

PUBLIC LAW BOARD NO. 7099

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES, DIVISION OF I.B.T.**

CASE No. 08

-And-

**UNION PACIFIC RAILROAD
COMPANY**

STATEMENT OF CLAIM:

The Claim, as described by the Petitioner, reads as follows:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned transportation Department employees (Switchmen/Trainors J. Noe, G. Lewkuc, W. Jensen and H. Carter) to perform Maintenance of Way and Structures Department work (replace windows, patch and paint walls and related work) at the Proviso Administration Building in Northlake, Illinois on August 9, 10, 11, 12, 13 and 14, 2004 (System File 9SW-2102T/1413445 CNW)
- (2) As a consequence of the violation referenced to in Part (1) above, Claimants K. Anetsberger, D. Johnson and M. Kress shall now ‘ . . each be compensated an equal and proportionate share of One Hundred Ninety Two (192) hours at their applicable rate of pay.’”

The Carrier has declined this claim.”

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

AWARD

After thoroughly reviewing and considering the record of this case together with the parties’ presentation, the Board finds that the claim should be disposed of as follows:

The Organization alleges that beginning August 9, 2004, four train service employees who are not represented by the Brotherhood of Maintenance of Way Employees (BMWE) performed remodeling work consisting of replacing broken windows, patching and repainting walls, using drywall taping tools, rollers and paint brushes to accomplish this task. This is work that should

have been performed by BMW forces the Organization contends. In response, the Carrier contended that the room in question located in the Proviso Building was a storage area that was transformed into a training classroom/facility for newly hired Operating Craft employees. The four individuals identified by the BMW in the instant claim were performing their normal functions, which involves instructing newly hired Operating Department employees in both a classroom and on the railroad property where they were actively involved in the indoctrination of numerous newly hired Operating Department employees, and devoted their working hours to providing such classroom/work site training, or in the manufacturing of their own training aides for use in their classroom instruction. Accordingly, the Carrier maintains that the construction of “mock-ups” and training displays cannot be considered as BMW work.

In its “last say letter” of July 11, 2005, the Organization submitted a statement signed by the Claimants who maintained that they witnessed the four Trainmen “patching walls, fixing windows & painting walls & floor” on each of the dates at issue.

As we review the statements noted herein, we are left with the allegations from each party who we believe to be honorable together with the obligations set forth in the Agreement. The Railway Labor Act does not deal with a Carrier’s assignment of work. The Board determines issues concerning assignment of work only from the interpretation of the existing Agreement between the parties together with the law of contracts plus history, tradition and custom in the industry. Well established principles of collective bargaining reserve to the employees covered by the Agreement the work of the positions within the unit when the Carrier requires the performance of such work. Notwithstanding the existence of express language, there may be exceptions, stated or unstated, which the parties intended in view of history, tradition or custom. Here, however, we find no evidence to support an exception, expressed or implied. Accordingly we are left with the language of the Agreement to guide us in the determination of whether the work at issue was Scope covered. In this later regard, Rule 1(Scope) provides in relevant part that employees included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance and repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common Carrier service on the operating property. Rule 2

(Subdepartments) provides for the establishment of the B&B Subdepartment within the Maintenance of Way and Structures Department, and Rule 3 (Classification of Work) at Section E provides that an employee assigned to construction, repair, maintenance or dismantling of buildings, bridges or other structures, including the building of concrete forms, etc., shall be classified as a B&B carpenter. Section F provides that an employee assigned to mixing, blending, sizing, or applying of paint, kalsomine, whitewash or other preservatives to structures either by brush, spray or other methods, or glazing, including the cleaning or preparation incidental thereto, shall be classified as a B&B carpenter. Given these Agreement provisions, it must now be determined if the work at issue should have been performed by BMW representative employees.

The Organization maintains, and the statement submitted by the Claimants supports the assertion that the work at issue, consisting of patching walls, fixing windows, painting walls and flooring was performed by four Trainmen. The Carrier does not dispute this point. On the other hand, the Carrier maintains that the work performed was in the nature of converting a storage room to a training classroom/facility for newly hired Operating Department employees. This assertion was not refuted by the Organization. More specifically, the Carrier asserts that the four Trainmen at issue constructed "mock-ups" and "training displays", work it maintains has not been traditionally and historically performed by the Organization. The Organization does not dispute this assertion either. Accordingly, when piecing these assertions together, it becomes clear to the Board that while the four Trainmen were converting the storage room into a training room, they were also constructing mock-ups and training displays that would ultimately be used for the training of newly hired Operating Department employees. As to the conversion, it is clear to the Board that this work is Scope covered – that is, work that has been historically and traditionally performed by BMW representative employees, work that is covered by Rules 1, 2 and 3. As to the later, it is also clear to the Board that work of this nature is not Scope covered in that it has been more appropriately performed by Trainmen.

Given the foregoing determination, it must be determined how much time was spent in the conversion of the storage room to a training room. Once this time has been determined, the Carrier is obligated to pay the Claimants for time lost as a result of its decision to improperly assign this work to non-BMW representative employees. The fact that the Claimants may have

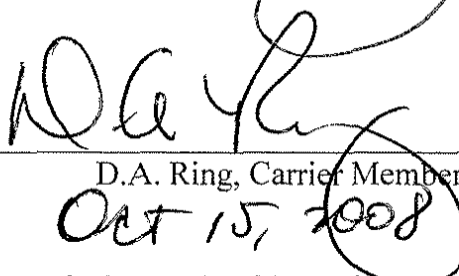
been fully employed is of no moment to the Board in the assessment of damages due. In this regard, there is a long line of cases, which this Board chooses to follow, that provide that monies are due and owing for lost work opportunities. (See e.g., Third Division Awards 31562, 32699, 32861 together with on-property Awards 35735 and 35736.)

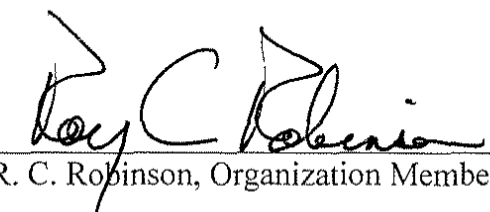
Finally, the Board cannot find support for the Carrier's assertion that the instant claim represents a duplication or pyramid of another claim. In this regard, we find support in the record that there were two totally different and distinct projects, and while it is understandable that the Carrier could have understood them to be one in the same due to the numerous similarities involved in each project, the Board is convinced that they were not.

AWARD

Claim sustained in accordance with the findings herein.



Dennis J. Campagna, Neutral Member

D.A. Ring, Carrier Member

R. C. Robinson, Organization Member

Dated: September 30, 2008

Buffalo, New York