

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22780  
Docket Number MW-22696

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(  
(Chicago, Milwaukee, St. Paul and Pacific  
( Railroad Company

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

(1) The Carrier violated the Agreement when it failed and refused to allow Track Laborer E. W. Murphy pay at the machine operator's rate for twenty-eight (28) hours of work he performed on March 31 (8 hours), April 1 (3 hours), April 13 (8 hours), April 14 (8 hours) and April 18, 1977 (1 hour) /System File C#52-Montana/Case No. D-2000-2/.

(2) Track Laborer E. W. Murphy be allowed the difference between what he should have received at the machine operator's rate and what he was paid at the track laborer's rate for the services described in (1) above."

OPINION OF BOARD: In this dispute, Claimant contends that Carrier violated the Agreement, particularly Rules 33 and 46(f) and the pertinent seniority rules, when it directed him to operate the tractor machine at Harlowton, Montana on March 31, April 1, 13, 14 and 18, 1977. He argues that machines of this type, when used at various locations on Carrier's system, entitled the operators of this equipment to be compensated at the Machine Operator's rate of pay for the time used.

Contrariwise, Carrier contends that the work performed at that location was incidental to his specifically assigned laborers duties and that use of the equipment in that fashion was consistent with twenty (20) years' practice on the Montana Division, whereby section crews operated small farm tractors to clean snow, drag rail and other such related duties. It additionally asserted that the tractor was not classified under Group 4 of the Roadway Equipment and Machine Sub-Department.

Rules 33 and 46(f), which are cited by Claimant as relevant to this dispute, are referenced as follows:

Rule 33 - Composite Service

"An employe required to fill the position of another employe receiving a higher rate of pay, shall be paid the rate of such position for the work day when the time so engaged is in excess of four (4) hours.

"Except in case of force reduction, if an employee is required temporarily to fill the place of an employee receiving a lower rate, his rate will not be changed."

Rule 46 - Classification

"(f) An employee assigned to operate roadway equipment and roadway machines, as covered by this schedule, will be designated as a roadway equipment or roadway machine operator."

In reviewing this case, this Board finds that the introduction of Employees' Exhibit A is inadmissible under the requirements of Circular 1. The signed affirmations were not submitted to Carrier during the claims' handling on the property and their inclusion in the Employees' ex parte submission is improper under this fundamental procedural rule. On the other hand, when the substantive record is carefully examined within the context of Rule 33's applicability, we do not find merit to petitioner's contention that the equipment was used to perform exclusively Machine Operator's work. In order for this rule to take effect, it would require Claimant to fill the position of another employee who received a higher rate which is not the case here.

Similarly, we do not find that Rule 46(f) is applicable to these facts since it requires that the affected employee operate roadway equipment and roadway machines covered by the Group 4 schedule. The equipment used by Claimant is not covered by this schedule and for us to include it by judicial interpretation would be an impermissible extension of our authority. We are not empowered to rewrite Agreement Rules.

We recognize, of course, the significance attached to Claimant's averment that the June 7, 1977 Machine Operator's Bulletin (335-A) refers to this equipment, but the position bulletined was not a Section Laborer's position and there is no evidence that Machine Operators cannot operate this type of equipment.

We must add, however, that we do not find that either party persuasively demonstrated its assertions of past practice. Because the proof burden falls upon the party initiating the claimed grievance, we must determine whether Claimant appropriately met this requirement. Upon the record, and for the reasons stated herein, we must conclude that Claimant didn't satisfy our evidentiary standards and thus we must reject the claim. In Third Division Award 20218, we stated in pertinent part that:

"..... In these circumstances, the Employes had the burden of adducing evidence to prove the existence of the past practice as alleged, but the Employes have provided no evidence at all to satisfy this burden. ...."

We believe this decisional holding applies to this case and sustains the rationality of our conclusion.

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 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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

  
Executive Secretary

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