

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC
RAILWAY COMPANY**

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

(1) The Carrier violated the Agreement when it assigned or otherwise permitted outside forces to perform the work of cleaning ballast on July 5, 1965 and on various dates subsequent thereto. (System file MW-23765)

(2-a) Foreman C. F. Capps and D. W. Helton, Machine Operators G. C. Hickey, J. R. Stephens, L. P. Cassidy, J. P. Sluder, L. King, H. Hughett, B. J. Moss and J. A. Jones each be allowed three hundred and four (304) hours' pay at their respective straight time rate and fifty-six (56) hours' pay at their respective time and one-half rate for the period of the violation extending from July 6 through August 26, 1965.

(2-b) For the period of the violation subsequent to August 26, 1965, each of the aforementioned claimants be allowed eight (8) hours' pay at their respective straight time rate for each workday (Monday through Friday) and eight (8) hours' pay at their respective time and one-half rate for each rest day and/or holiday that the outside forces continue to operate said ballast cleaner.

EMPLOYEES' STATEMENT OF FACTS: Sometime prior to May 1, 1965, the Carrier constructed an on-track ballast cleaning machine in its roadway shops at Charlotte, North Carolina. Beginning on July 6, 1965, this ballast cleaner was placed into operation, working two eight (8) hour shifts each day. The operation of said machine was assigned to employes of the Bankhead Railway Engineering Company, who hold no seniority under the Maintenance of Way Agreement.

The work of cleaning ballast is work which is covered by the scope of the Maintenance of Way Agreement and heretofore has customarily and historically been performed by the Carrier's employes holding seniority within the Track Sub-department. The Carrier's employes have accomplished said work by the use of Ballast Moles, included within the scope of the Agreement,

performed on Saturdays as shown as follows: June 28, 29, 30, July 1, 2, 3, (Saturday), 5, 6, 7, 8, 9, 10 (Saturday), 12, 13, 14, 15, 16, 17 (Saturday), 19, 20, 21, 22, 23, 24 (Saturday), 26, 27, 28, 29, 30, 31 (Saturday), August 2, 3, 4, 5, 6, 7 (Saturday), 9, 10, 11, 12, 13, 14 (Saturday), 16, 17, 18, 19, 20, 21 (Saturday), 23, 24, 25, 26, 1965, and each day thereafter the machine is operated by outsiders who hold no seniority rights under agreement rules.

The facts and circumstances having been explained to you in considerable detail and there being no basis for request or the claims, this confirms my previous declination of the same."

(Exhibits not reproduced.)

OPINION OF BOARD: The claim herein arose as a result of the Carrier contracting with the Bankhead Railway Engineering Company to clean ballast on its property by the use of a newly invented, specially designed, on-track high capacity ballast cleaning machine. Under the terms of the contract, the Bankhead Railway Engineering Company agreed to clean ballast on Carrier's property on a two-shift, six-day-per-week basis, and to furnish an adequate force, consisting of two foremen, six operators, and three operator mechanics to man the machine on the two shift, six-day-per week basis. The record shows that the machine owned and operated by the Bankhead Railway Engineering Company started cleaning ballast on Carrier's property on July 6, 1965, and continued through August 14, 1965.

There have been numerous Awards by this Division involving claims arising under the same Agreement as involved herein and involving the same subject matter as involved here — the right of the Carrier to contract work.

Some of the more recent Awards are 16351, 15135, 13988, 13987, 12930, 12929, 12927, 12845, 12803. The majority and more recent of these Awards have held that the Petitioner has the burden of establishing through probative evidence that the work contracted out is of the type which only employes under the Agreement have traditionally and customarily performed. Applying this principle to the present dispute, we must look to the record to determine whether the Petitioner has met the required burden of proof that is upon it.

A careful review of the entire record shows that while employes covered by the Agreement have performed some ballast cleaning work by the use of small off-track machines known as ballast moles, there is no proof that all ballast cleaning work has been performed by such employes. In fact, the record shows that from 1947 through 1964, the Carrier contracted with the Frank Speno Railroad Ballast Cleaning Company, Incorporated, to furnish a large, specially designed, on-track machine to clean ballast along sections of its main line trackage. Thus the record is conclusive that the cleaning of ballast on the Carrier's property has not been considered the exclusive work of employes covered by the Agreement.

Based on the many Awards between the same parties, which adhere to to proposition that the Petitioner must prove by probative evidence that the work contracted out is of the type that by tradition, custom and practice has been performed exclusively by employes covered by the Agreement, the claim herein must be denied.

The Petitioner has cited Award 14853 as supporting its position. That Award is clearly distinguishable because there it was found that the work involved was of the type that by tradition, custom and practice had been performed exclusively by employes covered by the Agreement. Such a finding, as heretofore shown, is not supported by the record in our present docket.

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 27th day of September 1968.