

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22779
Docket Number MW-22694

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Norfolk and Western Railway Company (Lake Region)

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

(1) The Agreement was violated when, on and subsequent to January 24, 1977, eight (8) machine operators were used to perform laborer's work in connection with the construction of new track to serve the Delco Plant at Muncie, Indiana, during which time Extra Gang Laborers L. C. Melson, L. P. Piercy, T. D. King, A. D. Randolph, R. F. Snyder, G. J. Reichert, W. E. McClellan and Utah Dockery were furloughed and available and willing to perform such laborer's work (System File MW-MUN-77-33).

(2) Each of the employes identified in (1) above be reimbursed for the wage loss suffered as a consequence of said violation."

OPINION OF BOARD: Before proceeding to a substantive assessment of the dispute's merits, this Board must dispose of the procedural objections raised in petitioner's rebuttal submission. Based on the accumulated documentary record, we do not find any specific unequivocal evidence that Carrier advanced exclusivity arguments on the property.

Careful reading of Carrier's written correspondence dated April 11, 1977, June 7, 1977 and September 29, 1977 reveals that Carrier considered the work of machine operators distinguishable from that of laborers and that petitioners failed to demonstrate that the machine operators performed laborers' work. An exclusivity argument would assert that the contested work was traditionally performed by both position classifications and would require a showing by the initiating party that the work by custom and practice accrued to that category of employes. This is not the case here and thus we must exclude this argument from our consideration pursuant to the requirements of Circular 1. The same is true regarding the seniority displacements articulated in Carrier's submission. They were not raised on the property and, as such, are inadmissible before this Board.

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On the other hand, we believe that petitioner adequately met its required proof burden by specifically delineating the type of work performed by extra gang laborers. It noted that this work included laying tie, rail, putting on angle bars, laying switches, spiking and gauging, etc. and further showed that the machine operators were not using assigned machines, since they were being repaired at Frankfort, Indiana, some eighty (80) miles away from the work situs. Moreover, notwithstanding Carrier's lack of denial of the aforesaid specifications, the Organization adduced three letters dated June 9, 1978 which were written by three machine operators employed in the contested work project, attesting that they did not operate any machinery, but instead performed laborer's work on the construction of the new line that was being built to the Delco Plant at Muncie, Indiana. The letters were served on the Carrier before the August 28, 1978 ex parte submission and were permissible evidence under our rules. The record, as developed on the property, competently affirms petitioners' position and we are compelled by the mandate of our appellate responsibility to affirm the claim.

We will, however, direct that the wage restitution be allowed to only those furloughed employees who actually suffered wage losses as a result of unemployment during the time period the machine operators performed the disputed 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 to the extent expressed in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Peuler
Executive Secretary

Dated at Chicago, Illinois, this 14th day of March 1980.