

Award No. 19158
Docket No. MW-17864

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Clement P. Cull, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
LOUISVILLE & NASHVILLE RAILROAD COMPANY

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

(1) The Agreement was violated when the Carrier used a mechanical department employe instead of Bullgrader Operator Aubrey Morris to operate a bullgrader on August 11, 14, 15, 16, 17, 18, 21 and 23, 1967. (System file 1-25/E 804-11)

(2) Bull-grader Operator Aubrey Morris be allowed fifty-three (53) hours' pay at the bullgrader operator's rate because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The claimant has established and holds seniority in Seniority Rank 3 of the track sub-department as of December 3, 1946.

During the period from August 11 through August 23, 1967, the Carrier used a Mechanical Department employe, who had no seniority within the Maintenance of Way and Structures Department, to operate a bullgrader that was being used in the repair of a road crossing located in the vicinity of the Round House and shops at Radnor Yard, Nashville, Tennessee.

Inasmuch as bullgrader operators are encompassed within Rank No. 3 of Rule 5(a) of the Maintenance of Way Employees' Agreement the work of operating a bullgrader, when it is used to perform Maintenance of Way work, is reserved to employes covered by that agreement under the provisions of Rule 1 thereof which reads:

"Subject to the exceptions in Rule 2, the rules contained herein shall govern the hours of service, working conditions, and rates of pay for all employes in any and all subdepartments of the Maintenance of Way and Structures Department, represented by the Brotherhood of Maintenance of Way Employees, and such employes shall perform all work in the maintenance of way and structures department."

(Emphasis ours.)

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 May 1, 1960, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: Carrier's Radnor Shops are located at Nashville, Tennessee. The roads and the crossings in the Shop area were in such condition that repairs were necessary, and the Mechanical Department borrowed a Bulldozer from the Maintenance of Way Department to do the necessary scraping and grading. These roads and crossings are for use by shop men and also trucks for delivering supplies.

A shop employe operated the Bullgrader, and the employes claimed that this was a violation of the Maintenance of Way Agreement of May 1, 1960 (on file with your Division and by reference made a part of this submission). Carrier saw no basis for the claim and it was denied. Correspondence exchanged in connection with the claim is shown by Carrier's attached exhibits "A" through "H."

(Exhibits not reproduced.)

OPINION OF BOARD: The dispute arose when Carrier, on August 11, 14, 15, 16, 17, 18, 21 and 23, 1967, assigned a shop man, from the Mechanical Department, to do scraping and grading of crossings and roads in the shop area at Nashville, Tenn., with a bullgrader borrowed from the Maintenance of Way Department.

Petitioner contends that the work of scraping and grading of crossings and roads is covered by its Scope Rule which reads as follows:

"Subject to the exceptions in Rule 2, the rules contained herein shall govern the hours of service, working conditions, and rates of pay for all employes in any and all subdepartments of the Maintenance of Way and Structures Department, represented by the Brotherhood of Maintenance of Way Employes, and such employes shall perform all work in the maintenance of way and structures department."

Carrier does not dispute scope rule coverage, however, it contended, on the property, that its actions were proper under Rule 2 (f) of the agreement and therefore the work was not exclusively reserved for Employes. Rule 2(f) reads as follows:

"The railroad company may contract work when it does not have adequate equipment laid up and forces laid off, sufficient both in number and skill, with which the work may be done."

The record reveals that the assignment herein was not made pursuant to Rule 2(f).

Carrier's defense is in effect an admission that the work in dispute is reserved for the Employes herein. Where, by agreement, parties created a limited exception to a rule, which is effective only when its terms are met, the exception does not defeat the rule. On the contrary it reinforces it. The need for the exception proves the vitality of the Rule. There would be no need for an exception if there had not been a controlling Rule in the first place.

Accordingly, we find that the rights Carrier has under Rule 2(f) do not destroy the exclusivity enjoyed by Petitioner under its Scope Rule.

As to the assignment of the shop man, Carrier contends that as it had certain rights to contract out work under Rule 2(f), it also had the option of assigning the operation of the tool involved (the bullgrader) to a qualified employe under any agreement. We find that Rule 2(f) merely gives Carrier the right to contract out under certain limited circumstances, none of which are present here, and does not give Carrier the right it asserts. In this connection, it is a recognized rule in the construction of contracts that where one or more exceptions to a rule are expressed no other or further exceptions will be implied.

Having found that the scraping and grading involved is covered by the Scope Rule of the herein agreement it appears logical that the person to be assigned should come from among the Employees for whose benefit the agreement was made. That, of course, would be the bullgrader operator which classification is specifically covered by the agreement. It would be illogical to reserve scraping and grading for performance by Employees under the agreement and then contend that employes from any class, under any agreement, who were capable of operating the machine, could be assigned. Therefore, we are of the opinion, that Award 19038 has relevance to the herein dispute. It reads in part as follows:

"Therefore, the character of the work performed by the machine would determine the craft from which its operator was drawn."

Having found that the work in dispute is reserved for Employees herein we further find that the bullgrader operator should have been assigned to perform the work rather than the shop man. Accordingly, we will sustain the claim. (Award 15689.)

This Board has notified the Organization representing the shop man, who performed the work, of dispute and invited its participation. That Organization has declined to participate. However, despite the declination we have discharged our responsibility under Transportation-Communication Employees Union v. Union Pacific Railroad Company (385 U.S. 157) by finding that the assignment of the shop man to do the scraping and grading violated Petitioner's agreement.

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 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 April 1972.

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