

Award No. 15221
Docket No. MW-15642

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY**

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

(1) The Carrier violated the Agreement when it assigned and/or permitted employes of the Pittsburgh-Midway Coal Company and employes of the Morrison-Knudson Construction Company to operate machines at Tunnel No. 45. [Carrier's File MW-17-64]

(2) The Carrier further violated the Agreement when it assigned and/or permitted employes of the Morrison-Knudson Construction Company to perform repair work at Tunnel No. 45. [Carrier's File MW-16-64]

(3) Cut Off Machine Operators G. A. Rich, W. H. Ogden, F. A. Rich, H. O. Chappell Jr., J. R. Carlson, D. L. Drake, V. J. Thompson, C. R. Adams, C. C. Blair, L. L. Moore, A. B. Carlson, R. G. Wort and M. R. McElvain each be allowed pay at his respective straight time rate for an equal proportionate share of the total man-hours consumed by contractors' forces in performing the work referred to in Part (1) of this claim.

(4) Each employe holding seniority in the B&B Department of the Colorado Division (names listed in attachment to letter of claim presentation) be allowed pay at his respective straight time rate for an equal proportionate share of the total man-hours consumed by contractor's forces in performing the work referred to in Part (2) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Tunnel No. 45 is located near Mile Post 140 on the Carrier's Colorado Division. It is 186 feet long. On the night of March 11, 1964, a fire occurred in this tunnel, causing portions of the tunnel to cave in.

The B&B Tunnel Gang, supervised by Foreman L. H. Stice, had been performing repair work on this tunnel prior to the fire. On March 12 and 13, 1964,

I have this day written you concerning the windfall claim you present on behalf of eighty-three (83) claimants—the entire Colorado Division B&B Department employees—your file D-5-76, our file MW-16-64. I refer you to that letter and include it here as a part of this answer. As part of that letter I set forth a list of past occasions on this property when outside contractors have performed tunnel repair work on this property. In most if not all of those instances the contractors brought in and used their own machines and their own operators to operate machines. It cannot be said that the operation of machines on this property—including Tunnel 45—is exclusively the work of Road Equipment Department employees, any employees covered by the Agreement or the cut-off, improper claimants herein.

I deny your allegations and your position. For reasons set forth above and in Superintendent R. E. Davis' letter of June 23, 1964, to you on this claim, this windfall, penalty claim must be denied.

Claim denied.

Yours truly,

/s/ E. B. Herdman
E. B. Herdman
Dir. of Personnel"

April 27, 1964, Employees' president wrote S. H. Schulty, Executive Secretary, Third Division, NRAB that they intended to present the above two claims to your Board. The claim on the property last detailed above is believed by the Employees to be on appeal to your Board as Items (1) and (3) of the claim set out in Employees' April 27, 1965, letter to Mr. Schulty. Carrier denies the claim on the property is properly now on appeal before your Board. Carrier was not consulted, did not and does not now consent to any alterations, amendments, date deletions or consolidation of original claims considered on the property for Employees' appeal purposes to your Board.

The Agreement between this Carrier and the employees represented by the Brotherhood of Maintenance of Way Employees, effective February 1, 1941, including Changes and Interpretations to Date of Reissue March 1, 1952, and subsequent Memorandums of Agreement up to and including the date of this claim are incorporated herein as a part hereof by reference.

OPINION OF BOARD: On the night of March 11, 1964, a fire occurred in Tunnel No. 45, located near Mile Post 140 on the Carrier's Colorado Division.

The tunnel burned out and caved in, disrupting main line service Denver to Orestod to Craig. Train service was restored on March 27, 1964.

Carrier confronts this Board with a procedural question contending that the "claim as presented to the Board" is not the same claim that was handled on the property. The Employees urge that two claims handled on the property were consolidated into one submission thus avoiding duplication of claims. The Board does not agree with Carrier's plea for dismissal on grounds presented. The record discloses that Carrier has not been misled in the Employee's Submission and such consolidation of like claims in one submission is to be encouraged. (See Awards 12424-14877.)

Claimants contend the work in question is covered under Rule 1 of their Agreement dated February 1, 1941 — a Scope Rule of the broad and general type. When confronted with such a rule, we must find that the work in question has been historically and traditionally reserved to the complaining craft else Claimants cannot prevail. The record is barren of such proof. Carrier alleges that on previous occasions under like circumstances a contractor had been engaged to perform work of the character involved here. There was no denial to this defense.

Our conclusion to deny this Claim is supported by previous awards of the same parties and agreement here. See Awards 11118, 11831, 14525 and 14638.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 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 30th day of January 1967.