

Award No. 16067
Docket No. MW-14172

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**SOUTHERN PACIFIC COMPANY
(Pacific Lines)**

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

(1) The Carrier violated the Agreement by compensating Luis M. Martinez and John M. Velasquez at Track Laborer's rate of pay when they were required to operate a Power Impact Wrench, for which a wage rate had been established by agreement to cover operators performing this type of work.

(2) Messrs. Luis M. Martinez, John M. Velasquez and/or their successors each be paid at the rate of pay listed in the Master Wage Schedule for Power Track Wrench Operator, less the amount each had received at Track Laborer's rate, for all services each was required to render under the violation referred to in Part (1) of this claim.

(3) A joint check of the pay roll be made by a representative of this Organization and a representative of the Carrier for the purpose of determining the amount due each of the claimants.

EMPLOYEES' STATEMENT OF FACTS: Mr. Luis M. Martinez is a regularly assigned track laborer in Extra Gang No. 38. On April 18, 1960, the Carrier equipped Extra Gang No. 38 with a power track wrench to remove and replace track bolts and therefore assigned Mr. Martinez to operate the machine at the track laborer's rate of pay.

Mr. John M. Velasquez is a regularly assigned track laborer in Extra Gang No. 26. On September 15, 1961, the Carrier equipped Extra Gang No. 26 with a power track wrench to remove and replace track bolts and thereafter assigned Mr. Velasquez to operate the machine at the track laborer's rate of pay.

A rate of pay has been contractually established to cover the work of operating power track wrenches and it is a higher rate of pay than the rate which has been contractually established for section and extra gang laborers.

The Agreement in effect between the two parties to this dispute dated January 1, 1953, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS:

1. There is in evidence an agreement between the Carrier and its employees of the Maintenance of Way Department, represented by the organization bearing an effective date of January 1, 1953 (hereinafter referred to as the current agreement), a copy of which is on file with the Board.

2. On April 18, 1960, Carrier's Extra Gang No. 38, Tucson Division, received and put into use an impact wrench tool — trade name Ingersoll-Rand Impactool. On September 15, 1961, Carrier's Extra Gang No. 26, Los Angeles Division, received and put into use the same make and model impact wrench mentioned next above. Attached hereto as Carrier's Exhibit A are several photographs showing both the impact wrench by itself and the proper method of handling when in operation.

3. John M. Velasquez and Luis M. Martinez, hereinafter referred to as the claimants, were assigned as laborers to Extra Gang No. 26, Los Angeles Division, and Extra Gang No. 38, Tucson Division, respectively. Neither claimant was qualified as a machine operator or held seniority as a Power Track Wrench Operator.

4. By letter dated January 15, 1962 (Carrier's Exhibit B), Petitioner's Division Chairman presented to Carrier's Los Angeles Division Superintendent claim essentially the same as that contained in Statement of claim hereinabove, based on the contention the claimant named therein (J. M. Velasquez) should be paid at Power Track Wrench Operator's rate of pay when he was required to use the impact wrench. The Division Superintendent denied the claim by his letter dated March 23, 1962 (Carrier's Exhibit C). On April 11, 1962 (Carrier's Exhibit D) the claim was appealed to Carrier's Assistant Manager of Personnel, and was denied by the officer's letter of June 8, 1962 (Carrier's Exhibit E).

By letter dated February 13, 1962 (Carrier's Exhibit F), Petitioner's Division Chairman presented to Carrier's Tucson Division Superintendent claim essentially the same as that contained in Statement of Claim hereinabove, based on the contention the claimant named therein (L. M. Martinez) should be paid at Power Track Wrench Operator's rate of pay when he was required to use the impact wrench. The Division Superintendent denied the claim by his letter dated March 7, 1962 (Carrier's Exhibit G). On March 29, 1962 (Carrier's Exhibit H), the claim was appealed to Carrier's Assistant Manager of Personnel and was denied by that Officer's letter of June 8, 1962 (Carrier's Exhibit I).

(Exhibits not reproduced.)

OPINION OF BOARD: On April 18, 1960, Carrier received and put into use on Extra Gang No. 38, Tucson Division, an impact wrench tool, trade named Ingersoll-Rand Impactool, and on September 15, 1961 did the same on Extra Gang No. 26, Los Angeles Division. Thereafter, on unspecified dates, Claimants were required to operate and use the new tools, Claimants Martinez on Extra Gang 38 and Claimant Velasquez on Extra Gang 26. Organization on January 15, 1962, filed claim in behalf of Velasquez; and on February 13,

1962, on behalf of Martinez, in each case contending that the claimant should have been paid at the Power Track Wrench Operator's rate of pay when he used the Impactool instead of at the lower rate of Track Laborer, and in each case asking that the amount due be determined by a joint check of the payroll.

Carrier in claiming for the first time in its Exparte Submission that the claims were untimely filed under the provisions of Article V, Section 1(a) of the Agreement, raised that question too late.

