

Award No. 9000
Docket No. MW-8109

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis B. Murphy, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY**

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

(1) The Carrier violated the agreement on July 18, 19, 25 and 26, 1953 when it assigned other than track department employees to clean cinders from the tracks at Chariton, Iowa.

(2) That Section Laborer D. R. Foster be allowed payment for a call on each of the dates referred to in part (1) of this claim account of the Carrier's violation of the agreement.

EMPLOYEES' STATEMENT OF FACTS: Prior to July 17, 1953, the Carrier assigned Track Forces to install metal plate shields over a portion of the track ties at Chariton, Iowa, in order to protect the main line track-ties from catching on fire when steam engines cleaned fire boxes (emptied cinders) between the rails while standing at that point. Maintenance of Way Employees were used to shovel these cinders and clean-up following the accumulation of this debris during their regular assigned work week (Monday through Friday) and on Rest Days and Holidays. The practice for Maintenance of Way Employees to perform this work on this Carrier has been in effect for many, many years.

Under date of July 22, 1953, the Carrier's Superintendent issued the following instructions:

"Ottumwa, Iowa
July 22, 1953

Messrs. R. H. Malay
J. W. Shehan
L. O. Atha

With reference to cleaning pits Chariton, Iowa, it has been arranged for this cleaning up to be done by the Mechanical Department and understand they started doing this July 17, 1953.

"We maintain that when cleaning cinder pit service is needed and section men used, then section laborer seniority should apply."

What does this mean? It simply means that section laborers have no contractual or exclusive right to the work of cleaning cinders. It means that if the Carrier does use section laborers on overtime for this work, to which section laborers have no right, then the Carrier must apply laborer seniority and use the senior laborer. It does not mean, however, that Carrier must use a section laborer to perform any of this work if employees of the class entitled to perform it are available and on duty. In this case the Mechanical Department employee responsible for the maintenance of coal and water supplies and the handling of cinders, was available and on duty during his regular assigned hours. There was no overtime work involved, consequently there can be no valid claim for overtime in behalf of an employee who had no right whatever to the work.

In conclusion, the Carrier asserts that:

1. Chariton, Iowa is an engine terminal as defined in Rule 2(b), Group 7, and as such all work of handling coal, water and cinders is a Mechanical Department function.

2. Claimant is a section laborer included in Rule 2(a), Group 1(c), and as such his seniority is confined by Rule 5(a) to positions included only in Rule 2(a), Group 1(c).

3. The work made the basis of this dispute has always been performed by Mechanical Department employees during their regular tour of duty; it has been performed by section laborers only during periods when no mechanical force was on duty.

4. Petitioner contended in Award 6964, and correctly so, that the work here involved does not belong to section laborers.

With these irrefutable facts before it, the Board must deny the claim in its entirety.

The Carrier affirmatively states that all of the data herein and herewith submitted has previously been submitted to the Employees.

OPINION OF BOARD: The Claimant in this case is a section laborer and it is the contention of the Organization that the work involved in cleaning of the cinder pits at Chariton, Iowa, on the dates of July 18, 19, 25 and 26, 1953, which was performed by the Mechanical Department employee was rightfully his, because it is work that "has always been performed by track department employees prior to the change made by the Superintendent under date of July 22, effective July 17, 1953".

The Organization in support of its contention cites several awards by this Board and relies strongly on Award 6964. Award 6964 involves the same parties as in the instant case.

In our opinion the disposition of this claim turns upon one determining factor and that is, does the cleaning of cinder pits at Chariton, Iowa, belong to the Claimant or may the Mechanical Department employees perform this duty under the Agreement.

Before the replacement of steam locomotives with diesel power, Chariton, Iowa was an important engine terminal, but by 1952, only two Mechanical Department employes are required to service locomotives and perform related work.

When cinder pit laborer positions were employed in the Mechanical Department at Chariton, an Engine Terminal, as they were prior to the advent of diesel locomotive operation, they cleaned the cinder pits in question, but with the reduced requirements it became incidental of other positions.

The record in this case contains so many conflicting statements as to which craft had been cleaning the cinder pit involved prior to July 18, 19, 25 and 26, 1953 that we will look for more descriptive language of the Carrier's assignment of the work involved. In the cited award the governing Agreement and the parties involved are the same and although the issues presented for determination are different they are sufficiently related that the parties have presented more detail information that will be helpful to us in making a determination as to the craft that has been performing the services of cleaning this cinder pit.

