Award No. 19038

Docket No. MW-17432

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Gene T. Ritter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ST. LOUIS-SAN FRANCISCO 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 operating a Brown Hoist Machine, which was used to perform ditching work and to remove debris from the right-of-way near Mile Post T-23, to a mechanical department employe instead of to Special Equipment Operator H. L. Cruise, during the period extending from September 19 through September 23, 1966 (System file D-4431/A-9121).

(2) Special Equipment Operator H. L. Cruise be allowed pay at the special equipment operator's rate of pay for an equal number of man hours as were expended by the mechanical department employe in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On September 19, 1966, and continuing through September 23, 1966, the Carrier used a Brown Hoist Machine, assigned to the Mechanical Department, to perform ditching work and remove debris from the right-of-way near Mile Post T-23. The Carrier assigned a mechanical department employe, who holds no seniority as a Special Equipment (machine) Operator within the Maintenance of Way Department, to operate same.

The claimant has established and holds seniority as a special equipment operator and was available, willing and qualified to have performed this work had he been given the opportunity to do so.

Claim was timely and properly presented and handled by the Employes 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 March 1, 1951, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: In the vicinity of Mile Post T-23 the tracks of this Carrier pass through a narrow cut with the sides of

the cut almost perpendicular and approximately 40 feet high. As a result of heavy rains a considerable amount of rock and dirt had fallen from the sides of this cut into ditches alongside the track through the cut. To provide for clearing the rocks and dirt from these ditches a work train handling air-dump cars and the Mechanical Department Brown Hoist (a track mounted crane equipped with clamshell bucket) departed Chaffee, Missouri, a terminal some 120 miles south of Mile Post T-23, at 8:40 A. M., Monday, September 19, 1966 enroute to Mile Post T-23. The work of clearing the ditches through this cut was performed by bucketing the rock and dirt into the air-dump cars after which the work train was moved out of the cut and the air-dump cars emptied.

Personnel involved in this ditching operation consisted of the train crew who manned the work train; the Brown Hoist operator who operated that machine; an extra gang foreman who handled the operating mechanism of the air-dump cars; and the Roadmaster who supervised the operation of the work train. The work train was tied up at Crystal City, Missouri, approximately 17 miles south of the work location, at 6:45 P. M.

On September 20, 21 and 22 the work extra was called each morning and tied up each evening at Crystal City and performed ditching work as indicated above on each of these days.

On Friday, September 23, the work extra was called at Crystal City at 7:30 A. M. and after completion of ditching work required departed with Brown Hoist and air-dump cars for the return trip to Chaffee, Missouri, arriving Chaffee at 4:20 P. M. and tying up at 4:40 P. M.

OPINION OF BOARD: From September 19, 1966, to September 23, 1966, inclusive, a Mechanical Department employe under the supervision of the Roadmaster, operated a Brown Hoist in the performance of clearing ditches near the vicinity of Mile Post T-23 on Carrier's right-of-way. The Organization relies on the Scope Rule of the Agreement in its contention that the Maintenance of Way forces have the right to operate equipment used in ditching work and in removing debris from along the right-of-way and that the character of the work performed determines the class from which the operator will be drawn. Carrier contends that the Brown Hoist was loaned to this operation by the mechanical department and that Maintenance of Way employes never operated this particular equipment; that the Scope Rule does not include Brown Hoist operators; that the April 1, 1951, Agreement specifically excludes Brown Hoist operators; that Claimant was not available for this job and was not available for this job and was fully employed during the performance of this operation: and that, therefore, Carrier did not violate the Agreement in this instance.

The record discloses that the work involved was that of clearing ditches through a narrow cut that had been accumulating a considerable amount of rock and dirt that had fallen from the sides of this cut into the ditches along side the track because of a heavy rain. Carrier contends that both the April 1, 1951 Agreement and the March 1, 1951 Agreement specifically enumerate machines by brand name and type of work they perform. In this connection, Carrier contends that a Brown Hoist is not enumerated or set out in either one of the Agreements heretofore mentioned entered into with the Brotherhood of Maintenance of Way Employes, and that, therefore, the Organization must prove exclusivity to the use of this machine by custom, practice and tradition. The Organization contends that it is the character of the work performed by the machine that ordinarily determines the craft from which its operator will be drawn.

