

Award No. 12795

Docket No. MW-12292

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY**

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

(1) The Carrier violated the effective Agreement when it assigned other than a B&B Department Truck Driver to perform B&B Department Truck Driver's work on November 12, 30; December 10 and 11, 1959.

(2) B&B Department Truck Driver Fred O. Curtis now be allowed twenty-two (22) hours' straight time pay because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: In November and December of 1959, the Carrier assigned B&B Supervisor Adkins and Assistant B&B Supervisor Pine, who occupy positions excepted from the scope of this Agreement, to perform the historical and traditional duties of a B&B Department Truck Driver.

Specifically, the work consisted of:

1. The operation of a B&B truck on November 12, 1959, in transporting an air compressor, paint spray, a barrel of kerosene, a barrel of gasoline, a tool box and two small cartons of supplies from Denver, Colorado, to Palmer Lake, Colorado, for the use of Bridge and Building employees in the performance of B&B work. Three hours were consumed by B&B Supervisor Adkins in the performance of this work.
2. The operation of B&B truck No. 419 on November 30, 1959 from Denver to and for the use of Bridge and Building employees at Phippsburg, Colorado, and to return the truck from Phippsburg to Denver on December 10, 1959. Assistant B&B Supervisor Pine consumed 16 hours in the performance of this work.

FOR THE EMPLOYES:

/s/ W. R. Ancell
W. R. Ancell
General Chairman, BofMWE

FOR THE CARRIER:

/s/ E. B. Herdman
E. B. Herdman
Director of Personnel"

These are all the rules and understandings this Carrier has with regard to operation of trucks on this property. It can be seen from the foregoing that there is no rule or understanding with the Employees that would validate the claims that have been appealed to the Third Division. Past practice on this property would not validate the claims. This Carrier has not received a request from the Employees for a rule that would entitle them to the work for which they are making claim. It would seem that the Employees are using the Third Division in this case in an attempt to secure a favorable award that would in effect write a rule securing for the Employees the work they seek.

It is the position of the Carrier that there is no rule, agreement or practice that would justify these claims, and it is not the purpose of the Third Division to write rules and that the Employees have not availed themselves of the provisions of the Railway Labor Act, specifically, Section 6, and under these circumstances the claims must be denied.

OPINION OF BOARD: On specified dates in November and December, 1959, B&B Supervisor Adkins and Assistant Supervisor Pine, who occupied positions outside the Scope of the Agreement, operated a truck which hauled material to B&B gangs of employees and also delivered and returned an empty truck from one gang to another. The issue of these claims concerns the question of whether or not truck driver, Fred O. Curtis, had the right under the Agreement to perform this work assigned to these supervisory personnel.

Organization takes the position that under Rule 35 and all of Supplemental G a company-owned truck, when assigned to or used in B&B Department service to transport employees, materials or tools, must be driven by a B&B Department driver. It points out that the only exception the rule permits is that a track department truck driver may perform truck service for the B&B Department within the limits of his seniority district. Since the supervisory personnel are not included in this exception, it maintains that the Agreement was violated.

Our study of the Scope Rule of the Agreement leaves doubt as to whether the work in question belongs exclusively to B&B truck drivers. The Rule refers to drivers of company trucks "used by B&B forces or when assigned to service with the B&B Department." From the facts and proof presented, we cannot conclude that the pick-up trucks driven by the supervisors to and from gangs in the B&B Department were clearly assigned for use of the B&B gangs. The hauling of material in a pick-up truck to the gang for later use of B&B Department employees or the moving of a truck to these employees cannot be interpreted from the language of the Agreement to confer an exclusive grant of this work upon the truck drivers. The truck or material comes within the jurisdiction of the B&B gang only after it is delivered for the use of the gang, and not while it is in transit. History and past practice, in fact, indicate that supervisors transferred trucks from one B&B gang to another, as well as hauled small amounts of material and supplies when going out to supervise jobs in order to expedite the work.

In the absence of a rule designating this work to B&B truck drivers and because of the established practice of supervisors performing this work, we hold that the Agreement was not violated.

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

The Agreement of the parties was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of July 1964.