

Award No. 12927
Docket No. MW-12461

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
SOUTHERN RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when on February 18, 1959, it assigned employees of a contractor to perform the traditional duties of a crane operator in the performance of ditching and banking work between mileposts 88 and 89 on the Charleston Division.

(2) Crane Operator C. M. Sipe, who holds seniority on the Charleston Division, be allowed pay at his straight time rate for a number of hours equal to the number of hours consumed by the Contractor's employees in performing the crane operator's work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On February 18, 19, 20, 23, 24, 25 and 26, 1959 and on dates subsequent thereto, employees of the Douglas Construction Company, who hold no seniority rights under the provisions of this Agreement, were assigned and/or permitted to operate a crawler crane, equipped with a clam shell, in the performance of ditching and banking work in Riley cut between Mileposts 88 and 89.

The Claimant, who has established and holds seniority as a crane operator on the Charleston Division, was available, fully qualified and could have expeditiously performed the Crane Operator's work assigned to contract.

The Agreement violation was protested and the instant claim filed in behalf of the claimant. The claim was declined as well as all subsequent appeals.

The Agreement in effect between the two parties to this dispute dated August 1, 1947, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rule 1, captioned "Scope", insofar as it is pertinent hereto, reads:

(f) Prior Board awards have denied claims where, as here, claimant was on duty and under pay when the complained of work was performed.

Claim, not being the same as that presented and handled through the usual appeal channels on the property, should be dismissed by the Board for want of jurisdiction; however, if, despite this fact, the Board assumes jurisdiction, it cannot do other than make a denial award, for to do otherwise would be contrary to the terms of the agreement in evidence.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier entered into an Agreement with an independent contractor to perform the duties of a Crane Operator. The facts briefly stated are, that there was a bad drainage situation in Riley Cut on Carrier's Charleston Division, that this constituted an emergency, that the Contractor's services were engaged because all Carrier owned and equipped cranes were being utilized elsewhere, and as a result were not available for use in doing the involved work.

The Petitioner alleges that this work belongs to Maintenance of Way employes under the Scope Rule. This rule does not define the work to be performed by the employes listed. It simply lists the various categories of employes who are covered by the terms and conditions of the Agreement. With such a Scope Rule, it is necessary to determine whether the work claimed was historically and customarily performed by such employes.

The issue in this case is precisely the same as that contained in Award Number 11645 involving the identical parties and the identical Agreement. The over-riding issue is the right of the Carrier to engage the services of an independent Contractor when confronted with such a broad, general Scope Rule. The burden of proving that this work was historically and customarily performed by the Claimant, is placed on the Claimant. Such evidence has not been forthcoming. We therefore agree with and adopt the reasoning and the decision in Award Number 11645.

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: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September, 1964.