On the merits, Carrier argues that the Impactool is not a Power Track Wrench, but a hand held power tool which is appropriate for use by Track Laborers and cannot properly be classified as like "the power track wrench for which the rate of pay of Power Track Wrench Operator was established." Organization argues that the Impactool is a power track wrench. This difference was the issue which, as Carrier states in its rebuttal statement, "in fact constitutes the dispute in this case." According to Organization's assertion, undenied by Carrier, the Impactool is powered by compressed air from a gasoline engine powered compressor, and the operator of the Impactool is responsible for the performance of the gasoline engine, the compressor and the wrench. Besides photographs showing the wrench end of the Impactool with the air hose attached, but without the compressor or engine, and of the Nordberg Power Wrench, admittedly covered by the Power Wrench Operator rate, Carrier compares and describes the two machines in the following:

In the letter dated March 23, 1962:

"My investigation reveals that this machine is not an added burden to a Track Laborer in performing his duties but rather decreases his manual work load. The machine cannot be placed in the same category as what we have now classified as power-driven equipment due to the fact that it is not heavy and adds no burden to an employe when using it; . . ."

and in the letter dated June 8, 1962:

". . . the tool involved in this case . . . is nothing more than a hand held power tool of a type commonly found in commercial garages, shops, etc. It in no way resembles the power track wrench for which the rate of pay of Power Track Wrench Operator was established, the latter being a piece of machinery running on flanged wheels on the track and powered by a gasoline engine. . . ."

and in the letter dated March 7, 1962:

"This impact wrench, which weighs approximately 5 pounds, (elsewhere in the record it is said to weigh 25 pounds), is used in lieu of hand track wrench and is considered a hand tool, along with numerous other hand tools operated by Extra Gang Laborers."

and in the Carrier's Submission:

"The power track wrench in use on Carrier's property for which Power Track Wrench Operator's rate of pay was established (see Carrier's Exhibit J) requires two men to place on or remove from the track, runs on flanged wheels on the track, and is powered by a

5.4 horsepower gasoline engine. On the other hand, the impact wrench involved in this case (Carrier's Exhibit A) is nothing more than a hand held, air driven tool of the type commonly found in commercial garages, shops, etc., measuring 10 inches high and 19 inches long, and requires no special skills to operate. The impact wrench, when it is used by track gangs, merely replaces the older type of track wrench tool used by laborers, which is about 4 feet long, weighs approximately 10 or 15 pounds, is ratcheted, and is manually operated. The impact wrench, rather than adding a burden to a track laborer's work, decreases his manual effort."

Organization supplies information regarding the machines in its letters of claim where it calls the Impactool a "power track wrench":

"This is a piece of equipment which requires the operator to assume a kneeling position, with his knees bearing upon the rock ballast, which bruises the operator's knees and destroys his clothing."

and in its Submission:

". . . the subject power track wrenches are fully comparable to other power track wrenches owned by the Carrier. The burdens and responsibilities accruing to the operation of the subject power track wrenches are equal to — if not greater — than those accruing to other power track wrenches. The subject power track wrenches are powered by compressed air delivered by an air compressor which, in turn, is powered by a gasoline engine. The operator is responsible for the proper performance of a gasoline engine, and air compressor and a power track wrench. The other power track wrenches owned by the Carrier are powered directly by a gasoline engine — there is no air compressor, and

The Carrier has never denied the fact that the power track wrenches which the claimants are required to operate are used for the same purpose and perform the same function as any other power track wrench used by the Carrier."

In its Submission, Organization stated that the foregoing data (as well as all other data set forth in the Submission) had been presented to the Carrier and was made a part of the question in dispute; in its Rebuttal Statement, although Carrier commented at length on the foregoing description in Organization's Submission, it made no claim that the data therein had not been before it on the property, and it did not dispute the assertion by Organization that the operator was responsible not only for operation of the head of the tool, but for the gas engine and the compressor.

The fact argued by Carrier that the Impactool (without the compressor and gas engine) weighs less than the Nordberg Power Wrench and imposes no added physical or manual burden on its operator as compared to use of a hand track wrench is no more relevant to the proper classification of the tool as either a hand tool or a power tool than the fact, argued by Organization, that the operator of the Impactool has to kneel on rock ballast and destroys his clothing; such data might be relevant in the establishment of a fair rate for the job, but that is not the question before us; we must determine whether the work involved, as described in the record, should have been classified as Power Track Wrench Operator work.

To decide that question we must determine from the record before us whether there was intended in listing in the Agreement the title and rate for Power Track Wrench Operator some more narrow meaning for the title "Power Track Wrench Operator" than those words would normally connote. From the information about the machine which we find in the record, we find that while the functions of the two machines is the same, there are differences between the jobs of operating the Nordberg and of operating the new tool; but we find no evidence that the skill, knowledge and effort required are so different as to require us to classify operation of the two tools in different categories. No evidence was introduced which proved that the title Power Track Wrench Operator was intended only for the Nordberg or other machines like it in function, in size and in method of operation; on the other hand it is admitted that the Impactool is a power driven tool used as a track wrench, and thus fits the normal unmodified meaning of the words in the title "Power Track Wrench Operator." Thus Carrier by paying Track Laborer rate to Claimants for those days on which they were required to operate the Impactool was in violation of Rules 26 and 27.

Carrier says in its Submission that a check of the payroll records would not help determine on what dates the claimants used the Impactool. Since Carrier conceded on the property that Claimants were in fact assigned to use the Impactool, this would affect only the remedy. We will award a remedy which does not order a joint check of payroll or any other Carrier records, but which will require Carrier, in order to comply, to check such of their records as necessary (and usual in such cases) to determine the amounts due under the award to each of claimants. We will not require that Carrier pay either claimant for any time more than 60 days prior to date of the initial claim in each case.

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 Carrier violated the Agreement.

AWARD

The Claim is sustained as herein modified; and substitute a comma for the period at the end of part 2 and add the following:

"on each day subsequent to the date sixty-one days prior to the date of the Organization's initial claim in each case on which claimant involved was required to operate the Impactool, and until the violation ceases."

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of January 1968.

Keenan Printing Co., Chicago, Ill.

Printed in U.S.A.