Award No. 11969
Docket No. MW-11458

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Michael J. Stack, Jr., Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY
(Lines West of Mobridge)

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

(1) The Carrier violated the effective Agreement when, on June 24, 1958, it assigned Roadway Equipment and Roadway Machine Operator's Work at its Continental Divide Tunnel to an individual who holds no seniority rights under the provisions of this Agreement.

(2) The Carrier further violated the effective Agreement when, on June 24, 1958, it assigned other than an employe holding seniority in Group 4 of the Roadway Equipment Machine Sub-department to operate an Auto Dump Truck used in connection with the backhoe and front end loader operations at its Continental Divide Tunnel.

(3) Mr. C. J. Metully, who has established and holds seniority in Group 1 of the Roadway Equipment and Machine Sub-department on the territory where the work was performed, be allowed pay at his straight time rate for a number of hours equal to the number of hours consumed by the outsider in operating the roadway equipment and roadway machine referred to in Part (1) of this claim, retroactive sixty days from September 18, 1958.

(4) Mr. D. H. Wallace, who has established and holds seniority in Group 4 of the Roadway Equipment & Machine Sub-department on the territory where the work was performed, be allowed pay at his straight time rate for a number of hours equal to the number of hours consumed by the other employe in performing the Auto Dump Truck Operator's Work referred to in Part (2) of this claim retroactive sixty days from September 18, 1958.

EMPLOYES' STATEMENT OF FACTS: Beginning on June 24, 1958, the Carrier assigned or otherwise permitted an individual who holds no sen-

by this division that except in exceptional circumstances it will not award two days' pay for one day's work."

Award 12673 (C vs Bingham & Garfield—Referee Roll)

"It has been repeatedly held by this division that in the absence of a rule clearly establishing the right, it will not be held that the Carrier and employes contracted to pay and to be paid two days' pay for one day's work. We find no such rule between the parties."

See also Second Division Award 1638.

The theory upon which employes are allowed to recover a day's pay is based on the proposition that they have lost a day's work. However, when, as here, it is shown that claimants worked their regular assignments such claims have been denied because it could not be said that they lost a day's work. See Third Division Awards 1453, 3964, 6299, 6300, 6592, 6818, 7212, 7309, 8500 and 8674, holding that loss must be shown and that claimants then made whole for loss incurred. See also First Division Awards 6716, 8992, 12837 and 13121.

The Carrier holds the claims presented in this submission to be without merit and urges they be denied if not dismissed by reason of failure to comply with the provisions of Article V of the August 21, 1954, Agreement.

All basic data contained herein has been made known to the employes.

OPINION OF BOARD: This docket raises the question of whether the Carrier violated the Scope Rule by its activity in leasing equipment manned by operators other than the seniority group of which Claimants are members.

We hold under the facts of this particular docket that the agreement was not violated.

In June of 1958 rehabilitation work was being done in two tunnels of the Carrier's electrified territory. Because of a drainage problem a ditch was to be constructed between the walls and the end of the cross ties for an aggregate distance of 3,361 feet. The limited lateral work space was further limited by the presence of an overhead 3,000 volt electric line.

This work required a tractor with a backhoe shovel and front end loader and a dump truck, special equipment which the Carrier did not possess and which Carrier believed lacked sufficient general utility for it to purchase. No machine owned by the Carrier was capable of performing the work required of the tractor. Carrier leased both pieces from an individual named Nichols, who refused to rent the tractor unless he personally operated it although he agreed to allow the Carrier to furnish a driver for the truck.

This work was claimed by Group 4 of the Roadway Equipment Machine Sub-department of which both employes here were members. At the time of the lease of this equipment and at all other material times all of the employes of Group 4 were working either on this job or on other jobs. Carrier to operate the truck utilized a section laborer in a different seniority classification. If there had been employes in Group 4 idle the tractor work would have been done by C. J. Metully. Metully was employed during the entire period of the claim at a higher rate then would have applied to the operator

of the tractor. The truck work would have been done by D. H. Wallace who at the time was employed and being paid the same rate he would have received had he operated the truck.

This Board has held that work may be contracted out when special skills and equipment are required.

It does not appear reasonable under the circumstances of this case that the work should have been delayed until a time when employes of Group 4 would otherwise have been idle.

It is significant that neither of the employes involved lost any compensation or time during the period involved and that the employe from the other seniority group received the higher rate of pay of a machine operator.

Although there is nothing in the record to show that the Carrier attempted to rent a similar tractor without an operator from other equipment lessors it was not unreasonable for it to accede to the demand that the equipment be leased with an experienced operator in view of the limited working space and the potential danger from the overhead electrical wires.

Under these facts we hold the agreement was not violated.

Because of our decision on the merits we do not reach the questions raised relative to the propriety of the processing of the claims.

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

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December 1963.