



Award Number 17319
Docket Number MW-16706

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
THE TEXAS AND PACIFIC RAILWAY COMPANY**

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

- (1) The Carrier violated the Agreement when it assigned to outside forces the work of grading road on right-of-way at Mile Posts 337-339 on June 2 and 3, 1965 and the work of demolishing the depot platform at Millsap, Texas (MP-290-291) on June 6, 7, 8, 9 and 10, 1965. (Carrier's file B-247-4414)
- (2) Roadway Machine Operators A. J. Averitt and K. R. Jones each be allowed pay at their respective straight-time rates for an equal proportionate share of the total number of man hours expended by outside forces in performing the work referred to in Part (1) of this claim."

EMPLOYEES' STATEMENT OF FACTS: The Carrier assigned the work of grading a road along the right-of-way at Mile Posts 337-339 on June 2 and 3, 1965 and the work of demolishing the depot platform at Millsap, Texas on June 6, 7, 8, 9 and 10, 1965 to forces outside the scope of its agreement with the Brotherhood of Maintenance of Way Employees. The contractor's forces used a D-7 Bulldozer and a No. 12 motor grader to perform the aforementioned work.

The Carrier owns similar and equally suitable equipment with which it could have performed this work. Claimants Averitt and Jones are two of the many Carrier employees who have acquired seniority within the Roadway Machine Operator sub department to which work of this character has customarily and historically been assigned.

During the period of this claim, Claimant Averitt was employed as the operator on Bulldozer CT44 and Claimant Jones was operating a speed swing.

Claim was timely and properly presented and handled by the Employees at all stages of appeal up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated September 1, 1963, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

In view of these facts, the Carrier was compelled to inform the Organization in part as follows under date of March 23, 1966:

"During the conference we explained to you that we can find no justification for changing the decision given you in our letter of January 20, 1966, which is hereby affirmed and these claims are declined."

11. Some eight months plus, the Carrier received notification under date of October 17, 1966 that the Organization desired to submit the claims to your Honorable Board for Adjudication.

OPINION OF BOARD: The claim herein arose because of the Carrier contracting with an outside contractor for certain grading work, which the Carrier described as "levelling right-of-way between Mile Posts 336 and 338 near Triffin, Texas," and "the work of removing the station platform and curb at Millsap, Texas."

It is well established that issues and contentions raised for the first time before the Board will not be considered. The record shows that in the handling of the dispute on the property the Organization contended that the work involved "clearly comes under the scope of work performed by the Roadway Machine Department * * *." The Carrier did not dispute this contention in the record as made on the property. Only after the dispute left the property did the Carrier make any contention as to the work not being covered by the scope of the agreement; that it was not of the character usually, customarily or traditionally performed by the Maintenance of Way Employees, or that it had been the practice through the years to contract such work.

Carrier's declination of the claim on the property was premised upon the defenses that it lacked adequate equipment, and that Claimants were fully employed by the Carrier throughout the period that the work was performed by the contractor. The Organization contended that during the period of the claim, the Carrier did have equipment available to perform the work. We agree with the argument on behalf of the Petitioner that the burden was on the Carrier to prove the lack of equipment, or that special equipment was actually necessary for the performance of the work, and that the Carrier failed to meet the burden required of it.

As to the Claimants being employed full time, the Board has held in numerous recent awards that where there is a loss of earnings opportunities, such as here involved, the employees should be compensated at the straight time rate. Awards 16430, 16521, 16608, 17108, among others.

The decision herein is based strictly upon the record as made in the handling of the dispute on the property, and cannot be deemed decisive on the question of exclusivity on this property for this type of work.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing:

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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of July 1969.