

PUBLIC LAW BOARD 5564

In the Matter of Arbitration between:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION – IBT RAIL CONFERENCE**

and

**NORTHEAST ILLINOIS REGIONAL COMMUTER RAILROAD
CORPORATION**

Case No. 51
Award No. 51

THE ORGANIZATION'S STATEMENT OF THE CLAIM

This Decision resolves the Organization's claim as follows:

1. The Carrier violated the Agreement when it assigned Work Equipment Subdepartment employee P. Martinez instead of Bridge and Building (B&B) - Water Service Subdepartment employee E. Deackman to install and repair fencing, make adjustments to platforms and related work at 35th Street Station beginning April 11 and continuing through April 29, 2011 (System File C-18-11-060-10-M/08-30-614 NRC).
2. As a consequence of the violation referred to in Part 1 above, Claimant E. Deackman shall be compensated one hundred twenty (120) hours at the applicable rate of pay for all of the hours work by employee P. Martinez during the claim period.

STATEMENT OF THE CASE

Based on the record developed by the Organization and the Carrier, this Public Law Board (Board) finds the Parties herein to be a Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction over the Parties and the dispute.

This dispute is between the Brotherhood of Maintenance of Way Employees Division – IBT Rail Conference (BMWE or Organization) and the Northeast Illinois Regional Commuter Railroad Corporation (Metra or Carrier) (collectively the Parties). The dispute arises out of BMWE's claim that Metra violated the Parties' Agreement Rules 1, 2, 3, 4 and

5 by assigning Pascual Martinez, a Work Equipment Subdepartment employee, instead of Edwin H. Deackman, a Bridge and Building (B&B) - Water Service Subdepartment employee, to install and repair fencing, make adjustments to platforms, and related work at 35th Street Station from April 11 through April 29, 2011.

Parties dispute the facts, and the interpretation and application of the Agreement Rules to the facts. The claim has a protracted history of handling on the property. The on property handling of BMWWE's claim is as follows:

On June 8, 2011, BMWWE submitted a claim on behalf of Deackman asserting that he and Martinez were regularly assigned to the 47th Street Capital B&B Crew (Crew). BMWWE noted that Deackman's assigned position was as a B&B Mechanic – Water Service Subdepartment while Martinez's assigned position was as a Group A, Rank 1, Class B Equipment Operator. BMWWE also notes the B&B Mechanics and Equipment Operators have separate seniority rosters. Furthermore, while Deackman was furloughed on April 8, 2011, Martinez remained on the Crew. However, BMWWE asserts that, thereafter, Martinez was used as a B&B Mechanic performing work including, but not limited to, installing and repairing fences, making final adjustments to the new 35th Street platform and associated clean up from April 11 through 29, 2011. BMWWE says that during this time Martinez's machine was rarely use or not present at 35th Street.

Based on these facts, BMWWE asserts that, in violation of the Agreement, Martinez, an equipment operator, with no B&B seniority, performed B&B work while Deackman, a B&B Mechanic, with a seniority date of January 30, 2001, remained at home on furlough. As remedy of this Agreement violation, BMWWE argues Deackman lost earnings of 120-hours for which he must be reimbursed at the appropriate rate.

On July 22, 2011, Metra responded to the claim asserting that in the Carrier's opinion Martinez was properly awarded the 47th Street Machine Operator position, a bulletined position, on March 14, 2011. Metra maintained that Deackman, a B&B Mechanic, was called to work unassigned and then put off on the furlough list. For these reasons, Metra concluded that Deackman "was not part of the regularly assigned position of B&B Mechanic, with a bulletined position with the 47th Street Gang."

On September 16, 2011, BMWWE appealed the initial denial. First, BMWWE agreed that Martinez was awarded the 47th Street Machine Operator position, a bulletined position, on March 14, 2011. However, BMWWE argued a bulletin assignment did not give Martinez the right to perform B&B work outside his classification and Subdepartment in violation of the Agreement Rules 2 and 3. BMWWE maintained that Martinez was physically performing manual labor contractually reserved to B&B Mechanics, such as, in this case, fence installation and repair, and clean up, at the 35th Street Station.

Next, BMWWE asserted that just because Deackman, an unassigned B&B Mechanic on furlough, did not possess a 47th Street Gang bulletined position,

does not negate or usurp the seniority rights he possesses for maintenance of way work within the Bridge & Building – Water Service Department.

BMWWE argues that the work Martinez performed was contractually reserved to B&B Mechanics within the Water Service Subdepartment, specifically Deackman, without regard to a bulletined position Martinez held as a Machine Operator.

