

PUBLIC LAW BOARD 5564

In the Matter of Arbitration between:

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

and

**NORTHEAST ILLINOIS REGIONAL COMMUTER RAILROAD
CORPORATION**

Case No. 58
Award No. 58

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 members of a Bridge and Building (B&B) gang headquartered on the Southwest Service District to perform B&B work on the Rock Island District on April 10, 2012 instead of the Claimants who were headquartered on the Rock Island District (System File A120608/08-20-632 NRC).
2. As a consequence of the violation referred to in Part 1 above, Claimants G. Ponce and R. Knor shall be compensated for two (2) hours at their respective straight time rates of pay.

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 Appendix O and the Parties' March 28, 2006 Memorandum of Understanding (MOU).

There is no dispute over the facts. The Parties dispute the interpretation and application of Agreement Appendix O and the March 28, 2006 MOU to the facts.

The Claimants are assigned to the Rock Island District, Building and Bridges - Water Service Subdepartment (B&B), also known or referred to as the Rock Island B&B Gang No. 1 or the Blue Island Gang No.1, which is headquartered at Blue Island, Illinois, Rock Island District.

On April 10, 2012, the Carrier assigned a Southwest Service District (SW) B&B Gang to install signs at the Union Depot (UD) Tower, Joliet, Illinois, on the Rock Island District. The UD Tower is within the Blue Island Gang No. 1's district boundaries. When the SW B&B Gang performed this work, the Claimants' Blue Island Gang No. 1 was working on the Blue Island turntable.

On June 7, 2012, BMW's presented the claim asserting that Metra violated Agreement Appendix O, Section 5, and the March 28, 2006 MOU by using the SW B&B Gang instead of the Claimants' Gang from the Rock Island B&B Gang No.1. The Claimants maintained that the work was exclusively reserved to the Rock Island B&B Gang No.1. As remedy, BMW requested that the Claimants be compensated 16 hours each at the straight time rate.

On July 23, 2012, the Carrier denied the claim responding that the work was assigned to the SW B&B Gang because the Rock Island B&B Gang No. 1 Gang was working on the long-term repair of the Blue Island turntable.

On September 6, 2012, BMW appealed Metra's claim denial asserting that the work belonged to the Claimants because the UD Tower was within the Rock Island District boundaries. BMW argued that Rock Island B&B Gangs had traditionally and exclusively performed this work within the Rock Island District.

On October 9, 2012, Metra denied BMW's appeal. Metra argued that March 28, 2006 MOU provided that emergency work supersedes District gang assignments, and since protecting the security of passengers and employees is an emergency, then the Carrier was entitled to assign any gang to perform the UD Tower work.

On August 16, 2013, the claim was conferenced without resolution. Thereafter, the dispute was docketed with this Board for adjudication.

The applicable provisions of the Agreement, Appendix O, and the March 28, 2006 MOU state:

APPENDIX O
OVERTIME

AGREEMENT between the Northeast Illinois Regional Commuter Railroad Corporation and the Brotherhood of Maintenance of Way Employees

IT IS AGREED:

In the application of Rule 17. Call Rule and Rule 18. Overtime of the April 16, 1984 General Rules Agreement, as amended, the following procedures will govern the assignment of overtime, whether planned or emergency.

* * *

Section 5. Rock Island - B&B: This district is broken down into three areas: LaSalle Street to M.P. 0.4 is normally assigned to the LaSalle Street Crew; M.P. 0.4 to Joliet is normally assigned to Blue Island Gang No. 1; and C.W.I. and the Heritage Corridor are normally assigned to Blue Island Gang No. 2. These gangs handle all B&B work on the district, including planned and emergency overtime. Any such overtime, either planned or emergency, is offered to the gang normally assigned to that area. Seniority within individual gangs is always honored.

- Any overtime help for LaSalle Street Gang would first go to Blue Island Gang 1 and then to Blue Island Gang 2.
- Any overtime help for Blue Island Gang 1 would first go to Blue Island Gang 2 and then to LaSalle Street Gang.
- Any overtime help for Blue Island Gang 2 would first go to Blue Island Gang 1 and then to LaSalle Street Gang.

* * *

Section 8. Southwest Service - B&B: One gang handles all work, including all overtime, on this district. If additional assistance is needed, Blue Island Gangs 1 & 2 will be called in seniority order. If additional employees are still required, other Rock Island B&B employees will be called in seniority order.

