

**PUBLIC LAW BOARD NO. 7201
CASE NO. 14**

PARTIES TO THE DISPUTE: |Brotherhood of Maintenance of Way Employees
|
|and
|
|Soo Line Railroad Company
|(former Chicago, Milwaukee, St. Paul and
|Pacific Railroad Company)

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

(1) The Carrier violated the Agreement when it assigned outside forces (employees of Northeast Illinois Regional Commuter Railroad Corporation) to perform Maintenance of Way work (install gauge ties and re-gauge track) on the Rondout rip track in the vicinity of Mile Post 32.0 on the Chicago Service Area’s C&M Subdivision on November 29, 2001 instead of Messrs. J. A. Gresk, S. A. Whedon, J. R. Hess, E. R. Castro and P. L. Poeschel (System File C-40-01-C080-12/8-00228-067 CMP).

(2) As a consequence of the violation referred to in Part (1) above, Claimants J. A. Gresk, S. A. Whedon, J. R. Hess, E. R. Castro and P. L. Poeschel shall now each be compensated for twelve (12) hours’ pay at their respective straight time rates of pay.”

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.

Claimants J. A. Gresk, S. A. Whedon, J. R. Hess, E. R. Castro and P. L. Poeschel have established and hold seniority in the Track Subdepartment as a foreman, a material truck operator and laborers respectively.

On November 29, 2001, the Carrier assigned 9 employees from Metra's Rondout and Morton Grove crews to install gauge ties and to re-gauge the Rondout rip track located within the Carrier's Chicago Service Area at Mile Post 32.0 of the C&M Subdivision. The Metra employees allegedly used no special tools or equipment to accomplish the ordinary track maintenance at issue in this case.

The Organization contends that the Agreement was violated when the Carrier contracted the installation of gauge ties and re-gauge tracks that is properly reserved to the Organization. According to the Organization, the Carrier had customarily assigned work of this nature to the Carrier's Maintenance of Way Employees. The Organization further claims that the work in question is consistent with the Scope Rule. According to the Organization, the Carrier's Maintenance of Way Employees were fully qualified and capable of performing the designated work. According to the Organization, Claimants were available, qualified and willing to perform the work involved. In addition, contrary to the Carrier's position, the Organization contends that the trackage was within the control of the Carrier and therefore, it was required that the work be assigned to members of the Organization. The Organization argues that because Claimants were denied the opportunity to perform the relevant work, Claimants should be compensated for the lost work opportunities.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier claims that the work does not belong to the Carrier's BMW representative Employees under either the express language of the Scope Rule or any binding past practice. Specifically, the Carrier contends that the trackage in question had been transferred to Metra and was within the control and authority of Metra. Therefore, it was completely appropriate that the work in question was performed by Metra. Further, as the Organization contends that the work in question was not under the control of Metra, there is an irreconcilable dispute of facts and as such, this Board cannot make a determination.

After a review of all the relevant evidence, this Board finds that the Organization has been unable to meet its burden of proof. The burden of proof in this matter falls to the Organization to prove that Claimants should have been awarded the work of installing gauge ties and re-gauging tracks on November 29, 2001. A review of the facts presented by both sides presents a very different version of the facts. According to the Carrier, the trackage in question was within the province of Metra and therefore, Metra had the right to perform the work. Conversely, the Organization contends that the Carrier had control of the trackage and therefore the work belongs to members of the Organization. It is clear that the facts provided by the Carrier and those provided by the Organization are directly opposing and thus, there is an irreconcilable dispute of fact. The Board cannot resolve such a matter. When such a dispute occurs, the Board has no choice but to dismiss the matter. See Third Division Awards 35855, 35497 and 33951. Because

we have determined that there is an irreconcilable difference of fact, the Claim is dismissed.

The Claim is dismissed.

AWARD


Claim dismissed.

Steven Bierig

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Steven M. Bierig
Chairperson and Neutral Member


Bjarne Henderson
Carrier Member


Roy Robinson
Organization Member

Dated at Chicago, Illinois this 14th day of June 2010.