

Award No. 3206

Docket No. MW-2955

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Mart J. O'Malley, Referee

**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC  
RAILROAD COMPANY**

**Henry A. Scandrett, Walter J. Cummings, George I. Haight,  
Trustees**

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

That Powderman Victor T. Gonion be paid the difference between Powderman's rate of pay, 85c per hour, and that which he received at section laborer's rate of pay from December 16, 1942;

That Jack-hammerman D. T. Gonion be paid the difference between Jack-hammerman's rate of pay, 65c per hour, and that which he received at section laborer's rate of pay from December 16, 1942;

That Air Compressor Operator E. P. Hillman be paid the difference between Air Compressor Operator's rate of pay, \$164.78 per month, and that which he received at section laborer's rate of pay from December 16, 1942.

**EMPLOYES' STATEMENT OF FACTS:** For many years past the Carrier has operated the rock quarry at Musselshell, Montana, with its own forces, employees in the rock quarry being regularly assigned to that work. On or about December 15, 1942, the Carrier assigned the work in the rock quarry to an outside contractor, displacing the railroad employees regularly assigned to that work.

The agreement in effect between the Carrier and the Brotherhood is by inference made a part of this Statement of Facts.

**CARRIER'S STATEMENT OF FACTS:** On December 1, 1942, carrier entered into a contract with Morris & Dougherty of St. Paul, Minnesota, to quarry and load onto cars furnished by the carrier approximately 100,000 cubic yards of heavy rock, commonly known as derrick rip rap. This work to be done at rock quarry owned by the carrier at Musselshell, Montana.

Work under this contract was started December 10, 1942, and completed July 17, 1943. Work was temporarily suspended from March 31, 1943, to April 16, 1943, while contractors' crew was taken to another division of the railroad to assist in restoring the main line to service after washouts between Ringling and Lombard, Montana, line being out of service 12 days.

101,178 cubic yards of rock were loaded and hauled out from Musselshell Quarry to July 17, 1943, when operations were discontinued.

"coyote hole". Exhibit "D" is a close-up view showing the rock gotten out by the contractor unloaded for riprap.

As comparison to the type of rock secured by the contractor under his method of operating the quarry and the rock secured through the carrier's operation of the quarry, an attempt was made to secure additional photographs showing the riprap previously placed; however, suitable pictures could not be secured as much of the rock had washed out and had been replaced by the heavy rock produced under supervision of the contractor as explained.

As above stated, subsequent to Morris & Dougherty taking over operation of the quarry, Miller's gang was utilized in preparing banks for riprap and the claimants worked in this gang at the established laborers' rate of 50 cents per hour.

Summarizing, the carrier has explained that the damage resulting from the unusually high waters during the spring of 1942 required the track be protected by a much greater quantity and larger size riprap than could possibly be secured through carrier operation of the quarry; experience further indicated the necessity for a radical change in the operation of the Musselshell Quarry and the futility of continuing the use as riprap of the small, badly broken and inferior type secured through carrier operation of the quarry.

The crew in charge of Foreman Miller consisted entirely of inexperienced men who were at the limit of their capabilities in operating the quarry as had previously been done and it was not reasonable to expect that these men could accomplish the results that were attained by the contractor. None of the claimants or Foreman Miller was qualified to dig, load and shoot tunnels or "coyote holes" as they had not had such experience. The crew furnished by the contractor were experienced tunnel men.

The carrier did not have a machine similar to the big Marion shovel, nor could one be purchased. Possibly some of the other equipment used by the contractor could have been picked up around the railroad. The fact, however, remains that this work was being carried on at a period when it was difficult to obtain new tool steel, motors, electric wire, trucks, repair parts and other equipment because of restrictions placed on the purchase and sale of such material.

The carrier appreciates that the farming out of work for economical reasons to the detriment of employees within the scope of the various agreements, is not proper. In this case, it, however, was not faced with a question of economical operation, but of having a special job properly done which the carrier was unable to do with its own organizations, supervision, equipment and maintenance of way employees. In other words, the protection of the right of way against the high water of the Musselshell and Yellowstone Rivers required riprap of a size and quantity that the carrier was not able to produce with its own men and equipment. It must be borne in mind that the carrier is charged with the safety of its men as well as that of the public using its transportation facilities.

The carrier feels that its action in contracting the work in question was proper and that this Division in its Awards 2338 and 2465 has recognized that conditions such as confronted the carrier in this case, justify the contracting of work as was done, and that, therefore, the claim is not supported.

**OPINION OF BOARD:** The Carrier operated Musselshell quarry to secure stone for use as riprap protection to its road bed. The system used by the Carrier was to bore holes vertically with a jackhammer 18 feet deep on the rear of a ten foot shelf. These holes were charged and shot and the stone thus obtained. The men who worked in this quarry were members of a track

gang under Foreman Miller and this crew worked part of the time in the quarry and part of the time on the track and road bed.

The Carrier had been bothered with washouts and determined that the riprap it had been using was not adequate, that since it was sandstone, it would be necessary to use large sizes and a greater quantity than it had formerly used; that this would necessitate a different form of quarrying. It was decided that it would be necessary to tunnel into the face of the rock to a considerable distance so that great quantities of huge pieces of the stone might be released. The plan as adopted called for five 6 ft. by 3 ft. tunnels into the rock to a depth of from 69 to 90 feet together with cross tunnels and branches, a total tunnel length in excess of 1,000 feet.

This class of work had never before been done by the railroad crew and the workmen on that crew had had but five months experience in drilling and blasting and none in driving tunnels. This work was dangerous and undoubtedly required equipment not ordinarily used on this road, and not obtainable at that time. It also required skill of a nature not possessed by the Maintenance of Way men. This work was let to an outside contractor and the Employees say it was a violation of the "Scope Rule".

This Board has held that ordinarily the scope of the contract includes all work unless excepted specifically. All the cases heretofore decided, including Awards 615, 757 and later ones, recognize that there is a line of demarcation between those that are within the scope and those that are without; that each case presents a factual situation which upon examination causes it to be cast to the one side or the other. That line has never been completely described, and perhaps because of the varying nature of undertakings, it never can be ascertained in a set and certain way. The general principles can be determined, but the particular facts of each controversy must be weighed and tested in the light of the scope of the contract and from that basis a decision can be reached as to whether it is within the scope of the Contract or forms an exception thereto.

A managerial judgment must be permitted whenever the case involves a highly skilled force, and other incidents that the Carrier probably could not provide from its force and equipment. Award No. 2338.

It is asserted by the employees that probably all, or nearly all, of the necessary equipment could have been found by the Carrier. However, this Board has held in Award No. 2338 that such assertions, "unsupported by factual data, are not sufficient to overcome the managerial judgment of the Carrier in contracting the work."

This particular kind of work was dangerous and required skill not shown to be possessed by the members of this crew. We feel that this work falls on that side of the line that makes it an exception to the Scope Rule. While it is asserted that the air compressor operator could have done the work performed by the Contractor's air-compressor man, we think that it would be rather difficult to divide the project into the small component parts; that the contract as a whole being outside the scope of the Agreement, it would neither be expedient nor wise to place small obstacles in the path of management and thus limit its discretion and judgment and cause friction and discord and perhaps the failure of the entire project.

**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 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 there was no violation of rules in contracting the type of work under consideration.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: H. A. Johnson  
Secretary

Dated at Chicago, Illinois, this 16th day of May, 1946.