

Award No. 6629

Docket No. MW-6651

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
SOUTHERN PACIFIC COMPANY (Pacific Lines)**

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

(1) That the Carrier violated the effective Agreement when they assigned a portion of the work of cleaning cuts between Crockett and Martinez to individuals holding no seniority under the effective Agreement;

(2) That the Employees shown on page 1 of the 1951 System Work Equipment Sub-department seniority roster, be allowed pay at their respective straight time rates of pay for an equal proportionate share of the total number of man-hours consumed by the contractor's forces in performing the work referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The Carrier owns tractors, shovels, ditchers, bulldozers and trucks that are operated by the employees holding seniority in the System Work Equipment Sub-department.

These units of equipment are utilized in the performance of the work of cleaning and sloping cuts along the Carrier's right of way.

On June 11, 1951, and subsequent days thereto, the Carrier employed a contractor to perform a portion of the work of cleaning cuts between Crockett and Martinez. The contractor furnished one tractor (End-Loader) and one operator, who worked in conjunction with employees of the Carrier and with Carrier owned equipment. The operator furnished by the contractor was supervised by the same individual who supervised the employees of the Carrier who were engaged on the same project.

During the period involved in the instant claim, there were several units of Carrier owned equipment at various places on the property which were available for assignment to the project herein involved and which could have been utilized just as efficiently as was the equipment furnished by the Contractor.

The work consisted of scaling off overhanging earth, cleaning of cuts, and removal of slide material that obstructed the free passage of water in the drainage ditches.

individuals for whom claim is made, or set forth the specific date or dates involved, nor the separate amounts of time for which claim is made in behalf of each unnamed individual. The burden to come forward with and to sustain that which it claims and intends to prove rests on the petitioner and not on the carrier. It is obvious that the petitioner has failed to sustain that burden in this case, and the claim, therefore, should be denied.

Subject to and without waiving the foregoing exception, the carrier will hereinafter discuss its position in this dispute and will show that the claim is without merit or basis on any ground.

The claim in this docket arose out of the necessity of removing slide material, scaling of overhanging earth to reduce the hazard of further slides and clearing of cuts. As clearly shown in carrier's statement of facts, the carrier used its own equipment and employes to the greatest extent possible in getting the work accomplished. However, certain of the work could not be done by the equipment owned by the carrier and it was therefore necessary to contract for the use of the end loader (special equipment not possessed by the carrier) to complete the work.

While the petitioner alleged in handling this claim on the property that the small portion of the work which was contracted could have been performed by use of crawler type shovel or ditcher, as pointed out in carrier's statement of facts, this is not correct, and the particular work here involved required the special equipment which was used.

The work referred to in this case is not reserved to claimants by any provision of the current agreement, and it is the carrier's position that its action in contracting for the use of one unit of special equipment not possessed by the carrier, in the circumstances here involved, did not contravene any provision of the current agreement. In this connection, attention is called to Awards 757, 2338, 2465, 3206, 4712, 4776, 4954, 5028, 5304, 5563 and 5848 of this Division.

CONCLUSION

The carrier asserts that the claim in this docket is without basis or merit and, therefore, respectfully submits that it is incumbent upon this Division to deny the claim.

All data submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF THE BOARD: Sometime prior to June 11, 1951, an earth slide occurred in the cut at Eckley, endangering the Carrier's main track. The slide extended 150 feet up the side of the cut, with the toe within 25 feet of the main track. The Carrier undertook the task of scaling off the overhanging earth, cleaning the cut and removing the slide material that obstructed the drainage ditches. A ditcher owned and operated by the Carrier was employed to remove the debris within the limits of its operation from the main track. There remained, however, considerable earth to be removed which was beyond the reach of the ditcher.

The Carrier says that its crawler type shovel could not have been used to remove the remaining material because there was insufficient room for it to operate safely, and that the ditcher could not be moved rapidly enough to prevent it from being buried by earth that might be expected to slide at any time. This machine was 5 feet, 6 inches in width, 13 feet, 7 inches in length, and had a low speed of 1 mile per hour, according to the statement of the Carrier. The Carrier says that it thereupon contracted with individuals holding no seniority under the effective Agreement for the short-time use of

their Allis-Chalmers, crawler-type, end-loader, with a speed of 5½ miles per hour, and for the services of the operator thereof. Following the completion of this phase of the work, the Carrier's employees finished the job, using the Company's equipment.

The evidence is in sharp conflict. The Employees deny that the end-loader was necessary or more adapted to the task than the Carrier's equipment. They assert that the speed of the shovel and the end-loader was about the same; that the shovel had a longer reach than the end-loader; that work of the character here involved had theretofore been satisfactorily performed by use of Carrier's available equipment; and that, in any event, the Carrier could have purchased suitable equipment at a "relatively small expense." Both parties have submitted written statements and affidavits of witnesses, of more or less probative value, in support of their contentions.

It is always difficult to resolve disputes of fact in a proceeding of this character. The Board has not seen the witnesses or had an opportunity to interrogate them. We are inclined to the view, however, that the sworn statements of the Section Foreman and the Division Engineer make out a prima-facie case in favor of the Carrier's position; and that the evidence produced by the Organization is insufficient to refute that showing. The Carrier's affidavits, after stating pertinent facts, positively declare that the use of the end-loader, in charge of an experienced operator, was necessary and required. On the other hand, the two affidavits furnished by the Organization merely declare, by way of conclusion, that the Carrier possessed equipment that could have been used; while the unsworn letter written by one of these, a Ditcher Engineer, though more detailed, is not, in our judgment, sufficient to dispute the showing made by the Carrier.

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 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 14th day of May, 1954.