

PARTIES TO DISPUTE:

Baltimore & Ohio Railroad Company

and

Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM:

1. Carrier violated the effective Agreement when it failed to allow Work Equipment Operator of Crawler Crane CC-19, Headquarters Garrett, Ind., to work his crane June 16, 17, 18 and 19, 1969 and assigned instead, another employee.

2. Carrier further violated the Agreement by failing to allow Crawler Crane Operator Earl Westfall to operate Crane CC-19 on July 1, 2 and 3, 1969, while another employee was being used.

3. Crane Operator Westfall be now compensated as follows: (Amounts of compensation are set forth in the claim)

OPINION OF BOARD:

The parties agree as to the basic facts in this case. Claimant was the successful bidder to fill a vacancy as a Crawler Crane Operator, advertised in bulletin No. 8, dated April 21, 1969, as:

"Operate Crawler Crane ----- One (1)  
Assigned Territory ----- Headquarters - Garrett, Indiana"

The dispute before us is whether Claimant, therefore, owned the position of operating a particular Crawler Crane, in this instance Crane CC-19, or whether he could be assigned to other work while Crane CC-19 was being operated by another

employee. Petitioner avers that Claimant had the right to operate this particular Crawler Crane "each and every time ..... (it) was in operation and in use by this Carrier."

It is noted that the instant claim is limited to the amount of overtime Claimant would have received had he accompanied the Crane CC-19 while it was being moved in a work train from Garrett to the outlying work locations and return and does not include the time said Crane was actually worked at such locations. There is no dispute that, on the claim dates, Crane CC-19 was operated by a qualified operator covered by the Agreement.

The Carrier, throughout the handling of this claim, adhered to its position that nothing in the Agreement prohibited the use of its equipment in the manner in question nor is there any requirement that Claimant, and no-one else, had the sole right to operate Crane CC-19. The Organization, in its letter of August 6, 1969, stated, on the other hand, "It is our position that the operation of Crane CC-19 on the above dates properly belonged to and should have been assigned to Mr. Westfall and to our knowledge there were no circumstances which prevented his being assigned to the machine which had been awarded to him." This statement, in essence, describes the basic argument presented by the Organization during the handling of this matter on the property.

A careful and thorough examination of the record before us fails to show that any particular rule violation was alleged during the handling of this claim on the property but merely, to put it simply, an assertion that Claimant owned the position of operator on one specific machine - to the exclusion of all others.

On the other hand, Petitioner, in his submission to this Board, cited Rule 53 "Seniority-Work Equipment Operators" and specifically paragraph "h" thereof, of the Agreement, as being the Rule that was flagrantly violated thus depriving Claimant of his seniority rights. The record does not show that this allegation was ever made a subject of argument between the parties prior to the hearings before this Board. In Award No. 18964 of the 3rd Division, NRAB, it was stated in part:

"We find that the Organization, during the handling on the property, did not assert that a specific rule of the agreement had been violated by carrier, -----  
This Board, in a long continuous line of awards, has repeatedly held that it is too late to supply the specifics for the first time in the submission to this Board because (1) it in effect raises new issues not the subject of conference on the property; and (2) it is the intent of the Railway Labor Act that issues in a dispute before this Board shall have been framed by the parties in conference on the property -----."

This same principle is set forth in Awards 18442, 18122, 18006, 16733 and in Third Division <sup>Award 19831</sup> Docket CL-19781.

We concur in the rationale expressed in these prior awards and find that Petitioner's introduction of Rule 53 (h) in its submission to this Board was an effort to "mend its hold" and is not properly before us.

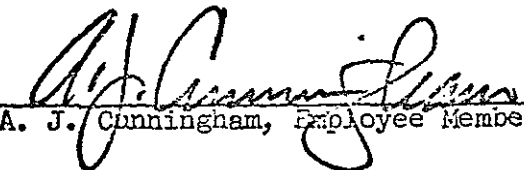
Previously, herein we noted Petitioner's statement that Claimant had the right to operate Crane CC-19 "each and every time . . . . (it) was in operation and in use by this Carrier." Carrier, on the other hand, stated that it was "preposterous to suggest that the Carrier should send an equipment operator along for the ride and pay him travel time when the Carrier has a qualified equipment operator at the point to which the equipment is being sent. As stated above, Carrier has certainly never followed such a practice."

As in Award No. 1, of this Board, the Petitioner bears the burden of proof in establishing exclusivity based upon custom and/or past practice. Petitioner has submitted nothing in the record before us to enable this Board to reach a sustaining conclusion. For the reasons stated herein we have no alternative but to deny the claim.

AWARD:

Claim denied.

  
C. Robert Roadley, Neutral Member

  
A. J. Cunningham, Employee Member

  
E. W. Burks, Carrier Member

Baltimore, Maryland  
March 11, 1974