

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19657  
Docket Number MW-19628

Frederick R. **Blackwell**, Referee

(Brotherhood of Maintenance of Way **Employees**

PARTIES TO DISPUTE: (

(Norfolk and Western Railway Company (Western Region)

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

(1) The Carrier violated the Agreement when, without notice to **or** discussion and agreement with the General Chairman, it used outside forces to operate **a** tie tamping machine beginning on or about April 5, 1970 (System File MW-MOB-70-10).

(2) Machine Operator Glenn A. **Durbin** be allowed pay at the **tamper** operator's rate of pay (\$626.4349 per month) for the **same** amount of time expended by outside forces in the performance of the work referred to within Part (1) of this claim since June 20, 1970.

OPINION OF BOARD: This is an Article IV dispute arising under Agreement between the parties effective December 1, 1963.

This dispute arose from the Carrier's need for the services of **s tamper-**ing machine on the Carrier's Decatur Division. Without notice to the **Organiza-**tion these services were obtained by rental of **a** Plssser Universal Tamper machine from the Graystone Corporation and, because the Carrier had **no** operator **available** and qualified to operate the tamper, the Carrier also obtained the services of an operator from the Graystone Corporation.

The claim is that Carrier's action violated the mandatory notice requirement contained in Article IV of the May 17, 1968 National Agreement. Carrier contends the facts do not involve contracting out as contemplated by Article IV, but merely amounted to the rental of a piece of equipment of **a** type and size which the Carrier did not have, together with **a** operator, **all** of which was consistent with past practice of which the Organization had not complained.

The Agreement provisions involved in this dispute are Rule **1** and Article IV of the 1968 National Agreement which, in pertinent part, read as follows:

"RULE 1

These rules govern the rates of **pay**, hours of service and working conditions of all employees in the track sub-department and bridge and building sub-department of the Maintenance of Way and Structures Department listed in this rule, and other employees performing similar work recognized as belonging to **and** coming under the

"jurisdiction of the track and bridge and building sub-departments of the Maintenance of Way and Structures Department, but do not apply to supervisory forces above the rank of foreman.

\* \* \*

(d) Track and Bridge **and** Building Sub-department - Lines West of and including Detroit and Toledo:

\* \* \*

Group 4. **Matisa** Tamper Operators.  
**Electromatic** Tamper Operators.  
Power **Ballaster** Operators.  
Tile Master (self-propelled) Operators.  
Spike Master Operators.  
Track Liner Operators.

\* \* \*

Group 8. Mstiss Tamper Helpers  
**Electromatic** Tamper Helpers.  
Power Ballaster Helpers.

\* \* \*

NOTE: When a new type of system machine is to be placed in operation, a representative of the railroad and the general chairman will confer regarding the seniority group into which the operator of the new machine will be placed, which will not necessarily be an existing seniority group.

In event the operator is placed in an existing seniority group, men holding seniority in that group will be given the opportunity in seniority order to elect to qualify on the new machine."

"Article IV of the May 17, 1968 National Agreement

In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contract **transaction** as is practicable and in any event not Less than 15 days prior thereto."

We do not agree with Carrier's contention **that** procurement of the equipment through a rental arrangement is somehow material to this dispute. The employees' rights under the Agreement concerns **work**, not equipment, Award 6905 (Coffey), so we must determine whether the operation of the Plsster Universal Tamper **was** within the scope of the Maintenance of Way Agreement. **Al-** though the Plsster Tamper is not one of the tamping machines referred to in Groups 4 and 8 of Rule 1(d), the note thereto **makes** it clear that the use of tamping machines, in addition to those referred to, was contemplated by the parties in agreeing to the provisions of the Rule. From this we must conclude that the operation of a machine which performs the function of tamping is the coverage which was contemplated for Rule L by the parties; accordingly, we find **that** the performance of tamping work by the **Plasser** Universal Tamper machine **was** within the scope of the work covered by the Agreement. Once the disputed work is found to be within the scope of the Agreement, we believe it **necessarily** follows that the employees' rights are paramount to past practice **and** also that the use of **an** employee of the Graystone corporation to perform the disputed work comes within the purview of Article IV. The controlling consideration here is that scope covered work was performed **on** Carrier's property by **an** employee of an outside business concern, and it is no defense that the **machine was** rented and then operated under the supervision of Carrier rather than under supervision of an independent contractor. Award 16009 (Ives)

We find therefore on the whole record that the Carrier violated Article IV when it failed to notify the Organization that it intended to use the Universal Plsster Tamper machine for tamping work on Carrier's property. Having **made** this finding we see no relevance either in Carrier's contention about not having a qualified **operator** or in Petitioner's contention that the Agreement required Carrier to train an operator. These are matters which the parties might have discussed under the procedures provided in Article IV, but they have no bearing on whether the Article IV notice should have been given in the first instance. The record does not show any wage Loss by claimant, or Lost work opportunity; consequently, in accord with prior decisions, we shall deny the compensation requested in Part (2) of the **claim**. See Award 19399 (O'Brien), 18305, 18306, 18687, 19305, et al.

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;

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That this Division of the Adjustment Board has jurisdiction **over** the dispute involved herein; and

That the Agreement was violated.

A W A R D

Part (1) of the claim sustained; Part (2) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

E. A. Killen  
Executive Secretary

Dated at Chicago, Illinois, this **23rd** day of **March 1973**.