On November 7, 2011, Metra responded to BMWWE's appeal confirming that Martinez began working as a Machine Operator on March 17, 2011 while Deackman was furloughed on April 8, 2011. Metra argued that there was an absence of substantive evidence that Martinez's work assignment changed after Deackman was furloughed or that Martinez, a Machine Operator, was taking the place of a B&B Mechanic. Further, Metra argued there is nothing in the record to show Martinez did not continue to work as a Machine Operator on the project while Deackman was furloughed. Metra maintained that whatever work was assigned to Martinez was not exclusively reserved to B&B Mechanics under Agreement Rules 1, 2, 3, 4 and 5.

The claim was conferenced on June 28, 2012 but not resolved. However, the on property handling did not end at that time.

On July 6, 2012, BMWWE responded to Metra's assertion that there was no record evidence regarding Martinez's work was not that of a Machine Operator with a written, signed statement from Juan Duran, a 47th Street Crew Class A Driver, during April 2011.

Duran stated in pertinent part,

We were working on a fence and finishing off platform tasks before final completion of 35th St. Station project. From April 11-29, I witnessed a Track Machine Operator assigned to our crew doing basic hand work and manual labor instead of operating a Bobcat (skidsteer) as he was supposed to do. The reason for this was because there just wasn't much use for a machine at this end point of the project. Mostly everything was done by hand by B&B employees and this Machine Operator did his best to assist us as if he were a B&B laborer. This was not right because many B&B mechanics had just been laid off earlier in the month and I feel that a Track machine operator should not be doing B&B manual labor if brothers from the B&B are on furlough.

On July 16, 2012, Metra responded to BMW's submission of supplemental evidence. In response to Duran's statement, Metra asserts that Paul Sorenson, B & B Supervisor of the 35th Street Crew stated,

that due to the two year long construction project there was a great deal of construction materials that needed to be removed from the site as well as site clean up during the winding down of the project. He stated that the Track Machine Operator claimed against would have been using a machine every day during the claim period for substantial periods of time. Mr. Sorenson stated any assertion that the individual claimed against (Mr. P. Martinez) performed only hand work and manual labor during this period is an inaccurate portrayal of the work performed and completely without merit. In addition, there is nothing in the record to establish that whatever work was assigned to Mr. Martinez was exclusively reserved to the B&B mechanic classification under Rule 1, 2, 3, 4 or 5 cited by the Organization.

The Carrier denied the claim in its entirety.

On June 28, 2012, the claim was conferenced without resolution and BMW progressed the claim for resolution before this Board.

The applicable work rules cited by BMW in its *ex parte* submission provide:

RULE 1. SCOPE.

(a) These Rules govern the hours of service, rates of pay, and working conditions of all employees in the Maintenance of Way Department, as listed by Subdepartment in Rule 2, and other employees who may subsequently be employed in said Department, represented by the Brotherhood of Maintenance of Way Employees.

* * *

(b) Employees included within the Scope of this Agreement shall perform all work in connection with the construction, maintenance, repair, and dismantling of tracks, roadbeds, structures, facilities, and appurtenances related thereto located on the right-of-way or used in the operation of the Carrier in the performance of suburban passenger service.

* * *

RULE 2. SUBDEPARTMENTS - SENIORITY GROUPS AND RANKS. (a)

The seniority rights of employees will be confined to subdepartments and groups as provided hereinafter and shall extend throughout the Carrier's entire suburban passenger operation, which on the effective date of this Agreement is comprised of the territory from Chicago to Joliet (excluding the Heritage Corridor but including the CWI Branch), Chicago to Big Timber, Chicago to Fox Lake, Chicago to University Park (including the South Chicago Branch and the Blue Island Branch), Chicago to Manhattan between MP 8 at 74th Street and MP 40.9, and the yards at Western Avenue, Fox Lake, Elgin and Antioch. The rank sequence of employees within the various groups shall be as shown below, the lowest number designating the highest rank in the group.

* * *

Work Equipment Subdepartment

Group A - Work Equipment Operators

Rank 1 - Heavy Equipment Operators

Rank 2 - Light Equipment Operators

* * *

Bridge and Building - Water Service Subdepartment

Group A - Bridge and Building

Rank 1 - Foremen
Rank 2 - Assistant Foremen
Rank 3 - Mechanics
Rank 4 - Assistant Mechanics

* * *

RULE 3. CLASSIFICATION OF WORK. The denominations within the various subdepartments listed below set forth the type of work that shall be performed by employees assigned to each respective subdepartment and group and the primary duties of the employees assigned to classifications within each group.