* * *

The March 28, 2006 MOU:

This is in regard to the application of the General Agreement between the Northeast Illinois Regional Commuter Railroad Corporation and the Brotherhood of Maintenance of Way Employees, particularly in regard to the assignment of district gangs. It is understood that such gangs will be established for the purpose of performing work on a particular district and will be assigned to perform work only within that district, except in the event of an emergency. The delineation of districts as set forth in Appendix "O" will govern in the application of this letter of understanding. In other words, the system will be divided into four districts: Rock Island, Metra Electric, Milwaukee, and Southwest Service.

In other than emergency situations, arrangements may be made for temporary cross-district assignment of gangs by agreement between the parties.

* * *

DISCUSSION AND FINDINGS

BMWE asserts that Appendix O and the March 28, 2006 MOU clearly and unmistakably establish seniority boundaries and work rights of employees so that the work in a district will be handled by the gangs in that district. For this reason, BMWE argues that the Claimants were entitled to the work on the UD Tower which the Carrier assigned to SW B&B Gang employees in violation of the Agreement and the MOU. BMWE argues the well-established principle that where seniority is confined, work is also confined is supported by many NRAB Awards. As remedy for the Carrier's violation, BMWE requests 16 hours straight time pay for the Claimants.

The Carrier asserts 3 defenses to the Claim as follows:

First, the Carrier asserts that the Board lacks jurisdiction to resolve the dispute because BMWWE has attempted to progress multiple claims for connected work on multiple days. The Carrier argues that the Board has 4 claims for one incident before it including Cases 53, 54, 55 and 58. The Carrier argues the cases involve the same facts and arguments covering different dates. The Carrier argues that this is improper claim splitting, also known as claim stacking, of a single incident into separate days and separate portions of the same work. The Carrier concludes that this is a significant procedural defect such that the Board lacks jurisdiction to resolve the dispute and requests dismissal of the claims.

Second, the Carrier asserts that BMWWE has not met the burden of proof to prove the claim because the Organization merely quotes the Rule without proving that the Rock Island B&B Gang had rights to be assigned the UD Tower work over the SW B&B Gang. Metra also collaterally argues that, at the time of the claim, the Rock Island B&B Gang was working on the Blue Island turntable. For this reason, the Carrier says the Rock Island B&B Gang could not be assigned to the UD Tower security improvements.

Finally, Metra asserts that the Agreement was not violated based on the emergency exception in the Agreement and the March 28, 2006 MOU. Metra argues that there is no Agreement or MOU language which requires the Carrier to exclusively reserve emergency work to the Rock Island B&B Gangs. The Carrier says that the UD Tower work involved security improvements to protect the public thereby constituting emergency work. Metra again argues that, since the Rock Island B&B Gang No. 1 was working on a long term Blue Island Facility turntable, then the Carrier was within its right to assign this security work to the SW B&B Gang. Further, Metra concludes an emergency will supersede any district gang assignment based on the March 28, 2006 MOU. Metra asserts that for these reasons, the UD Tower work was considered straight time emergency work.

Claim Splitting

The record establishes, and it is undisputed, that Cases 53, 54, 55 and 58 do not involve identical UD Tower work assignments and the work did not occur on the same.

The on property handling record shows that the Claim 53 April 18, 2012 work involved installation of 2 windows and preparation for a gate. The Claim 54 April 11, 2012 work involved installation of gate posts. The Claim 55 April 13 and 16, 2012 work involved installation of posts, fencing and gates. The Claim 58 April 10, 2012 work involved installation of signs. Moreover, Claims 53, 54 and 55 are advanced on behalf of Ponce, Knor and Butler. However, Claim 58 is advanced on behalf of Ponce and Knor. Based on these facts the claims involve different work on different days and, in Case 58, different Claimants. The NRAB Awards cited by the Carrier as grounds for dismissal of these claims for claim splitting involve factually identical or virtually identical claims regarding time, place and circumstance or duplicate claims. These claims are significantly different and do not for that reason constitute split or stacked claims.

The only connection among the claims is that the work was done on the UD Tower.

For these reasons, the Board finds that BMWE has not engaged in claim splitting or claim stacking.

However, *arguably*, to achieve efficiency in the on property claim handling and in the Board's dispute resolution processes, the Parties' consolidation of these claims would seem to have been favored. But, there is no evidence in the on property handling that either Party sought claim consolidation. Therefore, the Board must take these claims as they find them presented by the Parties.

For these reasons, the Carrier's assertion that the Board does not have jurisdiction over the claims is without merit.

