

PUBLIC LAW BOARD NO. 6375

Case No. 4

Award No. 4

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it bulletined and assigned surfacing gang positions to employees under the Rail Gang Roster 5600 and when it assigned the surfacing gang to perform track surfacing work on the Del Rio Subdivision beginning October 1, through 8, 2000, instead of Del Rio Division Seniority employees J. Terrazas, R. Gutierrez, G. Chavez, R. Cervantez, and F. Cardona (System File MW-01-44/1252903 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants J. Terrazas, R. Gutierrez, G. Chavez, R. Cervantez, and F. Cardona shall now each be compensated for sixty-four (64) hours’ pay at their respective straight time rates of pay and thirty-two (32) hours’ pay at their respective time and one half rates of pay.”**

FINDINGS:

This Board, after hearing upon the whole record and all the evidence finds that the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

The specific issue at bar as viewed by the Organization began when the Carrier Bulletined surfacing gang positions on October 1, 2000 to the 5600 Rail Gang. The 5600 System Rail Gang performed the work of surfacing track. Claimants held seniority on the Del Rio Division Seniority District, were regularly assigned, available and willing to work the territory to which their seniority entitled. However, the Carrier is alleged to have violated the Agreement in that it Bulletined the work to a *system* rail gang to

work the Del Rio Division, when the work belonged to the Claimants. As there was no Agreement provision for the right of system surfacing gangs to do surfacing work on the Del Rio Division, the Carrier violated the Agreement in permitting the crossing of seniority lines. The work should have been properly assigned to those that held seniority on the *division* to which the work was performed.

The Organization argued that this work was clearly work that belonged to the employees who worked on the Del Rio division. It protested the bulletins, stating:

... inasmuch as surfacing gangs unquestionably are not rail gangs and as there is no contractual basis for advertising such positions as system rather than division those bulletins must be canceled.

Among the numerous other arguments in this record, the Organization maintained that the Claimants were qualified to perform the work that the Cat Tamper Gang performed, as they had "performed the same character of work involved" in the past. It holds throughout this claim that the Carrier had no right to bulletin this work at the system level, but should have bulletined it as a division position whereby the Claimants would have performed the work on their own seniority division; the Del Rio Division, where they held seniority rights.

The Carrier has denied violation of the Agreement and in fact, argues that it is in full compliance with Article 1 of the October 7, 1959 Mediation Agreement, which required notice and conference if requested. It maintains that it served notice by letter of November 25, 1997, of its intent to assign the operation of the CAT tamper to a system gang. It maintains that it did not violate any Agreement when it assigned surfacing gangs as system gangs. The Carrier questions the timeliness of this dispute and further the Organization's insistence that the Cat Tamper cannot cross seniority lines to perform the track surfacing work.

The burden of proof for this claim rests with the Organization. This Board has fully read all aspects of this dispute and its history. The Board finds in its study that the Carrier did submit to General Chairman Palmer a notification on November 25, 1997 of the CAT Tamper and its assignment to a system rail gang. The record indicates that it was Bulletined in December 1997, with no qualified bidders. The position was re-advertised and assigned prior to this dispute in 1998. Further, the Board finds no probative evidence presented by the Organization that system gangs did not perform surfacing work on various divisions as indicated by the Carrier.

The question at bar is not the Scope of the Agreement, but the assignment of system gangs to work across districts or subdivisions. The Carrier argues that there is no proof of exclusivity. The Board finds no probative evidence that this work is restricted by Agreement to the system or is work of the division which cannot be performed by a system gang. While the Organization continues throughout this claim to assert a violation, the Board finds no proof of a violation. The Board has searched the on-property handling to find evidence that the use of the CAT Tampers was restricted to the division, or that surfacing work was not system gang work. Although the Organization continues to argue that such work could only have been performed along with legitimate system gangs, there is a lack of probative evidence to prove that point. The Organization states:

We will acknowledge that tampers have been and may be assigned with rail or tie gangs for use in connection with rail or tie gang work. However, the disputed work assignment involved here was only for the purpose of surfacing track, and was not working in conjunction with any rail or tie gang.

The Board finds the Carrier's rebuttal position to the above persuasive. Roster 5600 is the assignment to system gangs and not a title. As the Carrier states:

... we have rail gangs, curve gangs, unloading gangs, switch gangs, construction gangs, etc. assigned to this roster. The title to the roster was not established by agreement language and does not restrict the carrier in the manner you are suggesting.

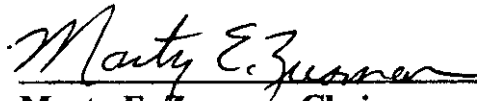
Accordingly, we find no proof that the Carrier is restricted to perform surfacing work to a particular system, district or division group of employees. The Organization has provided no evidence of past practice to support its argument that the work disputed is reserved to division employees. The Awards submitted in support of a violation involved crossing divisions, not restricting between division and system employees (Third Division Award Nos. 35732, 35082, 34049, 32993, 32419, 32394). We find no proof that when the Carrier permitted system employees to perform this work, it violated the rights of the division employees who were Agreement protected to perform the work.

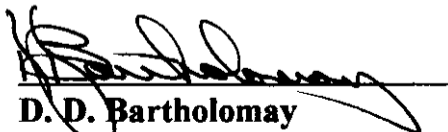
Nothing in this record proves that the work performed was protected to division employees and could not be performed by system employees. No proof was shown of a

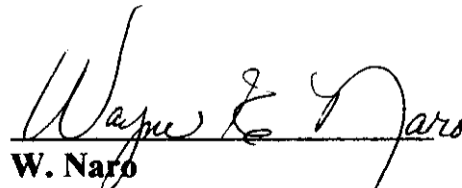
practice to that effect. No evidence was submitted by the Organization to document by affidavit or un rebutted assertion that this had been the practice on this property. As system gangs cover the whole property with districts below them and within districts there are many divisions at the bottom; and while movement between divisions is restricted, the Organization has failed to prove that system gangs were not permitted to do division work. In fact, there is evidence of record of this occurring as far back as 1987. In short, there is no proof in this record that the Carrier is restricted from using a system gang to perform surfacing work as herein disputed on the Del Rio division (see Third Division Award 29977). Having failed to meet its burden of proof, the claim must be denied.

AWARD:

Claim denied.


Marty E. Zusman, Chairman
Neutral Member


D. D. Bartholomay
Organization Member


W. Naro
Carrier Member

Date: 5-27-03