

Award No. 15486
Docket No. MW-13581

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David L. Kabaker, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY**

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

(1) The Carrier violated the Agreement when it assigned the work of cleaning cuts, ditches and subgrade to a contractor whose employees hold no seniority within the scope of the Agreement between the Carrier and the Brotherhood of Maintenance of Way Employees.

(2) Power Shovel Operator J. P. Kopp be allowed pay at the power shovel operator's straight-time rate for a number of hours equal to the total consumed by outside forces in performing the work referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Beginning on May 4, 1961 and continuing through July 25, 1961, an individual who holds no seniority rights under the provisions of this Agreement was assigned or otherwise permitted to operate a crawler type power shovel in the performance of the work of cleaning cuts, ditches, subgrades, and other work related thereto between Gregson, Montana and Anaconda, Montana.

The equipment used to perform the subject work was a Bucyrus Erie 22-B Power Shovel, equipped with a $\frac{3}{4}$ -cubic yard bucket, and was used eight (8) hours a day, five (5) days a week.

The Carrier owns a Bucyrus Erie Power Shovel which has been used frequently in the past to perform work of the character here involved and which was idle and available for use during the period here involved.

The claimant, who has established and holds seniority as an Equipment Operator, was available, fully qualified and could have expeditiously performed the subject Equipment Operator's work.

The Agreement in effect between the two parties to this dispute dated July 1, 1952, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: Included as one of the major projects in our 1961 annual budget of capital and extraordinary expenditures was a re-ballasting program of approximately ten (10) miles of Main Line track. This work was scheduled for the month of July, when the carrier could lease a Mannix Ballast Sled to expedite the work.

As considerable time had elapsed since we had done any major work on cleaning cuts, ditches and subgrade, the carrier felt that these improvements should be accomplished prior to starting the ballasting program. Therefore, in view of the limited time available to the Railroad, and because we had no roadway machines capable of handling this cleaning program, we engaged the services of the F. & S. Contracting Company, Butte, Montana, on a contract basis, including the use of their equipment and operators. The work got under way on May 5 and was completed July 26, 1961. The ballasting program started July 13, 1961.

On the day before the roadway contracting work got under way, May 4, 1961, to be exact, the carrier assigned claimant J. P. Kopp as an equipment operator on the Payloader machine, in accordance with bulletining procedures of the working agreement.

Under date of May 12, 1961, the local Chairman of the BMWWE filed a letter with the Superintendent of the carrier, alleging violation of the agreement in not assigning claimant to the position of power shovel operator on the roadway cleaning program. The claim was handled in accordance with the Agreement and time-limit-on-claims rule, by correspondence only. There never was a request for a formal conference on the property to discuss the claim. On September 7, 1961, the carrier notified the General Chairman of the BMWWE by letter that the claim was declined because it was without merit under the current working agreement. There were no more developments on the case until the carrier received letter notification from the Third Division under date of June 18, 1962, advising of the Brotherhood's intent to file an ex parte submission involving the unadjusted claim.

OPINION OF BOARD: It is the position of Carrier that this Board should not consider this claim on the merits, inasmuch as it was not discussed in conference on the property as required by the provisions of the Railway Labor Act.

After a search of the record, we find no evidence that a conference was held on the property.

The claim is, therefore, dismissed. Awards 15400 (House), 15212 (Kabaker), 15148 (Hall), 15159 (Engelstein), and others.

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 Claim is barred.

AWARD

Claim dismissed.

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

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of April 1967.