

Award No. 7804
Docket No. MW-5972

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

James P. Carey, Jr., Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI PACIFIC RAILROAD COMPANY

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

(1) That the Carrier violated the effective agreement when it assigned employees holding no seniority under the effective agreement to the work of pumping Diesel Fuel Oil at Omaha, Nebraska subsequent to May 4, 1951;

(2) That W. M. Hardenberger, who performed Pumper's duties at Omaha, Nebraska prior to May 5, 1951, be assigned to perform the work of pumping Diesel Fuel Oil at Omaha, Nebraska;

(3) That W. M. Hardenberger be allowed eight (8) hours pay at the Pumper's straight time rate for each day subsequent to May 4, 1951, on which employees holding no seniority under the effective agreement, were permitted or required to pump Diesel Fuel Oil at Omaha, Nebraska.

EMPLOYES' STATEMENT OF FACTS: Prior to May 5, 1951, Mr. W. M. Hardenberger was employed as a Pumper at Omaha, Nebraska, and was assigned to operate pumps in connection with the transfer of Diesel and fuel oil from tank cars to storage tanks.

Effective on May 5, 1951, Pumper Hardenberger was relieved of his fuel and oil pumping assignment and the work was assigned to employees of the Stores Department who hold no seniority under the effective agreement.

Diesel and fuel oil unloading and storage facilities at other locations on the Carrier's property such as Wynne and North Little Rock, Arkansas, are operated, maintained, repaired and installed by Maintenance of Way employees.

The Diesel and fuel oil plant at Hoisington, Kansas is also one of the plants assigned to Maintenance of Way Employees. Although the Carrier at one time assigned Mechanical Department employees governed by the Shop Crafts agreements (not clerks) to the operation of the Hoisington Plant, it was subsequently restored to Maintenance of Way employees in accordance with the findings of this Board in Award 4848, Docket MW-4798.

Except for the class of employees which the Carrier contends should be assigned to the operation of the Omaha facilities, the general factual situation is similar to that involved in Docket MW-4798, Award 4848.

pumpers alone were contemplated. The use of fuel oil for locomotives and Diesels was comparatively small at that time. The term Water Service Foremen, the first positions named, bears out this fact. It seems unlikely, therefore, that the parties contemplated anything more than water pumpers at the time the rule was negotiated. Standing alone, we would be compelled to hold that the Scope Rule, in specifying the positions of pumpers, was intended to include water pumpers only within its scope."

After making this statement, the award went entirely outside the Agreement and citing certain Carrier instructions with reference to water service foremen training pumpers in the operation of water and fuel oil stations, ordered the pumping of Diesel oil at Hoisington be given to pumpers under the Maintenance of Way agreement.

This decision seemed to the Carrier to be so obviously wrong and beyond the authority of the Board that we requested a rehearing of the case on its merits. This rehearing was denied but a "Ruling on Petition for Rehearing" was promulgated. The following is quoted from this ruling:

"The Carrier appears more apprehensive of the effect of the award than of its application at Hoisington. Where a practice exists, it would well prevail over the interpretation to be made in a case where that factor was non-existent. We have not said that all fuel oil pumping was the exclusive work of pumpers."

It is the Carrier's position that in view of the long time well-established practice of Store Department employees pumping Diesel oil at Omaha, there can be no support in Award 4848 for the claim here involved.

Decision MW-85, referred to in Section 9 of our Statement of Facts, and the letter of January 9, 1941 referred to therein are attached as Carrier's Exhibits "I" and "J", respectively. An examination of these documents quickly reveals that they pertain only to the matter of seniority and promotion. They merely place pumpers in the line of promotion covering Water Service Department Employees. The classification of pumper was already in the Scope Rule. The decision does not contain anything more with respect to employees covered by the Maintenance of Way Agreement than is contained in the agreement itself. It is not, in any wise, support for this claim.

(Exhibits not reproduced.)