In describing the claimant and outlining his duties in Docket MW-6996 Award (6964) the Carrier said: "The Claimant is 67 years old, and in recent years because of his advanced age he has been given the less strenuous duties of taking care of the depot lawn, filling switch lights, oiling switches, and picking up papers and rubbish in the yard, including cleaning cinders from the cinder pit, during his five-day Monday through Friday assignment. Whenever any of this work was necessary on Saturday or Sunday, the senior member or members of the section gang to which claimant was assigned were called to perform the service in conformity with the provisions of Rule 40 (a)."

The Carrier further stated that "Since Barker has no other seniority than that of section laborer as stated by petitioner, how then can he claim that the Agreement was violated when the service in dispute was performed by a yard cleaner?" Carrier further discloses: "Section men were used on an overtime basis to clean the cinder pits in Chariton yard, the Carrier called the senior member or members of the Section gang, in strict conformity with the provisions of Rule 40 (a). The Claimant is not the senior member of the gang and he has no seniority except that of a section laborer, consequently there can be no valid basis for the allegation that the Agreement was violated when employes other than the Claimant, who are senior to him, were called to perform the overtime service in dispute."

The above alleged violation occurred in January 1952, and the Carrier admitted "that claimant holds seniority as a section laborer and that in recent years he has been given the duty of cleaning the cinder pit, during his five day Monday through Friday assignment and when this work is necessary on Saturday and Sunday, the senior members of the section gang are called."

We find it impossible to reconcile these statements of fact with the Carrier's present contention "that at Chariton, Iowa the Mechanical Department employes have always cleaned cinders from the cinder pit, and that only on occasion when there are no Mechanical Department forces on duty, section laborers are used to shovel the cinders from the cinder pit track." This may have been the fact regarding the cinder pit located in

the roundhouse and before the mechanical force was reduced by the advent of diesel locomotives, but certainly not in "recent years".

The cinder pit in question is located outside the roundhouse and on the main line running through Chariton, and is not a part of the roundhouse operation, which is operated by the Mechanical Department.

The Carrier contends that in Docket MW-6996, Petitioner claimed that Carrier violated the Agreement when it required or permitted this same employe to perform the duties here involved. The Petition did take that position, but nevertheless it is shown by the Carrier's admission that Petitioner was assigned and did perform this work of cleaning cinder pits, Monday through Friday, and that he is a member of the section gang and that only when this section gang member was not on duty did other employes do this work and then other members of the section gang were called. This Division supported the Carrier in his contentions on the basis that Barker was a section laborer.

This Division in arriving at their decision in Award 6964 must have given considerable weight to Carrier's Exhibit No. 13, which was a letter written by Mr. G. F. McNulty, General Chairman to Mr. G. M. Youhn, Carrier's representative to whom the Organization had appealed the lower decision, wherein the General Chairman stated, "If you will refer to the Ottumwa Division seniority roster you will find that Chariton, Iowa has no yard cleaners listed, therefore Barker has no other seniority than that of section laborer." In reference to this the Third Division ruled "apparently to sustain this claim we would have to designate the Claimant a yard cleaner or so consider him. This we have no right to do."

In reviewing the facts and the evidence in this instant case we must admit that the statements of the Carrier were most confusing and misleading. In this case we must disagree with their contention that prior to July 18, 19, 25 and 26, 1953 this work of cleaning the cinder pit involved had been performed by several organizations including the Mechanical Department (working foreman).

We find in this record a letter written by the Superintendent, dated July 22, 1953, giving the following instructions: "With reference to cleaning pits Chariton, Iowa, it had been arranged for this cleaning up to be done by the Mechanical Department and understand they started doing this July 17, 1953."

After reviewing all of the evidence in this case and taking the Carrier's own outline of the assignment and work performed it is our opinion that when Chariton, Iowa was a busy terminal and employing a large Mechanical Department the cleaning of cinder pits in and near the roundhouse was performed by the Mechanical Department but we must hold that since then and until July 17, 1953 when arrangements were made for this work to be done by the Mechanical Department it had been done by section laborers. We feel that this change was made when the crews were cut because of the diesel locomotives from Mechanical Department to section laborers and at least "for recent years" this work has been performed by section laborers.

In reviewing all of the evidence in this case and the undeniable testimony of the Carrier in Docket MW-6996 (Award 6964) sufficient evidence has been presented to prove that by reason of tradition, custom and prac-

tice this work belongs to section laborers as it properly comes under the Scope Rule of the Agreement.

