PUBLIC LAW BOARD NO. 7099

BROTHERHOOD OFMAINTENANCE OF WAY EMPLOYES, DIVISION OF I.B.T. **CASE No. 10**

-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 Consolidated System Gang 9068 employes to perform local district maintenance work (gauging track, adzing and respiking existing ties) on Seniority District T-7 territory in the vicinity of Chippewa Falls, Wisconsin between Mile Posts 0.0 and 0.6 on December 4 and 5, 2004, instead of Seniority District T-7 employes (System File 7WJ-7449T/1419649 CNW)

(2) As a consequence of the violation referenced to in Part (1) above, Claimants M. C. Kuberra, K. R. Julian, M. A. Dobson, W.E. Brewer, T. J. Sturz, R. A. Fogelberg, O. L. Wahlberg, D. E. Zawistowski, J. E. Ball, D. T. Kaufman, T. J. Baehr, J. J. Hanus, L. S. Sprinkle, R. P. Pichler, J. T. Van Tassel, R. H. Reese, J. R. Lilly, K. D. Brown and r. W, Meyer shall now *** each be compensated at their applicable rate of pay for an equal proportionate share of the for hundred eighteen (418) man/hours work performed by the forces of he 9068 Gang in performing the track gauging work cited herein.'"

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:

This case questions the propriety of the Carrier's actions in assigning Consolidated System Tie Gang 9068 to perform gauge track work between Mile Posts 0.0 and 0.6 on the Chippewa falls

Subdivision on the Twin Cities Service Unit on Saturday, December 4th and Sunday, December 5th, 2004. At issue is the interpretation of Side Letter 1 to Appendix 13 of the November 1, 2001 Agreement. Side Letter 1provides:

> This is in reference to the Implementing Agreement providing for the consolidation of system gang operations on UPRR, WPRR, SPRR, C&NW and D&RGW territories effective June 1, 1998.
>
> Concern exists that by listing the specific types of system gang operations in Section I of the implementing agreement, disputes may arise concerning the performance of gauging work by system gangs. To clarify this issue, it is agreed that the performance of gauging work by system gangs is acceptable when:
>
> (1) It is directly connected to and within the limits of system steel, curve, or switch replacement projects, or system new construction work.
>
> (2) It is being done in immediate preparation for a system tie renewal project.
>
> (3) The class of track is being upgraded necessitating more spikes in the tie plates.

The relevant facts giving rise to the instant claim are not in serious dispute.

Consolidated System Tie Gang 9068 ("Gang 9068") had been scheduled to install ties on the Chippewa Falls Subdivision during November and December 2004. Sometime prior to December 4, 2004, weather conditions prevented Gang 9068 from performing any further tie installation work. The Carrier in turn decided to abolish Gang 9068 effective December 8, 2004. On Saturday, December 4 and Sunday December 5, 2004, the Carrier directed employes of Gang 9068 to gauge track between Mile Posts 0.0 and 0.6 on the Chippewa Falls Subdivision of the Twin Cities Service Unit.

Claimants have all established and hold seniority in the Maintenance of Way Structures Department, Track Subdepartment on Seniority District T-7. They were observing their regularly scheduled rest days on the dates involved in this dispute. The Organization maintains that the Carrier's decision to schedule Gang 9068 to perform the gauge track work at issue the Carrier violated Side Letter 1, and also deprived BMWE represented employees of work, which the Organization maintains amounts to a total of 418 hours.

It is the Carrier's stated position that the instant claim has no merit and must therefore be dismissed. The Carrier rests its position on two points:

> First, the Carrier maintains that this claim has not been handled in the usual manner in accordance with the Railway Labor Act. In this regard, the Carrier asserts that the General Chairman who processed the claim beyond the first level did not have Section 3 authority to pursuant to the Act to handle claims and grievances under the Collective Bargaining Agreement.
>
> Second, the Carrier maintains that Side Letter 1 has not been violated. Moreover, in reliance on Rule 26(h) of the UP Agreement, the Carrier adds that the gauging and crossing work performed by Gang 9068 was within the scope of their work, and was performed on December 4th and 5th, their regular assigned work days.

We address each of the Carrier's assertions in the order given.

First, the Board notes that the Carrier raised virtually the identical procedural argument in its argument before the Board the NRAB, Third Division Award 37368 where it maintained that the claim had been submitted before the wrong General Chairman, who was not a recognized representative of the Claimants. The Board easily disposed of this argument, concluding that the claim had been properly submitted, due to the fact that "[t]he August 1, 1998 Agreement mooted the Carrier's contentions otherwise." Moreover, we note that even had this not been the case, it is telling that during the on-property correspondence between the parties, the Carrier, in its December 5, 2002 letter to the Organization, noted, in relevant part, "Without agreeing in any way with the positions raised in your letter, I do agree that the matter ultimately will be resolved in court." Given this stated position by the Carrier, it can be reasonably assumed that had the Courts ruled in a manner consistent with the Carrier's position, the procedural issue raised in this case would have been mooted. We therefore conclude that there is no basis for the Board's dismissal of the instant claim on the basis of a procedural defect.

Now addressing the merits of the instant claim, the Board notes that the Carrier initially defended its action by asserting the following:

> According to the information presented by Manager of Track Maintenance Terrance E. Wagner, Manager of Track Projects Thomas Foxen, and Track Supervisor Doug Brenke, all explained that the work in question was a part of the tie project and that the work done was in preparation of the ***eventual*** tie renewal project. Therefore, since the work was in preparation of the tie renewal project, it was in accordance with parts 1 and 2 of the Appendix 13/Side Letter 1 . . .(Emphasis added)

The Board finds on the basis of the record that the Carrier's stated action is not in accord with part 1 of Side Letter 1since it cannot be said that the work at issue was "directly connected to and within the limits of . . . new construction work." At most, the work performed by Gang 9068 was part of a renewal project which cannot be categorized as "new construction work." Similarly, the Carrier's stated action is not in accord with part 2 of Side Letter 1 since "eventual" does not equate to "immediate".

The Carrier also defends its action by relying on Rule 26(h) which provides:

> Where work is required by the Company to be performed on a day which is not part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employee.

A fair reading of Rule 26(h) together with Side Letter 1 persuades the Board the assignment of work to be performed under Rule 26(h) must be made to the proper craft under the terms of the Agreement. Clearly, such assignment should have been made to the Claimants who were fully qualified and readily available to perform all the gauging work at issue.

As to the remedy, the Board finds that a monetary remedy is appropriate given the lost work opportunity experienced by the Claimants. This determination notwithstanding, there appears to be a substantial difference between the parties regarding the amount of time it took Gang 9068 to accomplish the work at issue. While the Organization maintains that it took 418 man hours, the Carrier maintains that Gang 9068 expended 272 hours. We therefore leave it to the parties to review the time logs in order to make a determination as to the hours due the Claimants.

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