* * *

Work Equipment Subdepartment

Group A - Work Equipment Operators - Employees assigned to operate and service machines used in the performance of Maintenance of Way Department work.

* * *

Bridge and Building - Water Service Subdepartment

Group A - Bridge and Building - Employees assigned to perform the work involved in the construction, maintenance, repair and dismantling of all buildings, bridges, and other structures, facilities, and appurtenances related thereto, regardless of material content, except the work in connection therewith that shall be performed by Group B - Water Service employees in the performance of their work.

* * *

Rank 3 - Mechanics - Employees capable of and assigned to perform skilled non-supervisory work procedures.

DISCUSSION AND FINDINGS

BMWE maintains that this is a straightforward case in which the Carrier violated the Agreement. Simply stated, BMWE argues that the Carrier was required to assign Deackman, a senior B&B Mechanic, to the 35th Street Station work, but instead assigned Martinez, an Equipment Operator, an employee on a separate seniority roster, in violation of the Agreement.

The Carrier disputes BMWE's rendition of the facts asserting instead that Martinez was operating a skidsteer on the 35th Street Station project and did not perform B&B Mechanic work. The Carrier argues that BMWE's evidence, in support of its rendition of the facts, constituted unsubstantiated statements and allegations which do not constitute sufficient proof that the Carrier violated the Agreement Rules. Furthermore, the Carrier disputes BMWE's interpretation of the Rules assert instead that the scope Rule does not provide the Claimant an exclusive right to the work claimed and that the work is not part of the scope Rule. The Carrier also argues the Claimant is not entitled to 120 hours of straight time or overtime pay because the Carrier had every right to have Martinez perform work using track machinery under his specific classification.

In the Board's view, Duran's statement is not an unsubstantiated allegation. His statement is credible evidence which must be considered on its own weight and balanced against evidence advanced by the Carrier. In this regard, Duran's statement is a first hand, eye witness account of the work performed by Martinez at the 35th Street Station during the time of the claim. Duran's description supports the conclusion that Martinez performed B&B work.

In contrast, the Carrier only recounts Sorenson's speculative statement that Martinez "would have been using a machine every day during the claim period for substantial periods of time." Sorenson's statement is not only speculative because it is not a first hand, eyewitness account of the facts, but also is double hearsay because it is the

Carrier restatement of Sorensen's statement of events that he did not witness. In addition, the Carrier recounts Sorensen's blanket, general denial that any assertion that Martinez "performed only hand work and manual labor during this period is an inaccurate portrayal of the work performed and completely without merit." This statement balanced against Duran's first hand, eyewitness statement lacks probative, material weight.

Based on the record, the Board finds that BMWWE met its burden of proof during the on property handling of the dispute to establish that Martinez performed B&B Mechanic work at the 35th Street Station during the claim period.

Rule 2 reveals that the Parties' negotiated a clear distinction in seniority rights by Subdepartments and groups of workers. Relevant to this dispute, Rule 3 clearly separates the seniority rosters of B&B - Water Service Department and Work Equipment Subdepartment employees. Since the employees grouped under these Subdepartments have two separate seniority rosters, the generally accepted practice in the railroad industry is that these groups perform separate work. Reflecting this practice, Rule 3 specifically states that Equipment Operators "operate and service machines used in the performance of Maintenance of Way Department work" while B&B Mechanics perform work "in the construction, maintenance, repair and dismantling of all buildings, bridges, and other structures, facilities, and appurtenances related thereto . . ."

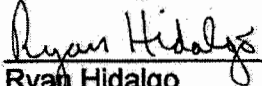
Applying Rule 2 and 3 to the proven facts, the Board finds that in the on property handling BMWWE proved that Martinez performed the claimed work to include installing and repairing fencing, adjusting the platforms and related work at 35th Street Station during the claim period. The Carrier's failure to call Deackman to service for this work constituted an Agreement Rules violation. Based on this proven Agreement Rules violation, the Board also finds that since Deackman was available for this work, then the well established make whole remedy applies. Consequently, the Carrier must compensate Deackman for his loss with 120-hours at the appropriate rate of pay.

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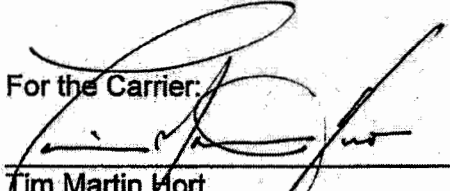
BMWE's claim is sustained.

For the Organization:



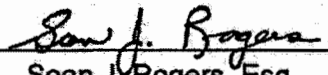
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For the Carrier:



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