This Board finds the Brown Hoist could be used by either craft. In other words, Maintenance of Way employes may use this machine as well as employes assigned to the Mechanical Department. Therefore, the character of the work performed by the machine would determine the craft from which its operator was drawn. See Awards 4546, 4547, 13517, 14004, and Second Division Awards 244, 1829 and 3405. There is no contention by Carrier in this record that an emergency existed in this instance. The record indicates that the ditches along the tracks at the particular point involved needed cleaning. This standard ordinary work belongs to the Maintenance of Way Department. If an emergency existed, such as a washout, derailment, etc., the decision here might have been different. However, the involved work was routine and belongs to Maintenance of Way employes. Had the clearing of the debris from the ditch been done by hand, another type of machine, or otherwise, this work, absent an emergency, would belong to Maintenance of Way employes.

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 Employes involved in this dispute are respectively Carrier and Employes 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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1972.

DISSENT OF CARRIER MEMBERS TO AWARD 19038,
(DOCKET MW-17432)

(Referee Ritter)

Award 19038 is in palpable error. It ignores the Agreement, the practices thereunder and the record in the dispute.

The General Rules agreement, by the specific language of the Scope Rule excepts Brown Hoist Engineers. The Carrier called attention to that portion of the Scope Rule reading:

"Following employes when work handled is under jurisdiction of Maintenance of Way Department:

'B&B Supply Yard Foremen.
Timber Treating Plant Laborers.
Ice Plant and Ice House Laborers.
Hoisting Engineers other than Brown Hoist Engineers.' "

Neither the Scope Rule of the Agreement of March 1, 1951 covering equipment mechanics, special machine engineers, operators, firemen and helpers nor the Rates of Pay Rule of the Agreement includes engineers or operators of Brown Hoists.

The Record showed that Brown Hoists had been in use on the property of the Carrier for over sixty years, that they had been used for many years to do the same type of work as involved herein, and that the operator had always been furnished by the Mechanical Department, under whose jurisdiction the machines are assigned. This was verified by statements from various Brown Hoist operators, but ignored by the Referee who chose to take the easy route of following other awards covering disputes arising between other parties involving other agreements and other records.

As the Agreement on which the claim was based lists the specific machines covered, but does not delineate or define work, then, under the consistent rulings of this Board the Petitioner properly had the burden of proving that the work complained of was of the kind that had been traditionally and historically assigned to and performed exclusively by employes covered by the Agreement. No such proof was presented by the Petitioner.

The Carrier also pointed out that claimant was not qualified to operate a Brown Hoist. This contention was simply ignored by the Referee.

The Referee likewise conveniently ignored the contention of the Carrier that claimant was not available to perform the work, working full time approximately 225 miles from the location when the work complained of was performed.

Numerous awards of this Division, such as 6413, recognize that it has authority only to interpret and apply the provisions of the Agreement and Rules as agreed upon between the parties and that it has no authority to fix rates of pay.

There is no single uniform rate of pay for special machine engineers, operators, firemen and helpers listed in the Scope Rule of the Controlling Agreement. Monthly rates of pay of such employes at the time of claim ranged from a minimum of $440.75 to a maximum of $526.78 and such monthly rates comprehend 174⅔ hours. The established rate of pay in the Firemen and Oilers' Agreement for the Mechnical Department employe used to operate the Brown Hoist was then $2.7628 per hour.

Part 2 of the Employes' statement of claim does not specify the special equipment operator's rate of pay claimed. The Scope Rule and the Rate of Pay Rule of the Controlling Agreement do not contain a classification and rate of pay for engineer or operator of Brown Hoist for translating the award into a precise monetary sum. Therefore, the award is ambiguous and casts a serious doubt whether it is final and capable of enforcement.

The Agreement rules, the practices thereunder, and the Record before the Board, called for a denial of the claim in its entirety. The referee commit-

ted serious error, and we must register a vigorous dissent to the erroneous award.

P. C. Carter

W. B. Jones

G. L. Naylor

R. E. Black

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