



Award No. 18521
Docket No. MW-18959

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Thomas Rimer, Jr., Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when it assigned Carpenter R. Lass instead of Crane Operator R. Waters to operate Tractor No. 426 on February 24, 1969. (System File BJ-2-69/SM-1-69).

(2) Crane Operator R. Waters be allowed pay at his straight time rate of pay for a number of hours equal to that expended by Carpenter R. Lass in the performance of the work referred to within Part (1) of this claim.

(3) The Carrier shall also pay the claimant six percent (6%) interest per annum on the monetary allowance accruing from the initial claim date until paid.

EMPLOYEES' STATEMENT OF FACTS: Approximately four (4) years prior to the date involved here, the Carrier equipped its Tractor #426 with a front-loader and a back-hoe attachment. Subsequent thereto, B&B crane operators have customarily been assigned to operate this equipment whenever it is used in connection with B&B work.

On February 24, 1969, the B&B gang in East Joliet Yard was assigned to repair a sewer near Building 21E and Tractor #426 was used to perform the necessary excavating work. Instead of assigning an employe with crane operator's seniority to operate the tractor, the Carrier assigned Carpenter Lass, who has no seniority whatsoever as a crane operator, to perform the crane operator's work.

Claimant R. Waters, with crane operator's seniority dating from July 17, 1943, was available, fully qualified and willing to perform the aforementioned work if the Carrier had so desired.

The rules controlling here include Rules 2, 3 and 4. Rules 2 and 3 read:

"Rule 2. (a) Except as otherwise provided in this rule, seniority begins at the time employe's pay starts, as of the last entry into the service of the Bridge and Building, Track, or Scales and Work Equipment sub-Department.

the backhoe attached thereto, to make this excavation in connection with the repairs to be made to the sewer line. Claimant Waters holds seniority in group 6 (Crane Operators) of the B&B sub-department and subject claim is based on the allegation that operation of the backhoe attachment on Tractor No. 426 is exclusively the work of Crane Operators.

Subject claim has been advanced on the property of the Carrier in accordance with the controlling agreement without the dispute being resolved and is properly before the Third Division, National Railroad Adjustment Board in accordance with the Railway Labor Act.

At all levels of appeal of subject claim the Carrier has advised the Organization of the following:

1. The operation of the backhoe attachment on Tractor No. 426 is not exclusively the work of Crane Operators and, to the contrary, this equipment is assigned to no sub-department of the Maintenance of Way Department and is used and operated by any department having need for it. Its use and purpose is comparable to a prior piece of equipment called a "Ditcher," the operation of which was never alleged to be the exclusive work of Crane Operators.

2. Claimant Waters worked and was paid as a Crane Operator on February 24, 1969 during the time Lass used the backhoe attachment and therefore suffered no pecuniary loss and therefore is entitled to no payment in accordance with Rule 62.

3. No rule of agreement between the Organization and the Carrier provides for the payment of interest as requested in paragraph (3) in the Organization's Statement of Claim.

In the handling of this claim on the property, the Organization has advanced the opinion that the operation of this backhoe by Lass constituted a violation of Carrier's Safety Rule 22. While the Safety Rules have no bearing whatsoever on the validity of the claim, the Carrier categorically denies that Mr. Lass was required to perform any unsafe act when instructed to operate the backhoe.

OPINION OF BOARD: We are here concerned with a claim for compensation for Crane Operator R. Waters for a violation of the Agreement on the date of February 24, 1969. It is charged that the assignment of Carpenter Lass to operate Tractor #426 on that date, and that date alone, constituted a breach of the Agreement and alleged past practice. On the day in question the Claimant was fully employed as a Crane Operator at a point 17 miles away from the area where Tractor #426 was operated by Lass.

The Petitioner is pursuing this particular claim to establish an exclusive right to operate a single piece of equipment by Crane Operators. It has done so by brushing aside the clear terms of Rule 62 which states in paragraph two:

"Time claim shall be confined to the actual pecuniary losses resulting from the alleged violation"

In support of its position the Organization cites prior awards, some of which deal with lost work "opportunities" as opposed to loss of work and thus, a pecuniary loss. None of these adequately deal with the mandate of the Agree-

ment which is positive, affirmative and unambiguous in its terms. In other Awards cited the Board rejected the Carrier's claim that no monetary loss was suffered with such findings based on totally different fact situations that the one before us in the instant case.

On the other hand, the Carrier has cited prior Awards involving disputes between the same Organization and the same Carrier in which parallel fact situations did exist i.e. claims for the exclusive right to perform specified types of work. In each such case, the Board gave weight to the absence of pecuniary loss and rejected the monetary claims based on Rule 62.

There is no contract rule or definition of duties which grants the Crane Operator the exclusive right to operate tractors, in this case a tractor with a back-hoe attachment. In the absence of such rule, the Board must look to proof of a grant through undeviating past practice or custom which has achieved the status of a mutual understanding as to work assignments. The Organization has not shown through a preponderance of evidence that the operation of tractor No. 426 specified in the claim had been customarily the work of Crane Operators and that such custom and practice was violated or ignored on the date in question.

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 not violated.

AWARD

Claim denied.

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

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of April 1971.