

Award No. 4536

Docket No. MW-4548

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

MISSOURI PACIFIC RAILROAD COMPANY

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

(1) That the Carrier improperly paid Extra Gang Laborer H. J. McSpadden, Gang No. 5, White River Division, while he was assigned and did operate a Track Bolt Tightening Machine since September 1, 1947;

(2) That Extra Gang Laborer H. J. McSpadden be reimbursed for the difference between what he did receive at Extra Gang Laborer's rate and what he should have received at the Track Bolt Tightening Machine Operator's rate of \$243.30.

EMPLOYEES' STATEMENT OF FACTS: On or about April 14, 1947 the Carrier assigned Extra Gang Laborer H. J. McSpadden, Extra Gang No. 5, White River Division, to the work of operating a track bolt tightening machine. The Carrier paid H. J. McSpadden the extra gang laborer's rate while operating this track bolt tightening machine.

However, it was not until September 1, 1947 that H. J. McSpadden made complaint to the Carrier that he should have been compensated at the track bolt machine operator's rate. Therefore, insofar as this claim is concerned, we must consider McSpadden as having been assigned September 1, 1947 to the position of operator of track bolt tightening machine and continuing through until relieved from such assignment.

The agreement in effect between the two parties dated July 1, 1938 and subsequent amendments and interpretations are by reference made a part of this agreement.

POSITION OF EMPLOYEES: A short time following the effective date of the referred to agreement the then General Chairman, Mr. George Hudson, wrote the Assistant General Manager, C. A. Clements, under date of September 29, inquiring about the rates of pay and classification of certain roadway machine operators. To Mr. Hudson's letter the Carrier under date of November 3, 1938 wrote as follows:

on what days, or parts of days, the claimant did tighten bolts or otherwise use this power bolt tightener.

POSITION OF CARRIER: It is the position of the Carrier that the work performed by Mr. McSpadden was not that of a roadway machine operator. He was not qualified as a roadway machine operator. The operation of power bolt tightener did not require that Mr. McSpadden be qualified as a roadway machine operator.

The claim of Mr. McSpadden is not supported by any rule of the agreement and no rule has been referred to by the Employees in their handling of the case on the property.

It is the position of the Carrier that the letter written by former Assistant General Manager Mr. Clements, in response to an inquiry made by former General Chairman Mr. Hudson, on which the Employees rely, is not controlling. The circumstances are entirely different in the case today and the exchange of correspondence having to do with rates of pay of roadway machine operators.

It is the position of the Carrier that the foreman of the gang was in charge of the power bolt tighteners and that he, therefore, took the place of a roadway machine operator, if it could be said that a power bolt tightener is a roadway machine, but the Carrier argues that power bolt tighteners are tools and are not roadway machines.

The claim is without merit and is without support of agreement rules and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was employed as an extra gang laborer on Extra Gang No. 5 which was engaged in laying rail. There were two bolt tightening machines used in the performance of this work. Claimant was used to operate one of these machines during the period stated in the claim. He was paid as an extra gang laborer. He claims he should have been paid the Track Bolt Tightening Machine Operator's rate.

The record shows that bolt tightening machines came into general use in 1933. A bolt tightening machine consists of a small gasoline engine geared to a wrench. The gearing is so constructed that when the tension reaches a certain point because of the nut tightening up on the track bolt, the wrench is disengaged from the engine. It is a substitute for wrenches formerly used which has resulted in a reduction in the amount of manual labor needed to install track bolts. It is not self-propelling. It operates primarily on one rail with a balancing arm with wheel attached extending to the other. It is not a roadway machine in the sense in which that term is usually employed. It is a power operated tool which has generally displaced the use of track wrenches where a volume of track bolt tightening is performed.

This dispute arises by virtue of a letter of November 3, 1938, written by the Carrier in answer to an inquiry by the then General Chairman as to the rates of pay and classification of certain roadway machine operators. The material part of the letter provides:

"Roadway machines operated by Maintenance of Way employes under the provisions of schedule with Brotherhood of M. of W. Employes consist of the following:

Weed Burners

Ballast Discers

Weed Mowers

Track Bolt Tightening Machines

Persons classified as operators of the above machines are paid our standard rate of pay, i.e., \$135.20 monthly, equivalent to section foreman's rate of pay. Persons classified as helpers in the operation of these machines are paid \$110.20 monthly. Such laborers as are used in connection with the operation of these machines are, as a general rule, section men and are paid prevailing rate of pay for section laborers."

The Carrier contends that when the letter of November 3, 1938 was written, bolt tightening machines were used by special gangs operating over more than one division. Such bolt tightening gangs were in charge of a foreman who was paid the machine operator's rate. We can readily understand that bolt tightening machines as they were used prior to November 3, 1938, might well be classified differently than they are now. At that time they were new, limited in number and considered as special equipment. Their use by special gangs over extended portions of the Carrier's property is altogether different than now when they have become of common usage by almost all track construction and repair gangs. The Carrier contends, and the Organization does not deny, that even prior to 1938, the actual operator of the bolt tightening machine was not paid at the section laborer's rate and only the employe in charge was paid the Bolt Tightening Machine Operator's rate. The Carrier contends that the claimed rate has never been paid to the actual operators of these machines prior to September 1, 1947, the date of this claim. The Organization has not pointed out a single occasion when the Agreement has not been so construed.

We think the circumstances here developed show that these bolt tightener machines have become common tools of track construction and track repair gangs. The fact that they are power driven does not change the classification as power driven tools are becoming more and more common. This view is supported by the interpretation placed upon the Agreement over a long period of years during which time the Organization has acquiesced without lodging complaint. We think the Claimant was properly paid as an extra gang laborer under this Agreement.

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 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: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 12th day of August, 1949.