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 Employees involved in this dispute are respectively Carrier and Employees 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 violated.

AWARD

Claim allowed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: F. P. Morse
Acting Secretary

Dated at Chicago, Illinois, this 1st day of October, 1959.

DISSENT TO AWARD NUMBER 9000, DOCKET NUMBER MW-8109.

The "Opinion" in this Docket contains a series of errors and in consequence the Award is obviously wrong.

The first error appears in the attempt made to reconcile conflicting statements by looking to a prior Award (6964) involving different issues. The Opinion in Award 6964 stated that two issues were presented therein for determination. They were (1) the jurisdictional question and (2) the merits which concerned claims as between section men under the same Agreement when a section man was called. The finding was that the position of Carrier was correct on both issues. There was no issue therein such as here, viz., as to claimant's exclusive right to the service performed by other classes of employees.

The Opinion in Award 6964 stated further:

"Also we find no showing herein that Petitioners have met the burden of proof theory recognized in numerous awards of this Division."

The same is true here. Petitioner obviously failed to meet its burden of proof, otherwise there would have been no occasion to refer to the various statements of the parties involving different issues in Award 6964. This unsound and unwarranted approach resulted in the majority's reaching erroneous conclusions for sustaining the instant claim.

It was erroneous to assume that section men had the exclusive right to the service of cleaning the cinder pit, from Carrier's statement in Award

6964 to the effect that because of claimant's advanced age he was given less strenuous duties, including among other things, cleaning cinders from cinder pit during his assignment Monday through Friday and calling senior section men when such work was necessary on Saturday or Sunday. It is obvious that a service which occasioned calling an employee to perform on a Saturday or Sunday when no one is regularly on duty, would likewise require prompt performance during that part of each twenty-four hour period when section men are not on duty but Mechanical Department employees are on duty and perform that service. The Carrier's statement in this Docket that Mechanical Department employees continue to remove cinders from the cinder pit during their assigned tours of duty was not refuted and commanded recognition.

Errors appear in the quotations taken from Award 6964. For example, the emphasized portion of the following quotation was omitted as were the quotes within quotes:

"Since 'Barker has no other seniority than that of section laborer' as stated by the Petitioner, how then can he claim that the agreement was violated when the service in dispute was performed by a section laborer instead of by a yard cleaner?"

The next quotation in the same paragraph is incomplete and out of context. After pointing out the Employees' contention in the case covered by Award 6964, the Carrier said:

"Thus, the Carrier 'did exactly what the General Chairman contended should be done when he stated in his letter of October 31, 1952 (Carrier's Exhibit No. 13):

'We maintain that when cleaning cinder pit service is needed and section men used then section laborer seniority should apply.'

"In other words, when section men were used on an overtime basis to clean the cinder pits in Chariton Yard, the Carrier called the senior member or members of the section gang, in strict conformity with the provisions of Rule 40 (a). The claimant is not the senior member of the gang, * * *."

The emphasized portion of the foregoing quotation was omitted in quoting it in this case. The misquotes in this case were referred to as "these statements of fact" and then the erroneous assumption was drawn therefrom that only section laborers cleaned cinder pits. Consequently, the confusion which the Opinion in this Award attempts to lay at the Carrier's door, was actually concocted here as a substitute for supporting proof by Petitioner, and the conclusions reached in this unorthodox manner to make a sustaining Award were palpably wrong.

The irrefutable evidence in the instant case clearly shows that the work in dispute has been performed by Mechanical Department employees and the known history of the representation of these employees performing cinder pit work confirms this evidence. The current Agreement between the Carrier and the IBF&O Organization includes "cinder pit laborers" in the Scope Rule. The representation of such employees was relinquished by the petitioning Organization here in the mid-twenties, as stated in Award 5702, and after a period of time with no representation whatever, their

representation passed to the IBF&O. Cinder pit laborers do not appear in the MofW Agreement. The petitioning Organization has since never had exclusive right by Agreement or otherwise to cinder pit work.

Incidentally, there is no cinder pit in the roundhouse; reference to "roundhouse circle" encompasses the area including the Engine Terminal facilities, such as the coal chute, water plug, cinder pit, roundhouse, storage and ready tracks, etc. The conclusion that the location of these facilities in the area had some bearing on the "exclusive-right-to-work" claimed by section men is wholly unfounded and unwarranted by evidence of record.

For these reasons, among others, we dissent.

/s/ J. F. Mullen

/s/ R. M. Butler

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. E. Kemp