

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 22780
Docket Number **MW-22696**

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**
(Chicago, Milwaukee, St. Paul and Pacific
(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 allow Track Laborer E. W. **Murphy** pay at **the machine** operator's **rate for** twenty-eight (28) hours of **work** he performed **on March 31 (8 hours), April 1 (3 hours), April 13 (8 hours), April 14 (8 hours) and April 18, 1977 (1 hour) [System File C#52-Montana/Case No. D-2000-2].**

(2) Track Laborer E. W. **Murphy** be allowed the difference between what he should have received at the machine operator's rate and what he was paid at the track laborer's **rate** for the services described in (1) above."

OPINION OF BOARD: In this dispute, Claimant contends **that Carrier** violated the Agreement, particularly Rules 33 and 46(f) and the pertinent seniority rules, when it directed him to operate the tractor **machine at Harlowton, Montana** on March 31, April 1, 13, 14 and 18, 1977. He argues that machines of this type, when used at various locations on Carrier's system, entitled the operators of this equipment **to be compensated at the** Machine Operator's rate of pay for the **time** used.

Contrariwise, Carrier contends that the work performed at that **location** was **incidental to his** specifically assigned laborers duties and that use of the equipment in **that** fashion was consistent with twenty **(20) years'** practice on the Montana Division, whereby section crews operated small farm tractors to clean snow, drag rail and other such related duties. It additionally asserted that the tractor was not **classified** under Group 4 of the Roadway Equipment and Machine Sub-Department.

Rules 33 and 46(f), which are cited by Claimant as **relevant** to this dispute, are referenced as follows:

Rule 33 - Composite Service

"An **employee** required to fill the position of another **employee** receiving a higher rate of pay, shall be paid the rate of such position for the work day when the time so engaged is in excess of four (4) hours.

'Except in case of force reduction, if an employe is required temporarily to fill the place of an employe receiving a lower rate, his rate will not be changed.'

Rule 46 - Classification

"(f) An employe assigned to operate roadway equipment and roadway machines, as covered by this schedule, will be designated as a roadway equipment or roadway machine operator."

In reviewing this case, this Board finds that the introduction of **Employes'** Exhibit A is inadmissible under the requirements of Circular 1. The signed affirmations were not submitted to Carrier during the **claims'** handling **on** the property and their inclusion in the **Employes'** **ax parte** submission is improper under this fundamental procedural rule. On the other hand, when the substantive record is carefully examined within the context of **Rule 33's** applicability, **we** do not find merit to petitioner's contention that the equipment was used to perform exclusively Machine **Operator's** work. In order for this rule to take effect, it would require **Claimant** to fill the position of another employe who received a higher rate which is not the case here.

Similarly, we do not find **that Rule 46(f)** is applicable to these facts since it requires that the affected employe operate roadway equipment and roadway machines covered by the Group 4 schedule. The equipment used by Claimant is not covered by this schedule and for us to include it by judicial interpretation would be an impermissible extension of our authority. We are not empowered to rewrite Agreement **Rules**.

We recognize, of course, the significance attached to Claimant's **avermnt** that the **June 7, 1977 Machine Operator's Bulletin (335-A)** **refers** to this equipment, but the position bulletined was not a Section laborer's position and there is no evidence that Machine **Operators** cannot operate this type of equipment.

We must add, however, that we do not find that either party persuasively demonstrated its assertions of past practice. Because the proof burden falls upon the party initiating the claimed grievance, we must determine whether Claimant appropriately met this requirement. Upon the record, and for the reasons stated herein, we must conclude that Claimant didn't satisfy our widentiary standards and thus we **must** reject the claim. In Third Division Award 20218, we stated in pertinent part that:

"..... In these circumstances, the **Employees** had the burden-of adducing **evidence** to prove the existence of the past practice as alleged, but the Employees have provided no evidence at all to satisfy this burden."

We **believe** this decisional holding applies to this case and sustains the rationality of our conclusion.

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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 14th day of March 1980.