OPINION OF BOARD: When facilities for handling Diesel oil were first installed at Omaha in 1940 the work of pumping oil was assigned to Store Department employees who have continued to perform this service except for a short period in 1951 hereinafter mentioned. Before and since 1940 pumping of water for steam locomotives at Omaha has been done by a pumper in the Water Service Department represented by the Brotherhood of Maintenance of Way employees. With the gradual substitution of Diesel for steam locomotives since 1940 the quantity of oil pumped at Omaha has increased and the need for pumping water for steam locomotives has been correspondingly reduced to a point where the position of water pumper at Omaha was abolished in May 1951.

In early 1951 enlarged Diesel oil facilities were constructed at Omaha and the oil pumps placed in operation on April 25 by water service employees who installed them. W. M. Hardenberger, a pumper employed in Carrier's Water Service Department, operated these oil pumps from April 25 to May 5, 1951 when the work was taken over by Store Department employees and the position of pumper discontinued. The Carrier asserts that this operation of the oil pumps for ten days was a test period and when the facilities were determined to be satisfactory for normal operation on May 5, they were then turned to Store Department employees by whom pumping oil at Omaha had always been done.

Claimant contends that the work of handling Diesel and fuel oil is properly within the scope of the Maintenance of Way Agreement and should have been assigned to pumpers in the Water Service Department; that pumpers handle oil at other points on this property which indicates that such work is construed to be within the scope rule of the Maintenance of Way Agreement; and that when the Carrier assigned the work at Omaha to Store Department employes it violated the scope rule. Specifically claimant asserts that Award 4848 of this Division issued April 28, 1950 settles this issue in its favor.

It should be noted that the work of handling Diesel and fuel oil for locomotives on this property has never been performed by water service pumpers exclusively. Although they have done this work at a few points on the system it is also done by other than maintenance of way employes at several points. The record shows that fuel oil is handled at 24 stations on the property and water service employes perform this service at less than one-third of these stations. The record shows in other words that the parties to the Maintenance of Way Agreement have heretofore accepted the fact that pumping oil at all points on this property was not the exclusive function of water service employes.

The sole issue for determination here is, therefore, whether Award 4848, which involved these same parties, can properly be construed to hold that pumping of oil at Omaha belongs to maintenance of way employes.

Analysis of the docket in Award 4848 discloses that facilities for handling oil at Hoisington, Kansas were intially installed in November 1942 and thereafter until June 1945 the operation of fuel pumps and maintenance of pipe line and tanks used in connection therewith was done by employes of the Water Service Department. In June 1945, the Carrier removed this work from maintenance of way employes and assigned it to Mechanical Department forces. It was also shown that there was no past practice at Hoisington which justified that action. This Award held that the scope rule of the Maintenance of Way Agreement construed alone referred to water service pumpers only, but in view of the sum of other factors, viz., Carrier's Rules and Regulations of September 1, 1941, its subsequent assignment of pumping oil to water service employes in November 1942 and the absence of past practice to justify assignment of the work to mechanical forces, the work came within the Maintenance of Way scope rule. It will also be noted that the Ruling on Petition for Rehearing in that case specifically stated that this Division had "not said that all fuel oil pumping was the exclusive work of pumpers" and that "where a practice exists it could well prevail over the interpretation to be made in a case when that factor was non-existent".

We think the situation at Hoisington, Kansas is clearly distinguishable from that shown to have existed at Omaha and that Award 4848, correctly construed, requires denial of the instant claim. The work of handling Diesel oil at Omaha was assigned to Store Department employes in 1940 before the Carrier's Rules and Regulations relied on in Award 4848 were in existence. Award 4848 holds that the language of the scope rule of the Maintenance of Way Agreement does not include oil pumpers among employes of the Water Service Department. Therefore the inference is that in 1940 the parties to that agreement did not interpret the rule to mean that oil pumping at Omaha was work belonging to maintenance of way employes exclusively. The present scope rule is identical with the rule then in effect. So far as the present docket indicates, no objection was made to other employes performing this work at Omaha until the position of water pumper was abolished on May 5, 1951 immediately after the ten day period during which he had handled this work. The Carrier's explanation that this short assignment was for tests purposes only is not unreasonable in the circumstances shown, and such assignment does not support the instant claim. For the reasons stated we hold it has not been shown that the Carrier violated the Agreement as claimed. It is therefore unnecessary to pass on the question of third party notice raised by the Carrier.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of March, 1957.