

**Award No. 14196**

**Docket No. MW-14208**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**(Supplemental)**

**Bernard J. Seff, Referee**

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**THE BALTIMORE AND OHIO RAILROAD COMPANY**

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

(1) The Carrier violated the Agreement when it assigned employees holding no seniority in the Carrier's B&B sub-department to perform the work of installing a cut-off in the sand bucket pit at the tipple at Fairmont, West Virginia, on September 23, 1961.

(2) Carpenter Foreman C. F. Hildreth and Carpenters G. R. Williams, Kassel Carroll and A. R. Bumgardner each be allowed five (5) hours' pay at their respective straight-time rates because of the violation referred to.

**EMPLOYEES' STATEMENT OF FACTS:** On September 23, 1961, boilermakers, who hold no seniority under the provisions of this Carrier's agreement with the Brotherhood of Maintenance of Way Employees, performed the work of installing a cut-off in the sand bucket pit at the tipple at Fairmont, West Virginia. This tipple at Fairmont is used as a sand handling and storage facility. The cut-off is an integral part of this structure and its purpose is to regulate the flow of sand to the conveyor bucket.

B&B forces have customarily and traditionally performed work of the subject character. Only a short time prior to the date of the subject rules violation, B&B forces installed an identical cut-off at the tipple at Grafton, West Virginia and similar work has been performed by B&B forces at Cumberland.

The time limits within which to institute proceedings to the Board on this case were extended by agreement and confirmed in a letter reading:

boilermakers performed the fabricating in the past but that in addition at Fairmont they had also in the past performed the work of installing cut-off at Fairmont.

There is nothing in the classification rule of the Maintenance of Way Agreement specifying that laying out and fitting up of sheet iron or sheet steel work, such as is here involved, is the work of employees covered by the BMWWE Agreement.

In handling this case on the property of this Carrier the BMWWE Committee was unable to cite this Carrier to any rule appearing in its Agreement that would give work of this kind by some exclusive reservation to employees coming under the scope of the Agreement between this Carrier and the Brotherhood of Maintenance of Way Employees.

While the claim in this case represents a total of 20 hours' pay at the straight time rate of pay, the claim as made is wholly disproportionate to the actual time consumed by these boilermakers in performing this work; actually the work required no more than 16 man hours.

**OPINION OF BOARD:** There is no dispute between the parties that on September 23, 1961, a cut-off in the sand bucket pit at the tipple at Fairmont, West Virginia was installed and that the said installation was performed by the Boilermakers' Organization. Petitioner contends that this work is reserved to the Maintenance of Way employees by the Agreement between the parties; that the installation of cutoffs have been traditionally and customarily been installed by B&B forces; in support of this contention the Organization calls attention to the fact that recently, at Grafton, West Virginia, and at Cumberland, Maryland identical cut-offs were installed by Maintenance of Way employees.

The Carrier explains its assignment of the work in question to the Boilermakers' Craft on the basis that Rule 71 of the said Boilermakers' Agreement with the Carrier clearly delegates this work to such employees. Carrier further argues that the disputed work falls within the meaning and intent of the above mentioned Rule 71; that the Boilermakers' Organization "fabricates" that part of the sand bucket involved in the instant case and, in addition, at Fairmont employees of this craft have in the past performed the work of installing a cut-off at Fairmont; that there is nothing in the classification rule of the Agreement between the parties specifying that "laying out and fitting up of sheet iron or sheet steel work, such as is here involved, is the work of employees covered by the BMWWE Agreement"; also that when the instant claim was handled on the property the Organization was unable to cite any rule in the Agreement that would give work of this kind by exclusive reservation to employees of the Petitioner. Two additional contentions are advanced by the Carrier to defeat the Organization's claim, viz: (1) the claim represents a total of 20 hours' pay at straight time whereas the Carrier claims that the actual time consumed by the boilermakers did not require more than 16 man hours; (2) Carrier also asserts that the Board is without jurisdiction to proceed in the disposition of the subject case because "there has been no proper joinder of interested parties," and that this Division must afford the employees a full opportunity to participate in the proceeding and present their views.

We find no merit in the Carrier's challenge to the Board's jurisdiction. The record shows that a Certified Mail, Return Receipt letter was sent to the interested parties on February 12, 1965 by this Division giving notice of the pendency of a hearing in the instant case; a disclaimer of interest in the matter was sent to the Division in response to the above referred to invitation to participate in the proceedings. The Maintenance of Way employees' Organization is the only Organization that expressed an interest and did in fact participate in the instant matter.

Carrier asserts on the record that:

(a) "The work that was done at Fairmont by Boilermakers is the same kind of work that has always been done by employees in that craft;

(b) It has been a practice of many years standing;

(c) It has been the practice to use employees covered by the Boilermakers' Special Rules to perform this kind of work for many years prior to the last revision of the agreement with the Brotherhood of Maintenance of Way Employees;

(d) Up to the time of the presentation of the instant claim . . . B&B forces had never advanced any protest as to this kind and type of work done by boilermakers;

(e) The Organization has offered no evidence that the Carrier . . . was not in conformity with established past practices on the property."

For its part the Organization points to its position on the record that "only a short time prior to the subject rules violation B&B forces had installed an identical cut-off at the tipple at Grafton, West Virginia and at Cumberland. If a cut-off was installed by boilermakers at some undisclosed date, it was done without the knowledge or consent of this Organization." Furthermore, the Organization contends that the matter of the man hours, involved herein was not previously raised by the Carrier on the property and is therefore a 'new issue' which is not properly before the Board for consideration. The Organization also urges that where a party is relying on past practice it has the burden of proving the said past practice and mere assertion of same is not sufficient to establish the said practice.

It is certainly clear that the evidence on the record in the instant case is in hopeless conflict. It is equally clear that in such circumstances this Division has repeatedly held that it cannot attempt to resolve conflicts in evidence. This point has so frequently been adjudicated that it does not require the citation of authority. In our view it therefore becomes unnecessary to reach the other points raised by the parties. We cannot decide the case absent evidentiary support in the record and we shall therefore dismiss the instant matter.

**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.

#### AWARD

The case shall be dismissed in accordance with the above decision.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1966.