

Award No. 14205
Docket No. MW-14207

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
THE BALTIMORE AND OHIO RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it assigned other than B&B forces to place wire mesh screening on thirty-six (36) wooden shaker frames for the grain elevator at Locust Point, Maryland.

(2) B&B Mechanic Jerome A. Burkowski be allowed four days' pay at his straight-time rate account of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: On February 1 and 2, 1961, a machinist and a machinist helper, who hold no seniority under the provisions of this Carrier's agreement with the Brotherhood of Maintenance of Way Employees, performed the work of placing No. 8 wire mesh screening on thirty six (36) wooden shaker frames which B&B forces had previously constructed and subsequently installed at the grain elevator at Locust Point, Maryland. Each shaker frame was constructed of 1 x 1½ inch oak lumber and was 45 x 24 inches in size.

B&B forces have customarily and traditionally performed work of the subject character.

The time limits within which to institute proceedings to the Board on this case were extended by agreement and confirmed in a letter reading:

"THE BALTIMORE AND OHIO RAILROAD COMPANY

Baltimore 1, Maryland
November 28, 1962

Mr. H. J. Walton, General Chairman
Brotherhood of Maintenance of Way Employees
703 United Bldg., Akron 8, Ohio

rule appearing in its Agreement that would give work of this kind by some exclusive reservation to employees coming under the scope of the Agreement between this Carrier and the Brotherhood of Maintenance of Way Employees.

NATURE OF CLAIM AS MADE.

The claim as originally presented on the property of this Carrier (letter dated February 10, 1962, from Local Chairman R. K. Rollins of Lodge 695 addressed to Terminal Engineer W. G. Stagge) stated in part as follows: " * * * Mr. Jerome A. Burkowski a member of the B&B Department wishes to claim 4 Days time for work done by the machinist of Locust Point at the grain Elevator. On February 1st and February 2nd, 2 Machinists worked 2 Days putting wire screen on wooden frames that go in the shakers at the Elevator. * * *." In the Carrier's declining letter of May 3, 1962, reference was made to " * * * the claim of Baltimore Division West End B&B mechanic Jerome A. Burkowski for 4 days' pay account machinists putting wire screen on wooden frames for shakers used in Grain Elevator at Locust Point, Baltimore, Maryland, February 1 and 2, 1962. * * *."

In its letter of decision of May 3, 1962, this Carrier stated in part as follows: " * * * As pointed out to you our investigation developed as to claim for February 1 that no machinist performed any work on these screens on that date. * * *."

The Organization has not subsequently disputed or challenged that statement.

Therefore, the only claim left remaining before this Board is that for February 2, 1962. Nonetheless, the record establishes that the claim as now made, i.e., "four days' pay at * * * straight-time rate" is wholly disproportionate to the actual amount of time consumed by the machinist and machinist helper in performing this work on February 2, 1962.

Actually the record establishes that the machinist and machinist helper consumed but two hours each on February 2 in performing this work.

OPINION OF BOARD: The facts are that on February 1 and 2, 1961, a machinist and a machinist helper performed certain work of placing No. 8 wire mesh screening on thirty-six wooden shaker frames at the grain elevator located at Locust Point, Maryland. The shakers had previously been constructed by Bridge and Building forces and the Organization contends that the affixing of wire mesh screen has customarily and traditionally been performed by B&B employees.

In further support of its claim herein the Organization states that the work involved comes under the Scope Rule of its Agreement and is reserved to B&B forces under Rule 1(c); that the Carrier, relying on a past practice which it alleges shows that Machinists have performed this type of work, has the burden of proving this contention by probative evidence; it is also argued that the Locust Point Grain Elevator is not a railroad structure under the meaning of Rule 1(c) of the current Agreement between the parties.

