaway he would be home waiting for the call because he was available for the work. However, Flesher further states, he was never called for the overtime work. The Organization contends there is no record evidence to show Carrier called any of the Claimants even though they were they were all available and qualified to do the overtime track repair work in dispute.

For all the foregoing reasons, the Organization asks the Board to compensate the Claimants for the sixteen (16) hours of overtime and eight (8) hours of double time at their respective rates. It maintains the predominant view is to make whole claimants for loss of work opportunity and to compensate them at the rate they would have received under the Agreement had they been called and assigned the overtime work as required by the Agreement. (Third Division Award Nos. 27593, 28010 and 31531).

Carrier, on the other hand, argues the derailment constitutes an emergency which grants Carrier great latitude to assign work as it deems appropriate. In this case, it asserts, it is uncontested the overtime work was performed to repair the damage caused by the derailment and to restore the train traffic on the main line track at MP 44.55 to 44.85. It asserts the derailment was caused by a train derailing into the side of another train in a main line; and it cost Carrier approximately \$644,000.00 to restore operations.²

Carrier also argues the assignment of overtime work was in accordance with Rule 26(h) of the Agreement, which provides work on unassigned days shall 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.*” It asserts the Claimants were not regular employees assigned to the territory where the derailment occurred. According to Carrier, during the time in question, the Claimants worked and were assigned to Division Section Gang 4792, headquartered in Freemont, Nebraska; and were all supervised by MTM Michael G. Blackley. The Claimants’ assigned maintenance territory, Carrier maintains, was the Blair Subdivision main line to the Freemont, Nebraska. Carrier further asserts “the regular employees” in this case were the employees Division Gang 4771, who were assigned and worked in the maintenance territory of the Columbus and Lincoln Subdivision where the derailment occurred. Carrier asserts the employees Division Gang 4771 were called for the disputed overtime work and were paid for their overtime and double time service, as required by the

² During the on property handling of the claim, the Carrier claimed the Claim is procedurally defective. This argument was not pressed in its Submission to the Board. During the initial processing, Carrier asserted the claim is procedurally defective and fatally flawed because after the denial at first level, it was *not* processed by a representative with Section 3 authority to handle claims and grievances for the UP BMWE Agreement. It claims David Tanner of Lyman Wyoming is the representative with Section 3 authority. The Claim was processed by General Chairman K.L. Bushman. The Organization refutes this procedural challenge and asserts General Chairman Bushman is the Section 3 representative for the employees in the Nebraska Division.

Agreement.³ In addition, according to Carrier, extra Gang 4686, and truck gangs 4689, 4698, 4935 and welding gang 4696 were called on their rest days to assist in the derailment. In support of its assertion, Carrier submitted a statement by MTM Michael Blackley (the Claimants' supervisor) who stated "I was not involved with and decisions for this derailment. It was off my territory." It also submitted a statement by MTM Callaway, who was assigned the maintenance territory where the derailment took place. MTM Callaway corroborates he spoke with Claimant Flesher the day of the derailment. MTM Callaway states he did tell Flesher he would call him "if the need arose." However, MTM Callaway states he did not call Flesher because the need did not arise since they "had ample help from the system gang, a division extra gang as well as MTM Held's home section."

In summary, Carrier insists the Claimants have no contractual right to demand the overtime work in dispute because they were not the regular employees assigned to the Columbus and Lincoln subdivisions and thus, Carrier was under no obligation to call them or assign them the overtime work.

In addition, Carrier argues the use of System Gangs to assist Division forces in the repair of the tracks did not violate the Agreement because it was justified by the emergency created by the derailment. Carrier claims the System Gang 9012, which assisted the Division Section Gang 4771, was on duty at the site when the derailment occurred and was working in the same territory. It asserts the Organization never refuted during the on property handling the System Gang 9012 were on duty when the derailment occurred. It also contends it is within its managerial prerogative, even in cases where no

³ The Organization never disputed on property or on its Submission to the Board, the Carrier's assertion the Claimants were not assigned to the maintenance territory where the derailment occurred. Neither did the Organization dispute the assertion Division Gang 4771 were the regular employees assigned to track maintenance where the derailment occurred.

emergency exist, to assign a System Gang which is on duty to assist the Division Gang forces in the repair of tracks. Carrier asserts the Organization failed to meet its burden to show Carrier has contractually restricted its managerial rights to assign the System Gang forces to the overtime work in dispute. It argues in the absence of clear and unequivocal language restricting its managerial rights, Carrier may determine the manner in which it runs its operations and how the work is performed in the best interest of efficiency and economy.

