

Award No. 32127
Docket No. MW-31823
97-3-94-3-117

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Railroad (former St. Louis-
(San Francisco Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way work (clean track) with a leased Kershaw Yard Cleaner at various locations on the Carrier's property beginning on November 4, 1991 and continuing (System File B-1150-24/9MWC 92-01-13A SLF).**
- (2) As a consequence of the violation referred to in Part (1) above, Special Equipment Operator R. C. Sandlin shall be compensated at the applicable special equipment operator's rate of pay for the total number of man-hours expended by the outside forces beginning November 4 through December 20, 1991 and the senior mechanic shall be paid ten percent (10%) of the time expended by the outside forces in the performance of said work."**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The claim asserts that the Carrier improperly leased a Kershaw Yard Cleaner with an Operator holding no seniority under the Agreement.

The Carrier did lease the equipment and a contractor's employee came with the equipment. The equipment was used at different locations on the Carrier's property in November and December 1991 and on several dates in January 1992 when it was removed from the territory. The contractor's employee operated the equipment.

At the time the equipment was used, the Carrier bulletined a Special Equipment Operator's position for the leased equipment to work with the contract employee. Claimant was called to serve in that position while the position was under bulletin. P. Petr was eventually assigned to the position under the bulletin.

The premise of the Organization's argument is that two employees were required to operate the equipment. According to the Organization, then, by using the contractor's employee instead of a covered employee, the Carrier violated the Agreement when it deprived a covered employee of a work opportunity. The Carrier countered that assertion on the property arguing that just as easily as the Organization's position that two employees are necessary to operate the equipment can be presumed, it is equally plausible that the owner of the equipment would not lease this high value equipment without having its own employee present during operation.

The Organization has made a prima facie demonstration that scope covered work was performed by a stranger to the Agreement. The contractor's employee, rather than a covered employee, operated a Yard Cleaner. That showing then shifts the burden to the Carrier. If the Carrier's position that Claimant, and then the successful bidder Petr, were used even though only one employee was required, then the Carrier's shifted burden requires that it demonstrate that fact. The Carrier has not done so. Instead, the unrefuted record before us only has Claimant's statement which shows that the covered employee was only used as an Assistant and was not allowed to operate the equipment. That unrefuted statement further underscores the Organization's position that two individuals were needed—an Operator and an Assistant.

There are no facts from the Carrier to rebut that showing. The Carrier's position that only one individual was needed to operate the equipment is speculative, at best. There are no statements from Carrier officials or other factual evidence before us concerning the number of employees needed to operate the equipment on the particular duties performed during the dates covered by the claim. The case comes back to the fact that the Carrier used two individuals to perform scope covered work—one covered, the other not. If only one individual were needed, then Carrier was obligated to make that demonstration through probative evidence. That was not done. The Organization's showing has therefore not been rebutted.

Concerning the remedy, with respect to Special Equipment Operators the claim specifically seeks relief only on Claimant's behalf. Claimant shall therefore be made whole at the Special Equipment Operator's rate in an amount commensurate with the number of hours expended by the contractor's employee during the period covered by the claim. However, Claimant's entitlements shall be reduced by the compensation he received for the days Claimant worked the position prior to the awarding of the bulletined position to Petr. Claimant's entitlement under this award shall be further reduced by any other pay received by Claimant during the period covered by the claim.

The Organization's argument that a Senior Mechanic should receive 10% of the time expended by the contractor's employee is rejected. The Organization's contention that the contractor's employee performed maintenance functions 10% of the time is not based upon sufficient probative evidence in this record.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 13th day of August 1997.