Award No. 12634
Docket No. MW-11763

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ILLINOIS CENTRAL RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when it failed and refused to compensate Mr. John Painting at the Chemical Spray Operator's rate of pay for service performed on September 2, 1958.

(2) Mr. John Painting be allowed the difference between what he was paid at the Motor Car Repairman Helper's rate and what he should have been paid at the Chemical Spray Operator's rate for the services performed on September 2, 1958.

EMPLOYES' STATEMENT OF FACTS: On September 2, 1958, and on dates subsequent thereto, the Claimant, who was regularly assigned to the position of Motor Car Repairman Helper, was assigned to and did perform Chemical Spray Operator's work in the operation of a Chemical Spray Machine which had been mounted on a flat car being handled by a work train and which was being used to spray both sides of the right-of-way on the Louisiana Division.

While so assigned, the Claimant, who performed the spraying operations on one side, was paid therefor at the Motor Car Repairman Helper's rate, whereas the employe, who performed the spraying operations on the other side, was paid therefor at the Chemical Spray Operator's rate, both performing identical work.

The Agreement violation was protested and the instant claim was filed in behalf of the Claimant. The claim was declined as well as all subsequent appeals.

The Agreement in effect between the two parties to this dispute dated September 1, 1934, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rule 28 reads:

"Rates of pay shown on rate sheets are the agreed rates of pay of employes covered by this agreement."

for the payment of the rate of a tie adzing machine operator were denied. It appeared on that property that there was a rule which inferentially included the making of running repairs on the machine as part of the duties of the machine operator and required capability to make such repairs for classification as a machine operator. In Award 2853, the payment of a machine operator's helper rate to a laborer who operated a tie adzing machine was denied. In that docket, there was no specific rule defining or setting forth qualifications for machine operators. Those two awards are not necessarily controlling of this particular dispute. However, when considered in addition to the practice on this property, they do lend weight to our conclusion that the duties of a tie adzing machine operator consist of something more than pushing the machine along the rail, making contact, lifting the blades, and going from tie to tie as the work progresses. There is no evidence that the claimants did more than that; hence, we have nothing upon which to base a finding that they performed the higher rated work. It follows that the claim must be denied." (Emphasis ours.)

Following the reasoning in the above case, certainly in the instant case the duties of a Chemical Spray Machine Operator consist of something more than handling spray nozzles, and for this reason alone the instant claim should be denied. However, there is an important difference between the above case and the case at bar which the Board should note. **Here, there was an Operator assigned to the machine who was readily able to perform any and all duties peculiar to an Operator,** and there was absolutely no need for two Operators.

The claim is without merit, and it should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts are not in dispute. On or about September 2, 1958, and subsequent dates, Carrier operated a Chemical Spray Machine used to control brush and weeds on the right-of-way. On the dates involved, the said Spray Machine was mounted on a flat car on a regular work train. Carrier assigned the regular Spray Machine Operator and a Motor Car Repairman Helper, one John Painting, the Claimant herein, to perform this work. Each of the employes operated a spray nozzle, the Operator on one side of the flat car and the Helper on the other side, thus both men sprayed the right-of-way on both sides of the track simultaneously. The Operator was paid at the Chemical Spray Operator's rate of pay, while the Repairman Helper was paid the rate of pay established in the contract at his regular Repairman Helper's rate.

The Organization contends that the Carrier was in violation of the Agreement when it refused to pay Claimant at the Chemical Spray Operator's rate of pay and the claim is for the difference between the Spray Operator's rate and the rate paid Claimant at his lower regular rate as a Motor Car Repairman Helper. Petitioner finds support for its contention in the following requirements of Rule 51, Composite Service, of the Agreement which provides as follows:

"An employe working on more than one class of work four (4) hours or more on any day will be allowed the higher rate of pay for the entire day. When temporarily assigned by the proper officer to a lower-rated position, his rate of pay will not be reduced."

Further, the Organization points to the record wherein the Carrier admitted that Claimant performed the same work on the day in question as did the Operator, but the Carrier claims that Petitioner was acting as an Assistant Chemical Spray Operator and was paid on that basis. The Agreement between the parties provides, in Rule 28, that the "Rates of pay shown on rate sheets are the agreed rates of pay of employes covered by this agreement." Significantly, it should be noted that nowhere on the said rate of pay sheets is there any such classification as an Assistant Chemical Spray Operator.

Carrier makes an assertion, totally unsupported in the record, that the Engineer of Maintenance, on May 16, 1957, issued instructions establishing the position of operator and assistant on chemical spray machine and additionally states that these instructions "reflect the mutual understanding of the parties" on this point. The Organization categorically denies that the Employes ever heard of these alleged instructions; that the said alleged instructions were neither proposed to the Organization, nor were they ever agreed to, and concludes that this allegation represents unilateral action on the part of the Carrier. It is significant that in the face of the Organization's denial of knowledge of the existence of these so-called "instructions", the Carrier made no effort to either contradict the Organization's contentions in this respect, nor did it affirmatively offer proof on the record that the instructions were, in fact, issued and agreed to by the Organization.

The Carrier argues that Petitioner has not sustained its burden of proving the affirmative of its case. The Board finds that the Carrier failed to sustain its burden of going forward with evidence to prove that the instructions were issued, known to the employes, or agreed to by the Organization. Carrier also argues that Claimant did not perform all the duties of a Chemical Spray Operator and, therefore, is not entitled to receive the pay of such an operator. It is well settled by previous Awards 4609, 6830 and 6870, among others, that it is not necessary for an employe to take over and perform all of the duties and responsibilities of a higher rated position in order to be entitled to pay at the higher rate.

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 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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of June 1964.