# Award No. 8908
# Docket No. MW-8272

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

Howard A. Johnson, Referee

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## PARTIES TO DISPUTE:

## BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

## THE DELAWARE AND HUDSON RAILROAD CORPORATION

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

(1) The Carrier violated the effective Agreement when on November 3 and 4, 1954, it assigned the work of excavating for water and sewer lines at Colonie, New York, to an individual holding no seniority in the Maintenance of Way Department;

(2) Crane Operator Zoel LeBlanc be allowed pay, at his respective straight time rate, for an equal proportionate share of the total man-hours consumed by the Contractor's forces in performing the work referred to in part 1 of this claim.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the effective Agreement when on November 3 and 4, 1954, it assigned the work of excavating for water and sewer lines at Colonie, New York, to an individual holding no seniority in the Maintenance of Way Department;

(2) Crane Operator Zoel LeBlanc be allowed pay, at his respective straight time rate, for an equal proportionate share of the total man-hours consumed by the Contractor's forces in performing the work referred to in part (1) of this claim."

EMPLOYES' STATEMENT OF FACTS: Maintenance of Way employes have for many years performed excavating work necessary in the changing of water lines and for laying of sewer lines. Similarly, Maintenance of Way employes perform the work necessary in making water line changes and laying of sewer lines.

The work performed in the above instance is similar to or the same as that for which this claim is made. At various other locations it has been necessary to rent equipment with operators for performing work—for example, highway trucks, snow plows, bulldozers, and other pieces of construction equipment.

The work involved in the instant claim was performed with equipment of a different type than owned by the carrier in the same manner as other work (some similar and some exactly the same) had been performed in the past without protest or claim from the employes. In addition, in the instant case it was impossible to rent the machine without the contractor's operator. Claim is not supported by agreement rules and practices thereunder and carrier respectfully requests that it be denied.

Management affirmatively states that all matters referred to in the foregoing have been discussed with the committee and made a part of the particular question in dispute.

**OPINION OF BOARD:** The claim is that the Carrier violated the Agreement when it caused the work of excavating for water and sewer lines at Colonie, New York, to be done on November 3 and 4, 1954, under contract, by means of a trench digging machine with an operator who is not under the Agreement. Claimant, a crane operator, claims pay at his regular rate for the time used by the machines and operator, which was twelve hours.

The first contention is that the claim should be sustained because there has been no valid disallowance of it on the property. The objection is that the disallowance was ineffective because it did not state the reasons therefor in accordance with Article V, 1 (a) of the National Agreement of August 21, 1954.

It is not necessary to consider whether that rule so requires, and if so whether its violation would, ipso facto, invalidate the disallowance. For the rule in question expressly states that it applies to "all claims or grievances arising on or after January 1, 1955."

The contention on the merits is that Maintenance of Way employes have for many years performed the excavating work incident to water and sewer lines, and that the Carrier therefore violated the Agreement by contracting the work.

The Carrier does not deny that these employes have for many years performed such work. Its position is that in this instance the work was performed with a backhoe, which digs a narrower trench than its cranes and equipment will dig; that it has no similar equipment, and that it was impossible to rent the machine without the contractor's operator; that it has long been Carrier's practice to rent equipment with an operator when it does not own equipment capable of performing work, or of performing it efficiently. It cites seven instances of that practice during 1950, 1952, 1953 and 1954 (two of which were after the date of the incident complained of), one involving a trench machine and the others involving cranes. It states that at various other times and places management has found it necessary to rent equipment with operators, including highway trucks, snow plows, bulldozers and other construction equipment.

The Employes do not deny these allegations or the statement that the Carrier does not own a machine of the precise type used by the contractor, but allege: (1) that a backhoe is not the only kind of equipment efficiently

used for such excavation; (2) that the Carrier owns many pieces of equipment which have been and can be used for such work; (3) that a backhoe is not a machine, but merely a shovel device for a crane, so attached as to move toward the machine rather than away from it; (4) that backhoe attachments for tractors, bulldozers and cranes can be purchased at a nominal cost from the Hyster Division of the Caterpillar Company and elsewhere; and (5) that the classified telephone directory for Albany, only 4.7 miles from Colonie, lists many companies and includes many advertisements for the rental of machines with backhoe attachments, either with or without an operator. These allegations are not denied in the record.

It is well settled that where, as here, the Scope Rule does not describe the kinds of work covered by the Agreement, resort must be had to past practice. Here, neither party denies the other's claims as to past practice, and the only question is whether, under the undisputed facts stated, the work contracted comes within the general circumstances shown by the Employes, or the exception stated by the Carrier.

In this state of the record we cannot conclude that the showing is sufficient for us to recognize this instance as within the exception. It seems clear that the Carrier's present equipment will dig trenches, though wider ones than desired in this instance; that a relatively minor appliance will remedy that objection, if it was one of the present instance, which is not shown; and that such an appliance can readily be purchased or rented without an operator.

**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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of August, 1959.