

**PUBLIC LAW BOARD NO. 7101
CASE NO. 10**

PARTIES TO THE DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(and
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Federated Craft Welder R. Haas to perform Maintenance of Way and Structures Department trackmen's work (snow removal from switches) in the Janesville Yard on Seniority District T-8 beginning on January 24, 2004 and continuing through February 12, 2004 instead of assigning furloughed Trackman C. Kalk (System File 8WJ-7401T/1398178 CNW)
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Kalk shall now be compensated for eighty-eight (88) hours' pay at his applicable straight time rate of pay and for thirty-six and one-half (36.5) hours at his applicable time and one-half rate of pay.

The Carrier has declined this claim."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by Agreement; this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the Hearing held.

Claimant C. Kalk has established and holds seniority on Seniority District T-8 of the Maintenance of Way and Structures Department, Track Subdepartment. Due to unilateral force reductions, he was furloughed and awaiting recall on the dates involved in this dispute.

Beginning on January 24, 2004 and continuing through February 12, 2004, Federated Craft Welder R. L. Haas from Gang 3196 worked on a Section Gang in Janesville, Wisconsin. The Section Gang was engaged in snow removal. The Organization contends that during this period of time, the work of snow removal was reserved to BMW employees. The Carrier contends that Haas merely acted as a lookout on the Gang and even if he engaged in any snow removal, it was not authorized. It is uncontested that Claimant was on furlough and was available for duty on the Claim date, fully qualified and willing to perform the relevant work.

The Organization submitted a Claim contending that the Carrier had violated the Agreement when the Carrier did not select Claimant for the Section Gang to perform the work of snow removal during the relevant time period. According to the Organization, it was improper to assign a Federated Craft Welder to the work of snow removal. Such work is reserved to Maintenance of Way employees. Claimant was on furlough and should have been called to perform the snow removal work. As a result of this alleged violation, the Organization requests that Claimant be compensated for 88 hours of straight time pay and 36.5 hours of work at the overtime rate.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that the Federated Craft employee was merely and properly acting as a lookout on the Snow Removal Section Gang. He was not assigned to perform any snow removal and even if he did perform any snow removal, such work was never authorized or condoned by the Carrier. At worst, this case is a dispute in facts and as such, the Referee cannot resolve that dispute. Claimant was not entitled to said work. According to the Carrier, the work in question was limited to that of being a lookout and therefore, the work was properly assigned to this Gang and no remedy is appropriate.

In the instant case, this Board cannot find that the Organization has been able to meet its burden of proof to show that Claimant should have been assigned to the Section Gang. The evidence presented by the Carrier provides that Welder Haas was only assigned as a lookout for the Section Gang. There is nothing that prohibits such assignment. However, the Organization contends that based on the statement by Foreman Kopp that Haas did engage in snow removal, there has been a violation. Even under these circumstances, this creates a dispute in facts that cannot be resolved by the Referee.

Arbitrator Marx opined in a similar dispute of facts:

The Board is faced with virtually irreconcilable statements of fact – whether the Extra Gang Laborers were simply performing routine Sectionman work installing ties or whether they were used in conjunction with System Gang work of a nature differing from

**routine track maintenance. While names of such Extra Gang Laborers were eventually provided, this provided no opportunity for timely discussion of such conflicting assertions. In this circumstance, the Board is without sufficient guidance to resolve the matter.
Third Division Award No. 29533 (Marx, Referee)**

Thus, after a review of all the evidence, there has been no sufficient showing that the Carrier erred when it did not select Claimant to work on the Section Gang between January 24 though February 12, 2004. The Claim is denied.

AWARD

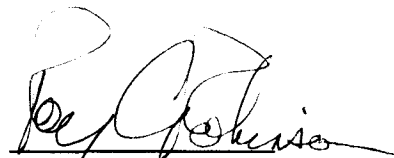
Claim denied.

**Steven
Bierig**

Digitally signed by Steven Bierig

Steven M. Bierig
Chairperson and Neutral Member


Dominic Ring
Carrier Member
5-6-09


Roy Robinson
Organization Member

Dated at Chicago, Illinois this 16th day of April 2009.