Further, Carrier refutes the Organization's claim the overtime work in dispute is exclusively reserved for Division Gang forces to the exclusion of System Gang 9012 and all other forces assigned to perform the track repair work in dispute. Carrier asserts the Organization failed to meet its burden to establish its jurisdictional claim. It also contends Carrier has a historical practice of including all classifications and crafts as well as outside forces to assist Division Gangs in the restoration of track caused by a derailment.

After reviewing the record facts, the Board finds the grievance must be denied. With regard to Carrier's contention the claim is procedurally defective because it was processed by the wrong General Chairman, the Board finds it was properly submitted and it has no basis for dismissing the Claim based on the alleged procedural defect. A review of the record and relevant arbitral precedent support the conclusion the General Chairman who processed the Claim is the authorized Section 3 representative for the UP-BMWE employees.

As for the merits the Board concludes the record evidence is insufficient to support the assertion the disputed work is contractually reserved for the Claimants. The Organization never contested (neither during the on property handling of the Claim nor in

its Submission to the Board) Carrier's assertion the Claimants were not part of the Division forces assigned to the maintenance territory where the derailment occurred, i.e., the Columbus and Lincoln subdivision. According to Carrier, the Claimants worked and were assigned to Division Gang 4792 in the Blair Subdivision of the Nebraska Division. Similarly, the Organization did not dispute the statement of MTM Michael Blackley (the Claimants' supervisor) stating the derailment was not in his territory and thus, he was not involved in the assignment of employees for the track repair in dispute. Notwithstanding their job classifications, the record is void of any probative evidence, or contractual authority, to support the assertion the overtime track repair work was performed within Claimants' section territory or was work contractually reserved for the Claimants to the exclusion of others. Therefore, even if no emergency existed, the record evidence is insufficient to establish the Carrier violated the Agreement when it failed to assign the overtime work to the Claimants.

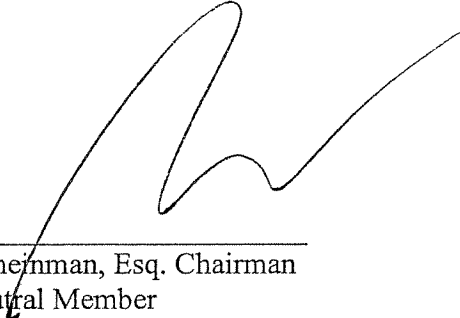
Furthermore, the Board finds the Carrier met its burden of proof to establish the overtime work in dispute was assigned in connection with an emergency situation. Here, the uncontested evidence shows the Carrier was faced with a derailment situation which needed immediate action. Thus, the derailment in this case, which interrupted the Carrier's operations, meets the Board's definition of an emergency. The uncontested record evidence shows Carrier called Division Gang 4771 (the Division who was regularly assigned to this maintenance territory) for the overtime work in dispute. It also paid Division Gang 4771 overtime and double time for the work performed to repair the damage caused by the derailment. Furthermore, it is not a violation of the Agreement to use System Gang forces, which are already on duty at the location, to assist Division forces to repair the damage caused by a derailment.


Therefore, the Board finds the Carrier's assignment of work to the System Gang 9012 as well as other additional forces called the assist Division Gang 4771 was not in violation of the Agreement.


Accordingly, the claim is denied.

AWARD

Claim denied.



Martin F. Scheinman, Esq. Chairman
Neutral Member

Carrier Member

Organization Member

Dated: December 24, 2008