

**PUBLIC LAW BOARD NO. 7101
CASE NO. 11**

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

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Federated Craft Welder E. Landuyt and his welder helper, along with Extra Gang Machine Operator V. Wheeler to perform regular Maintenance of Way and Structures Department section work (obtaining track permits and warrants for rail grinding train and put out fires behind the train) between Mile Posts 318 and 271 on the Boone Subdivision on May 20, 21 and 22, 2004, instead of assigning District Gang 3447 employees M. Bluml, G. Riley and J. Hilton (System File 4RM-9572T/1401929 CNW)
- (2) As a consequence of the violation referred to in Part (1) above, Claimants M. Bluml, G. Riley and J. Hilton shall now each '*** be compensated for all hours of straight time and overtime that the Federated Welder, Federated Welder Helper and the Extra Gang Machine Operator performed regular Maintenance of Way and section work, at the applicable rate.' "

The Carrier has declined this claim."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by Agreement; this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the Hearing held.

Claimants Track Foreman M. Bluml, Assistant Track Foreman G. Riley and Trackman J. Hilton have established and hold seniority in Seniority District T-4 within the Maintenance of Way and Structures Department. On the dates involved in the instant case, they were assigned to District Gang 3447 with scheduled hours of 7:30 a.m. to 4:00 p.m. Monday through Friday and headquartered at Denison, Iowa.

On May 20-22, the Carrier allegedly assigned Welder E. Landuyt and his welder helper, along with Extra Gang Machine Operator V. Wheeler to obtain train permits and warrants for a rail grinding train and put out fires behind the train between Mile Posts 218 and 271 on the Boone Subdivision. The Organization contends that during this period of time, Landuyt, his welder helper, and Wheeler performed work that was reserved to BMWWE represented employees. According to the Organization, Claimants were on duty on the Claim dates, fully qualified and willing to perform the relevant work, but were not given the opportunity to do so by the Carrier.

According to the Organization, the Carrier had customarily assigned work of this nature to the Carrier's Maintenance of Way Employees. The Organization further claims that the work in question is consistent with the Scope Rule. According to the Organization, the Carrier's Maintenance of Way Employees were fully qualified and capable of performing the designated work. The work done by the Federated Craft Employees and the Machine Operator is within the jurisdiction of the Organization and therefore Claimants should have performed said work. The Organization argues that because Claimants were denied the opportunity to perform the relevant work, Claimants should be compensated for the lost work opportunities.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that the work performed (obtaining work permits and warrants for the rail grinding trains and putting out fires behind the train), also known as "track & time" work, is not work that is reserved exclusively to Claimants. According to the Carrier, anyone, including managers, supervisors, trainmen, machine operators and welders, can obtain said "track & time" work. Further, the work does not belong to the BMWWE represented employees under either the express language of the Scope Rule or any binding past practice.

We have reviewed the question of whether the work in question has been traditionally and customarily performed by the Organization. In Special Board of Adjustment No. 1016, Award 150, the Board framed the scope issue as follows:

"In disputes of this kind, the threshold question for our analysis is that of scope coverage. There are generally two means of establishing scope coverage. The first is by citing language in the applicable scope

rule that reserves the work in disputes to the Organization represented employees. The second method is required when the language of the scope rule is general. In that event, the Organization must shoulder the burden of proof to show that the employees it represents have customarily, traditionally and historically performed the disputed work. It is well settled that exclusivity of past performance is not required in order to establish scope coverage vis-à-vis an outside contractor.”

In the instant case, we have carefully reviewed all evidence regarding the question of whether the Organization has proven that the work involved belongs to the Organization. First, we note that “track & time” work is not specifically identified in the Scope Rule.

We next turn to whether there is sufficient evidence for the Organization to have proven that it has customarily, traditionally and historically performed the disputed work. In the instant case, while the Organization has presented some evidence to show that the work in question belongs to the Organization, that evidence is insufficient for the Organization to meet its burden of proof. *See* Public Law Board No. 6537 above. *See Also* Third Division Award 37365 (Goldstein), Public Law Board No. 4402, Award No. 20, Case No. 20, Award No. 28, Case No. 28; Public Law Board 6537, Award No. 1.

Based on the evidence in this matter as well as the above-cited precedent, we cannot find that the “track & time” work is definitively encompassed within the plain language of the Scope Rule or that the Organization has been able to prove that this work has historically and traditionally been performed by members of the Organization.

Thus, we find that the Organization has not met its burden of proof and the Claim is therefore denied.

The Claim is denied.

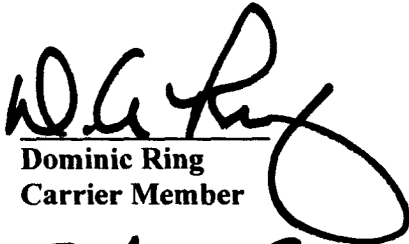
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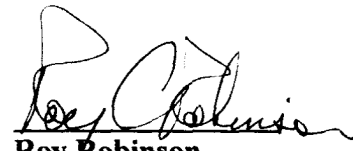
Claim denied.

**Steven
Bierig**

Digitally signed by Steven Bierig

**Steven M. Bierig
Chairperson and Neutral Member**


**Dominic Ring
Carrier Member**
5-6-09


**Roy Robinson
Organization Member**

Dated at Chicago, Illinois this 16th day of April 2009.