



Award No. 17211

Docket No. MW-16535

NATIONAL RAILROAD ADJUSTMENT BOARD

**THIRD DIVISION
(SUPPLEMENTAL)**

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
ILLINOIS CENTRAL RAILROAD COMPANY**

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

(1) The Carrier violated the Agreement when it failed and refused to compensate Mr. M. P. Ferguson at the on-track mower operator's rate of pay for service performed on October 6, 7, 8, 9, 19, 20, 21, 22, 23, November 2 and 3, 1964. (System Case No. 356 MofW MI-45-M-65)

(2) Mr. M. P. Ferguson now be allowed the difference between what he should have been paid at the on-track mower operator's rate (\$2.463 per hour) and what he was paid at the machine operator's rate (\$2.273 per hour) for all time worked on the dates specified in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Claimant M. P. Ferguson was regularly assigned as a Group 4 Machine Operator and, at the time of this dispute, was being paid at the rate of \$2.273 per hour.

On October 6, 7, 8, 9, 19, 20, 21, 22, 23, November 2 and 3, 1964, the Carrier assigned the claimant to perform the duties of head operator on an on-track power mowing machine. In this instance, these duties consisted of operating the track motor car which towed the on-track mowing machine and, in addition thereto, responsibility for the care and servicing of the mower. To insure proper performance of the mowing machine, the claimant was also required to make all necessary adjustments and minor repairs thereto.

The duties as herein above described, with the exception of this instance, have historically and traditionally been performed by employees defined as Head Operators, who have received compensation at the head operator's rate of pay. However, in this case the Carrier has refused to pay the claimant the head operator's rate of pay. (\$2.463 per hour)

Claim was timely and properly presented and handled by the Employees 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 dated September 1, 1934, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

The issues in this case, therefore, have been effectually narrowed down. But even having been limited, they remain two-fold: (1) Is the company required under all circumstances to pay a head operator's rate when it works the on-track mowing machine? And (2) is the company prohibited under the conditions described in this case from using a section foreman to act as head operator on the on-track mowing machine?

To both questions, the company will respond in the negative. We will show:

(1) that the claimant did not perform head operator's work, and was therefore not entitled to the head operator's rate of pay;

(2) that the company did not agree to pay a head operator's rate under any and all circumstances;

(3) that practice, recognized by the union, and lending meaning to the rules agreement, invalidates the instant claim.

(Illustrations not reproduced.)

OPINION OF BOARD: Claimant contends that on the days alleged in the month of October and November, 1964, he was assigned to perform, on-track-mower machine, Head Operator's work. Carrier compensated him at the machine operator's rate and he now brings this claim for reimbursement for the difference between what he received at the machine operator's rate (\$2.273 per hour) and what he should have received at the On-Track mowing machine Head Operator's rate. (\$2.463 per hour.)

The Organization contends that Carrier is contractually obligated to pay the Claimant under the "Rates of Pay" rules or the agreed rate of \$2.463 per hour—the rate for head operators of discing and on-track mowing machines. Further, that regardless the section foreman was present, Claimant assumed the essential duties of head operator and is therefore entitled to the head operator's rate as he operated the motor car that pulled the mowing machine and issued instructions to the other employees as necessary to the mowing operation.

Carrier declined the claim by stating that the responsibility for and the operation of the Mowing Machine was that of the Section Foreman, under whose jurisdiction the Claimant was employed.

This Board has consistently held that with conflict in the record relative to evidence essential to a proper determination of a claim, it cannot resolve such conflicts of evidence if neither side has offered any evidence supporting their respective contentions, other than mere assertion.

This reasoning is found in Award 11715-Hall which involved a claim between these same parties similar to that now before the Board. The Board held:

"Thus, we find two conflicting claims by the parties to this dispute as to what the practice is, or was, on this property. Neither side has offered any evidence supporting their respective contentions other than mere assertions of the claim of the practice on the property." (Emphasis added.)

Although the expertise of the advocates and the prior awards of this Board have been carefully considered, the claim must stand or fall on the record.

With conflict in the record relative to evidence essential to a proper determination of this claim and with a lack of method at disposal of this Board to resolve conflicts in evidence, the Board has no alternative but to dismiss the claim.

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 Employee involved in this dispute are respectively Carrier and Employee 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.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of June 1969.