

Award No. 13772

Docket No. MW-13587

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Kieran P. O'Gallagher, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MIDLAND VALLEY RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when, beginning with June 28, 1961, it assigned or otherwise permitted outside forces to perform the work of cutting right-of-way.

(2) Furloughed Section Foreman M. A. Bryan be allowed eight (8) hours' pay at the section foreman's straight time rate of pay for each date, beginning with June 28, 1961, of the violation referred to in Part (1) of this claim.

(3) Each of the three (3) senior furloughed section laborers be allowed pay at the section laborers' straight-time rate for each date, beginning with June 28, 1961, of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The work of cutting of brush and other growth on the Carrier's right-of-way was assigned to a Mr. Kelly. The Contractor commenced work on June 28, 1961 at Mile Post 63.

Four (4) employees of the contractor, one of whom was designated as a foreman, none of whom hold any seniority rights under the effective Agreement, were engaged in this work.

Two (2) tractor-drawn brush-hogs and one (1) tractor with a mower attachment were used by the contractor's employees to perform this work.

The Claimants were furloughed during the period of time that the contractor was performing this work, and the Claimants were ready, willing and able to have performed this work, had the Carrier given them the opportunity to do so.

Carrier owns a weed burner, weed sprayer and 14 foot mower, all capable of operating only on the rails, and also a tamping machine. In order to qualify operators, carrier and the organization entered into Supplement No. 28, effective October 1, 1960, Exhibit E.

After execution of Supplement No. 28, carrier then qualified the first roadway machine operator of its history with seniority date of June 6, 1960. There are a total of two roadway machine operators to date; Mr. Leo Sinyard and Mr. G. N. Sly, with seniority dates of June 6th and 27th, 1960, respectively.

Roadway machine operators may place themselves on section gangs wherever seniority will permit, but section laborers haven't any rights as operators. Carrier is not obligated to make or qualify laborers to be operators and at its discretion, may hire whoever it feels is qualified and deserving.

The organization's claim is for M. A. Bryan at foreman's rate and three senior section laborers at section laborer's rate of pay, not for operator's rate of pay.

Neither these section laborers nor M. A. Bryan were entitled to operate the tractors in question under any circumstance. They held no seniority right or any other right to operate a tractor or any roadway machine that carrier operates. The only way a laborer or foreman is entitled to any consideration is after qualifying as an operator.

Furthermore, Mr. M. A. Bryan was working as track supervisor, an excepted position, during the period in question at a higher rate of pay.

Under these circumstances, claimants are not proper parties.

SUMMARY:

The organization failed to request or hold a conference on these claims or handle them in the "usual manner" in accordance with the Railway Labor Act.

None of claimants hold seniority as roadway machine operators. All roadway machine operators were working as roadway machine operators or on higher rated positions.

Carrier owns no off-track equipment with which to mow or cut right of way.

Carrier has contracted out the mowing and cutting of its right of way during its entire history, which of course includes the period during which the current contract was negotiated, while the organization stood by with full knowledge of the practice without objection or comment. This was the established and accepted practice by both the carrier and the organization.

The claims in question are without merit or agreement support and this honorable board is respectfully requested to deny same.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts and circumstances found in the instant claim are similar, with some minor variations to those found in

Award No. 13771 wherein the same Organization was involved with Kansas, Oklahoma & Gulf Railway Company. In this case, as in Award No. 13771 the Organization failed to meet the burden of proof imposed upon it to show that it had exclusive right to perform the service involved, and we must arrive at the conclusion, as we did in Award No. 13771 that the claim lacking the merit for a sustaining award, must be denied.

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 Agreement 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 29th day of July 1965.