

Award No. 13771
Docket No. MW-13604
NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Kieran P. O'Gallagher, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

KANSAS, OKLAHOMA & GULF RAILWAY CO.

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

(1) The Carrier violated the Agreement when, beginning with June 12, 1961, it assigned or otherwise permitted outside forces to cut right-of-way around road crossings and at the Henryetta Yards and continuing to cut right-of-way.

(2) Section Laborer W. L. Foster be paid the difference between what he was paid at the section laborer's rate and what he would have been paid at the roadway machine operator's rate if he had properly been assigned to perform the subject work.

EMPLOYEES' STATEMENT OF FACTS: The work of cutting the right-of-way around road crossings and at the Henryetta Yards was assigned to a Mr. Kelly.

The contractor's employees, who hold no seniority rights under the effective Agreement, commenced work on June 12, 1961 and the contractor used a tractor-drawn brush-hog to perform this work.

The Claimant was employed as a section laborer during the period that the contractor's employees were employed in the aforementioned work and was available and qualified to have performed the work assigned to the contractor, had the Carrier given him that opportunity.

The Agreement in effect between the two parties to this dispute dated May 16, 1937, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Rule 1 reads:

"SCOPE

(a) These rules govern the hours of service and working conditions of all employees in the Maintenance of Way and Structures

After execution of Supplement No. 28 (Exhibit E), carrier then qualified the first roadway machine operator of its history with seniority date of June 6, 1960. There is a total of three roadway machine operators to date: Mr. Leo Sinyard, Mr. G. N. Sly, and Mr. C. W. Mustin, with seniority dates of June 6th, 27th and October 3rd, 1960, respectively.

Roadway machine operators may place themselves on section gangs wherever seniority will permit, but section laborers haven't any rights as operators. Carrier is not obligated to make or qualify laborers to be operators and at its discretion, may hire whoever it feels is qualified and deserving.

The organization's claim is for the difference in pay between what section laborer, W. L. Foster, made working as section laborer and what he would have made as operator had he been allowed to perform the mowing.

Mr. W. L. Foster holds rights only at a section laborer. He holds no rights as a roadway machine operator, in fact, prior to his claim had never requested that he be qualified as an operator. Without such rights as an operator, he is not entitled to operate the tractor in question under any circumstance. Claimant is not the proper party in this instance even if there were a violation of the agreement.

SUMMARY:

The organization failed to request or hold a conference on this claim or handle it in the "usual manner" in accordance with the requirements of the Railway Labor Act, as amended.

Claimant hasn't any seniority as roadway machine operator.

Carrier owns no off-track equipment with which to mow or cut right of way.

Carrier has contracted out the mowing and cutting of its right of way during its entire history, which of course includes the period during which the current contract was negotiated, while the organization stood by with full knowledge of the practice without objection or comment. This was the established and accepted practice by both the carrier and the organization.

The claims in question are without merit or agreement support and this honorable board is respectfully requested to deny same.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts giving rise to the instant claim are uncontroverted. The Carrier employed an outside contractor to mow a portion of its right-of-way, and the Organization contends its members have the right to perform this service by virtue of the provisions of the current agreement between the parties, the Scope Rule of which is quoted below:

"RULE 1

"SCOPE

"(a) These rules govern the hours of service and working conditions of all employes in the Maintenance of Way and Structures Department (not including supervisory forces above the rank of

Foreman and not including signal maintenance department), including all foremen in the Maintenance of Way and Bridge and Building Department, together with their timekeepers, also pumpers, friction engineers and their firemen on ditching machines, also linemen and helpers.

"(b) All employes working on bridge, masonry, concrete, house and fence gangs; carpenters, painters and all helpers employed to assist employes in the above named work together with all laborers engaged in work on pile drivers, rail saw banking, section and extra gangs and their gang leaders, together with employes engaged in such work as welders and their helpers while engaged on maintenance of way work, walking track, watching crossings, track and bridges, cleaning station grounds, caring for switch lamps, and all other work in the Maintenance of Way Department."

The issue here to be resolved is whether the Scope Rule, above quoted, confers upon the Organization the exclusive right to perform the work done by the contractor. It will readily be seen the rule is general in nature, and in the absence of a specific reservation of the work in question to the Claimants, the Organization has the burden of proving the work performed was of a type historically and traditionally done by Maintenance of Way employes to the exclusion of all others. The evidence shows that over the years the Carrier has in fact contracted out the work in question. We also find the Organization has failed to meet the burden of proving that the work was performed historically and traditionally by the Maintenance of Way forces to the exclusion of all others and for the reasons found we must conclude the claim lacks the merit for a sustaining award and shall be denied.

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 29th day of July 1965.