Rock Island B&B Gang's Right to the Claimed Work

The Carrier's second defense to the claim asserts that BMWE has not proved that Rock Island B&B Gang's right to the UD Tower work. The Carrier also argues that the Claimants' assignment to the Blue Island turntable work prevented assignment to the claimed work and required the Carrier to assign the UD Tower work cross-districts boundaries to the SW B&B Gang.

The plain, clear and unambiguous language of Appendix O, Section 5 provides that the Claimants' Rock Island B&B Gang No. 1 is to handle all B&B work on the Rock Island district, including planned and emergency overtime. The UD Tower is located on the Rock Island district. Furthermore, the March 28, 2006 MOU's plain, clear and unambiguous language provides specifically for the assignment of district gangs stating in pertinent part,

gangs **will** be established for the purpose of performing work on a particular district and **will** be assigned to perform work only within that district, except in the event of an emergency. (Emphasis added).

The undisputed facts establish the UD Tower work was work within the Claimants' Gangs' district. Pursuant to the proven facts, when read together, Appendix O, Section 5 and the March 28, 2006 MOU require that the Carrier will assign all B&B work, including planned or emergency overtime, to the Claimants' Gang and that such work will be assigned only to the Gang within the UD Tower's district boundaries which is, in this claim, the Rock Island Gang No. 1.

The March 28, 2006 MOU further provides that, in other than an emergency and with the Parties' agreement, the Carrier may make temporary cross-district Gang assignment. This language would allow the SW B&B Gang to perform the UD Tower work in cases other than an emergency, such as the Rock Island Gang No. 1's work on the Blue Island turntable, with BMW's agreement. However, there is no evidence in the on property handling that the Carrier had an agreement with BMW regarding a cross-district assignment of the claimed work.

For these reasons, the Board finds that the Carrier's assignment of the SW B&B Gang to the UD Tower work, based only on the Claimants' assignment to the Blue Island turntable work without BMW's agreement, is a violation of the Agreement and the March 28, 2006 MOU.

However, the Carrier also asserts as its third defense that an emergency existed, which is a recognized exception to the Agreement and the March 28, 2006 MOU work assignment rules.

The Emergency Exception

It is well-established in NRAB Awards that when the Carrier asserts that an emergency exists to justify deviating from the requirements of the Agreement, the Carrier is obligated to present sufficient evidence establishing an emergency existed. Specifically, the Carrier must demonstrate that its extraordinary action of deviating from the governing work place rules was necessary to preserve property and to protect life and limb. In this regard, it is reasonable to find a record of some actions or reactions recognizing the emergency in announcements of or declarations of the existence of the emergency by the Carrier. In addition, it is reasonable to expect that out of a sense of urgency, an emergency would result in rapid deployment of forces on overtime assignments. However, the record contains no evidence of actions, reactions, emergency announcements or emergency declarations by the Carrier. The record also shows that the Carrier assigned the UD Tower work with straight time pay during regular shift times which does not manifest a sense of urgency on the Carrier's part indicating an emergency.

In this dispute, based on the totality of the circumstances and evidence, there is no evidence of an emergency *before* the Carrier's assigned the SW B&B Gang to the UD Tower work. The record shows that the Carrier's assertion that an emergency existed regarding the UD Tower work arose during the on property handling. For this reason, the Carrier's emergency exception defense is *post hoc* of BMW's claim filing.

The Board finds these facts establish a *post hoc* emergency defense by the Carrier amounting to an excuse for the Carrier's violation of the agreement and not grounds supporting or a defense of the Carrier's deviation from the governing work place rules.

For all these reasons, the Board finds the Carrier violated the Agreement and the March 28, 2006 MOU in the assignment of the SW B&B Gang to the UD Tower work.

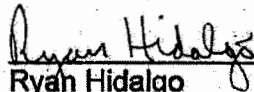
As to remedy, the Board also finds that but for the Carrier's violation, the Claimants would have performed the work and been paid straight time for the claimed hours. Therefore, the Carrier must make the Claimants whole with 2-hours straight time pay.

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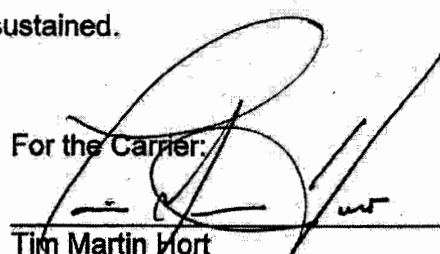
BMWE's claim is sustained.

For the Organization:



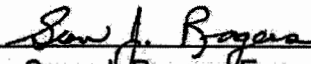
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