

Award No. 16258
Docket No. MW-16844

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(SUPPLEMENTAL)

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when it assigned S. Rodriguez to operate Roadway Equipment No. 665 and compensated him for such service at the Track Laborer's rate of pay. (System File No. TJ-2-65 -- UM-2-65).

(2) Mr. S. Rodriguez (Acct. #56578) now be allowed the difference between what he was paid at the Track Laborer's rate and what he should have been paid at the Roadway Machine Operator's rate of pay for each day he operates said machine for the period extending from May 15, 1965 and continuing until the violation is corrected."

EMPLOYES' STATEMENT OF FACTS: The Carrier purchased and put into service a unit of roadway equipment identified as SOLO OILER No. 665. Said roadway machine is basically a portable blower powered by a gasoline engine. It is used mainly to clean and lubricate switches, cross-overs, etc., and to remove snow and ice from tracks, switches, equipment, etc.

Beginning on or before May 14, 1965, the Carrier assigned and used Track Laborer S. Rodriguez to operate Solo Oiler No. 665 to blow the dirt and debris from switches, cross-overs and certain other track facilities and to then lubricate same by spraying oil thereon. Instead of allowing him the roadway machine operator's rate of pay for operating said roadway, the Carrier compensated him for such work at the track laborer's rate of pay.

Claim was timely and properly presented and handled by the Employes at all stages of appeal up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute "Revised and reissued August 1, 1952", together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

The senior Track Laborers who are assigned to this work are under strict instructions to frequently change off using the Solo. The way they usually do it, is one takes this set of switches and the other takes the next.

There is also an enormous safety feature attendant with the employment of the Solo in cleaning out and lubricating yard switches. When moving from one place to another, the Track Laborer who has the Solo strapped on his back has both hands free and when using it to clean out switches and to lubricate same, he is standing upright on his feet free to move quickly in any direction at an instant's notice. He is not in some awkward kneeling or stooping position consuming and captivating a considerable amount of his time and attention.

INVOLVED RULES: In processing this claim on the property, up to and including the office of the Carrier's highest designated officer in final conference, the Organization cited no rule which the Carrier allegedly violated. All the Organization said and submitted is that a Solo is "roadway equipment". Rule 56 II, sub-section (f) of the Organization's basic Agreement Revised and Reissued August 1, 1952, states:

"(f) An employe capable in and assigned to the operation of roadway equipment shall constitute a roadway machine operator.

NOTE: Power driven track tampers are not roadway equipment."

After final conference and going on four months after the Carrier rendered its final decision declining this claim (See Carrier's Exhibits "I", "J" and "K"), the Organization's General Chairman wrote a letter dated June 3, 1966 and maintained, for the first time, that the Carrier was violating Rule 57, by giving these Solos to Track Laborers to assist them in their switch cleaning and lubrication work. Rule 57 reads:

"RATES OF PAY

Rule 57. The fact that the positions covered by this agreement and the rates of pay therefor are included herein is no guarantee that such positions will be maintained permanently.

The rates of pay for new positions shall be in conformity with those for positions of similar kind or class on the railway."

(Exhibits not reproduced.)

OPINION OF BOARD: In the Spring of 1965, Carrier purchased and put into service a piece of equipment called the Dixon/Solo blower to clean and lubricate switches, cross-overs, etc. and it could also be utilized to remove snow and ice from tracks, switches, etc. Prior to placing this machine in use, track laborers manually, with a broom or brush, cleaned and oiled switches. This equipment is basically a portable blower powered by a gasoline engine being carried on the back of the track laborer in the performance of his duties.

Claimant was assigned to operate the machine and was compensated for such work at the track laborer's rate of pay instead of machine operator's rate of pay. Claim is for the difference in rate of pay received and the rate of pay he would have received as a machine operator.

Carrier questions the manner in which the claim was handled on the property as being improperly appealed at the Chief Engineer's level, citing Article V, of the August 21, 1954 Agreement. In Award 15837, between these same parties, the Board ruled on the same procedural issue and found that the claim, as in the instant case had been submitted, appealed, and denied in compliance with the procedures in accordance with the Railway Labor Act. This dispute then is properly before the Board on its merits.

Petitioner asserts that the Dixon/Solo blower is a piece of roadway equipment and as such, said operators of the machine should be classed as a roadway machine operator under Rule 56, II, (f), which reads:

"An employe capable in and assigned to the operation of roadway equipment shall constitute a roadway machine operator.

Note: Power driven track tampers are not roadway equipment."

and that under Rule 43, the composite service rule, the claimant track laborer should be paid at the roadway operator rate. Further, that Rule 57 applies in that employment of a Solo blower to clean out switches creates a new position within the meaning and intent of Rule 57.

Carrier's position is that the Dixon/Solo blower is not a piece of roadway equipment and that its use by track employees, at the track laborers' rate, is proper.

In considering the rules cited by the Petitioner, it can be said that they in no way define in detail what is roadway machine operator's work or describe what is roadway equipment. Prior to the purchase and use of these machines, the work of cleaning and oiling switches was done manually. Since their use the track laborers still perform the same work with the machines and their use has not changed the character of work to be performed. This blower is not an on-track machine or transported over the tracks of the carrier, but is a portable machine designed to increase efficiency of the same work, therefore, Carrier, has not established a new position as alleged by the Organization and Carrier is not obligated to adhere to Rule 57. Rule 57 pertains to similar positions not like positions.

In Award 9655, the Board held:

* * * * *

"An improvement in a machine does not make a new or different operation and does not call for the establishment of a new position. Change to a power mower for cutting weeds (Award 4756), improvement in a bolt tightening machine (Award 4536), change to power from hand operation of a rail laying device (Award 4430) are examples of improvements to machines such as the improvement we have here." (Emphasis ours.)

A memorandum from the Assistant to the Chief Engineer listed twelve items for which roadway machine operator's rate was not paid. He further noted that the solo blower (third item on list) was simple to operate and put it in the class of skill required to operate rail drills, rail saws, track wrenches, hydrenewers and power jacks. The Organization asserts that these tools described above are recognized and classed as roadway machines. Carrier

refutes this assertion and states that the tools referred to in the memorandum are in the hand tool category.

Petitioner has submitted no evidence that the tools named in the memorandum require the services of a roadway machine operator or that the roadway machine operator rate is applied or paid when in use. Obviously from the record, improvements upon hand tools has progressed through the years and certainly the use of some demand the roadway machine operator's rate of pay. But, what specific tools? Without sufficient evidence to support the Petitioner's position that the Dixon/Solo blower is roadway equipment within Rule 56, II (f), we must deny the claim. Mere assertions by the Claimant's Representatives cannot be accepted as proof and the Board, under the circumstances here, may not insert its sense of equity to establish an applicable rate for this piece of equipment. Nor may the Board rewrite the Agreement where one of the parties find it wanting, as recourse for both parties lies in the collective bargaining procedure.

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 26th day of April 1968.