

Award No. 17003
Docket No. MW-17645

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John J. McGovern, 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 Carrier violated the Agreement when, on March 20, 1966, it assigned the work of cutting and clearing brush and weeds from the right-of-way between Conneaut, Ohio, and Buffalo, New York to forces outside the scope of the Agreement. (System file 30-20-173.)

(2) Section Foreman Mike Colby and Section Laborers Miro Turk, Charles Beatman, T. J. Caldwell, A. Carlucci, J. Gurto, F. Gurto and Carl McCumber each be allowed nine (9) hours' pay at their respective time and one-half rate because of the violation referred to within Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Section Foreman Mike Colby, Section Laborers Miro Turk, Charles Beatman, T. J. Caldwell, A. Carlucci, J. C. Gurto, F. Gurto and Carl McCumber hold seniority within their respective classes on the Lake Erie Seniority Division and are all regularly assigned to a work week extending from Monday through Friday (Saturdays and Sundays are rest days).

On Sunday, March 20, 1966, (one of the claimants' rest days) the Carrier assigned the work of cutting and clearing brush along the right-of-way on the claimants' seniority district to forces employed by Van Sickle Tree and Saw Shop, by Steimor Company, by Giebon of Dunkirk, by Hamtrack and by Davey Tree Experts.

The brush along the right-of-way had grown and accumulated because of a deferred maintenance program. It did not, however, interfere with the safe and efficient operation of trains through the area. The sole reason for performing this work on Sunday, March 20, 1966, was to create an impression of good housekeeping to the Carrier's president who was scheduled to pass through this area shortly thereafter.

The claimants were fully equipped, available and willing to have performed this work had they been given an opportunity to do so.

**EXHIBIT M - October 12, 1967 - Letter - Manager-Labor Relations
to General Chairman.**

(Exhibits not reproduced.)

OPINION OF BOARD: On the date specified in the claim, Carrier hired independent contractors to cut and clear brush and weeds from the right-of-way between Conneaut, Ohio and Buffalo, New York. Petitioner has alleged a violation of the Scope and other rules of the Agreement.

The overriding rule in this case is the Scope Rule. It is a general rule which in accord with innumerable awards, requires that the Claimants demonstrate by a preponderance of evidence that such work has been performed historically, traditionally, etc. by them to the exclusion of all other employees. Before we can consider other rules of the Agreement, a determination must first be made that the work comes within the purview of the Scope Rule.

As we view the evidence before us, we are convinced that the work in question has been performed by claimants over the years, but not exclusively. The Organization exhibits presented with their Ex Parte Submission, show that claimants have done this type of work, but they do not show that they and their fellow employees have performed the work to the exclusion of other employees including independent contractors. The burden of proof is on the Petitioner. That burden has not been met in this case. We will deny the claim.

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 not violated.

AWARD

Claim denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION**

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 25th day of March 1969.

Keenan Printing Co., Chicago, Ill.

Printed in U.S.A.