Carrier, for its part, urges that its declination of the instant claim is supported by these arguments: (1) The Shop Craft Employees (Machinists) entered into an agreement with Carrier on October 19 and December 1, 1921, which agreement established Special Rules 56, 57 and 59; the agreements of

October 19 and December 1, 1921 preceded the existence of Rule 1(c) of the Maintenance of Way Agreement which was first executed to be effective January 1, 1922 and therefore the Machinist's contract, being first in point of time, takes precedence over that of the Petitioner. Carrier also advances the argument that the awarding of the work in question to the Machinists must have been correct since it is alleged that the Maintenance of Way employees have not protested the assignment of the said work to the Machinists.

Rule 1(c) in the Maintenance of Way Agreement referred to supra, provides in pertinent part as follows:

" . . . Carpentry, painting, glazing, tinning, roofing, plastering, brick-laying, paving, masonry and concreting required in the construction and maintenance of railroad structures, other than tunnels, shall be performed by B&B forces. . . ."

The Organization contends the placing of wire mesh screening on wooden shaker frames is within the purview of the above quoted language in the contract; that the B&B forces constructed the shakers and could well have applied the screen to the shakers previously constructed by them; that B&B forces make repairs to various pieces of Carrier's machinery; that the subject grain elevator is a railroad structure within the contemplation of Rule 1(c); the record does not show that any emergency existed requiring that the work in question be performed by Machinist employees; the Carrier has not sustained its burden of proof as to its affirmative defense.

The Carrier contends that for years the work of applying screening, which screens are described as a component of a piece of machinery, was performed by a machinist at this location; further it argues that the claim cannot be sustained because there are no rules of the Agreement that exclusively reserve this work to the B&B employees. The Carrier then points out that in its letter of decision of May 3, 1962 it stated in part as follows: " * * * As pointed out to you our investigation developed as to claim for February 1 that no machinist performed any work on these screens on that date. * * * " In this connection the Carrier points out on the record that the Organization neither challenged nor disputed this statement. Therefore, the only claim left for consideration is limited to that for February 2, 1962. Nonetheless the record establishes that the claim as now made, i.e., "four days' pay at . . . straight-time rate" is wholly disproportionate to the actual amount of time consumed by the machinist and his helper in performing the work in question on February 2, 1962. Carrier states that the record actually establishes that the machinist and his helper consumed two hours each on the day set forth in the claim, viz: February 2. Carrier also raises, and argues at length, its position that the Board is without jurisdiction in the premises on the ground that the work which is the subject matter of the instant dispute fell within the meaning of machinists' work as comprehended by those rules; for this reason, since there has been no proper joinder of interested parties the Board lacks jurisdiction.

The Board finds no merit in the Carrier's challenge to its jurisdiction. The record shows that the Machinists' Organization was notified of the pendency of the instant dispute by Certified Mail on February 12, 1965; no reply was received from the said Organization and it failed to appear at the Board's hearing which took place on May 4, 1965.

Petitioner's argument is persuasive that its members had originally constructed the shaker frames in question and therefore, since the Scope Rule reserved the work of construction to them, it is logical that the parties intended that additions to the said construction would also devolve on such employees.

The issue as to past practice is clouded by the diametrically opposite contentions taken by the parties on the record. It has been many times held by this Division that under such circumstances the Board is unable to resolve such conflicts. In our view, based on the facts of record, it is not necessary to pass on this point or on certain other contentions raised by the parties since the basic issue has been resolved on the merits in the preceding paragraph. It appears that the Carrier violated its Agreement.

On the question of the claim for four days' pay it is the Board's opinion that the amount of damage sustained by the Claimant is not clear on the record as made. The damages due to Claimant should be the amount of financial loss suffered by said Claimant. He should be paid the difference between what he was paid and the amount he would have received but for the Carrier's violation. Since this is not ascertainable on the present state of the record that part of the Claim which relates to damages will be dismissed without prejudice.

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 contract was violated.

AWARD

Claim (1) sustained; claim (2) should be disposed of in accordance with the above Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1966.