

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Thomas C. Bagley, Referee**

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**MISSOURI-KANSAS-TEXAS RAILROAD COMPANY**  
**MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS**

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

(1) The Carrier violated the effective Agreement when it assigned the work of cleaning coal cars at Checotah, Oklahoma, to outside forces;

(2) Section Laborers J. E. Bledsoe and J. F. Crane each be allowed pay at their respective straight time rates for an equal proportionate share of the total man-hours consumed by outside forces in the performance of the work referred to in Part one (1) of this claim.

**EMPLOYEES' STATEMENT OF FACTS:** Cars placed for coal loading by this Carrier at a Coal mine at Checotah, Oklahoma must be cleaned before loading and it is the Carrier's obligation and responsibility to have such cars cleaned. Ever since this coal mine has been operating (since May 1951), the work of cleaning these coal cars has been exclusively assigned to and performed by Section Laborers assigned to Section No. 224 at Checotah, Oklahoma.

On or about February 7, 1956, the work of cleaning coal cars by Section Forces at Checotah was discontinued; the work thereafter performed by an individual named F. E. Harger, with whom the Carrier had then contracted for the performance of such work with the Carrier agreeing to pay him One Dollar (\$1.00) for each car he cleaned.

As a result of such contract, Section Laborers J. E. Bledsoe and J. F. Crane were laid off from Section 224 and were thereafter recalled for service for short intermittent periods.

Claim as set forth herein was filed, the Carrier denying the claim

The Agreement in effect between the two parties to this dispute dated September 1, 1949, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

and the Board is without authority at law and is without jurisdiction to grant the request of the employes and assess a fine or penalty on the Carrier, for which reason the claim must be denied.

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All data submitted in support of the railroads' position have been heretofore submitted to the employes or their duly authorized representatives.

The railroad requests ample time and opportunity to reply to any and all allegations contained in submission and all pleadings of the employe or employes and the Brotherhood of Maintenance of Way Employees.

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas deny each and every, all and singular, the allegations of the employe or employes and the Brotherhood of Maintenance of Way Employees.

For each and all of the foregoing reasons, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas respectfully request the Third Division, National Railroad Adjustment Board, deny said claim and grant said Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas all other relief to which they or either of them may be entitled.

(Exhibits not reproduced).

**OPINION OF BOARD:** The Employes state that cars placed for coal loading by this Carrier at a coal mine at Checotah, Oklahoma, must be cleaned before loading and that it is the Carrier's obligation and responsibility to have such cars cleaned.

Since May, 1951, the date that this coal mine started its operation, the work of cleaning the coal cars had been exclusively assigned to and performed by Section Laborers assigned to Section No. 224 at Checotah, Oklahoma. On or about February 7, 1956, the work of cleaning coal cars by Section Forces at Checotah was discontinued; the work thereafter performed by an individual named F. E. Harger, with whom the Carrier had then contracted for the performance of such work. As a result of such contract, Section Laborers Bledsoe and J. F. Crane were laid off from Section No. 224 and were thereafter called for service for short intermittent periods.

The Carrier states that cleaning cars is work performed by various classes of persons, such as shippers, shippers-laborers, agents, clerical Employes, shop crafts Employes, laborers, contractors and others. The work is of a general nature and peculiar to the work of no craft. This work has not been contracted to forces covered by the Maintenance of Way Agreement and it was proper for the Carrier to change the manner in which it was having cars cleaned at Checotah,

The same basic issues are involved in this claim as in Docket MW-9186, arising on the same property between the same parties and which resulted in affirmative Award No. 9849.

For the reasons advanced in sustaining Award No. 9849, we will sustain this claim as to the work of cleaning coal cars at the coal mine at Checotah, Oklahoma.

**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

The Carrier violated the Agreement, as indicated in the Opinion.

#### AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 17th day of November, 1961.

#### DISSENT TO AWARDS 10195 AND 10196, DOCKETS MW-9328 AND MW-9329

The majority in Awards 10195 and 10196 purport to grant the exclusive right to Maintenance of Way Laborers on the Missouri-Kansas-Texas to the cleaning of coal cars under a general scope rule which lists classifications of employees, but is silent as to the work embraced within such classifications.

The proper basis for determination as to exclusivity in such cases is past practice, custom and usage on a systemwide basis since the Agreement is systemwide in its application. The claim in each of these dockets was to the work of cleaning coal cars at two named points on the railroad, i.e., West Mineral, Kansas in Award 10195, and Checotah, Oklahoma in Award 10196. It is fundamental that the burden of proof as to past practice rests on the claimant.

In both of these Awards, the burden was on the Organization to prove past practice on a systemwide basis if it were to prevail. In neither case did it meet this burden. It rather alleged a past practice at the local points involved, which the Carrier did not challenge and which the majority accepted as proof necessary to sustain the claims. The Carrier asserted a systemwide past practice of having agents, clerical employees, Shop Craft employees, shippers and contractors clean coal cars. This assertion the Employees did not challenge or disprove. If the same reasoning is to be applied to both parties, then the Carrier must be said to have proved a systemwide past practice that the work involved was not exclusive to any one craft since their assertions were not denied or disproved by the Organization. Since systemwide past practice is the proper criterion, the majority has adopted the wrong proof as controlling.

These Awards wrongfully deny to the Carrier the unsundered prerogative of managerial discretion as to using various classes of employees and out-

siders in the cleaning of coal cars. The Awards improperly write a new rule to which the Carrier has never agreed, drastically restricting it to the use of Maintenance of Way Laborers only in cleaning coal cars.

The two claims here, as well as that involved in Award 9848 which the majority refers to with approval, are themselves further evidence of the Carrier's contention that other than Maintenance of Way forces have been traditionally used for this work.

The work here involved is peculiar to no craft by its very nature, and to hold it the exclusive province of Maintenance of Way Laborers in the absence of a rule so granting it, or past practice over the entire system so recognizing it, is to commit error of a most serious kind.

For these reasons, we dissent to Awards 10195 and 10196.

/s/ D. S. Dugan

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ T. F. Strunck