

Award No. 17051
Docket No. MW-17573

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Jan Eric Cartwright, 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 it assigned the work of cutting and clearing brush and weeds from the right-of-way on the Cleveland District of the Lake Erie Division to Stevens Construction Company. (System File 30-20-171)

(2) Each claimant* be allowed pay at his respective pro rata rate for an equal proportionate share of the total number of hours consumed by outside forces in the performance of the work referred to in Part (1) of this claim.

*Fred Vanek - Foreman
Willie Watters - Laborer
Gerald Hoad - Laborer
Newell Olin - Laborer
Jake Johnson - Laborer
Sam Lam - Asst. Foreman
Dock Dingess - Laborer
George Love - Laborer

Thomas Caruso - Foreman
Rogelio Martinez - Laborer
Albert Azzano - Foreman
Edwardo B. Aponte - Laborer
Bernardo Ayala - Laborer
Aniceto Afandor - Laborer-Driver

A. R. Pagan - Laborer
M. Santiago - Laborer

Lewis Bowen – Laborer
John A. Brown – Laborer
C. W. Kirchstein, Jr. – Laborer-Driver
Cleveland Wilder – Laborer
Eddie Thomas – Laborer
S. Slusser – Foreman
Louis Eskridge – Laborer

C. B. Rogers – Laborer
B. J. Strozier – Laborer
P. S. Toro – Laborer
J. Bailey – Laborer
Thomas C. Odens – Laborer
David Gates – Laborer-Driver
D. D. Wiley – Laborer
L. Simpson – Laborer
F. L. Wright – Asst. Foreman
G. Fornadley – Foreman
Carl Todd – Laborer
Hampson Blocker – Laborer

Nathaniel Lewis – Laborer
Ben Collins – Laborer
Juan Muniz – Laborer
William Hommel – Foreman
Jessie Hodge – Laborer
Charles Burnett – Asst. Foreman
Melvin Senegal – Laborer
Glover Phillips – Laborer
Alex Scott – Laborer
Nile Todd – Laborer
John E. Martin – Laborer
E. E. Diaz – Laborer
Shirley Drake – Foreman
Willie Taylor – Laborer
John Tiller – Laborer
Santos Diaz – Laborer
Serafin Alvaraz – Laborer
Jimmie Barnes – Laborer
William O. Jenkins – Asst. Foreman
Farlon Roebuck – Laborer

Blas Neco – Laborer
J. J. Zatorsky – Laborer
Tadeo Santos – Laborer
Jack Johnson – Foreman
Forrest D. Garrettson – Laborer

S. G. Chaparo - Laborer
Obadiah Miliner - Asst. Foreman
Bennie Harrison - Laborer-Driver
B. Kutschback - Laborer

Jesus Del Valle - Laborer
Osvaldo Vazquez - Laborer
DeJesus Pablo - Laborer
Juan Gonzalez - Laborer
Arthur Aspery - Foreman
Robert L. Woody - Asst. Foreman

EMPLOYEES' STATEMENT OF FACTS: During the period from March 14, 1966 to March 28, 1966, inclusive, employees of Stevens Construction Company performed work of cutting and clearing brush on the right-of-way between Conneaut, Ohio and Euclid, Ohio. The Carrier assigned said work to outside forces without benefit of notice to the Employees and without benefit of discussion and agreement with the Employees.

The brush along the right-of-way had grown and accumulated because of a deferred maintenance program. However, it did not interfere with the safe and efficient operation of trains through the area and did not create an emergency condition. The sole reason for performing this work during this particular period was to create an impression of good housekeeping to the Carrier's president, who was scheduled to pass through this area shortly thereafter.

On March 14, 1966 (the first day on which the violation took place), the undersigned General Chairman informed the Regional Engineer by telephone that the work assignment was in violation of the agreement, and suggested that the violation be discontinued immediately. His suggestion and advice was ignored.

Claim was timely and properly presented and handled by the Employees at all stages of appeal, up to and including the Carrier's highest appellate officer.

There is an agreement in effect between the Norfolk and Western Railway Company-Lake Region (formerly The New York, Chicago and St. Louis Railroad Company-Nickel Plate, Lake Erie and Western and Clover Leaf Districts) and its employees represented by the Brotherhood of Maintenance of Way Employees effective February 1, 1951. (Schedule No. 5.) Copy of that agreement, as amended, is on file with this Board and is, by reference, made a part of this submission.

CARRIER'S STATEMENT OF FACTS: The instant dispute involves the interpretation and application of the working agreement effective February 1, 1951, made between the New York, Chicago and St. Louis Railroad Company (The New York, Chicago and St. Louis Railroad Company was merged into the Norfolk and Western Railway Company effective October 16, 1964) and its employees represented by the Brotherhood of Maintenance of Way Employees on the Nickel Plate, Lake Erie and Western and Clover Leaf Districts. Copy of such agreement, as amended, is on file with this Board and is made a part of this submission.

EXHIBIT E -- November 2, 1966 -- Appeal -- General Chairman to Regional Engineer.

EXHIBIT F -- November 28, 1966 -- Denial of appeal -- Regional Engineer to General Chairman.

EXHIBIT G -- January 9, 1967 -- Appeal -- General Chairman to Director of Personnel.

EXHIBIT H -- January 11, 1967 -- Acknowledgment of appeal -- Director of Personnel to General Chairman.

EXHIBIT I -- March 9, 1967 -- Denial of appeal -- Manager Labor Relations (formerly Director of Personnel), to General Chairman.

EXHIBIT J -- August 28, 1967 -- Affirmation of denial -- Manager Labor Relations to General Chairman.

EXHIBIT K -- August 30, 1967 -- Letter -- General Chairman to Manager Labor Relations.

EXHIBIT L -- September 21, 1967 -- Letter -- Manager Labor Relations to General Chairman.

(Exhibits not reproduced.)

OPINION OF BOARD: It is undisputed by the parties that during the period from March 14, 1966 to March 28, 1966, inclusive, employees of a private Contractor, Stevens Construction Company, performed work of cutting and clearing brush and weeds on the Carrier's right-of-way between Conneaut, Ohio and Bellevue, Ohio. The Organization had no notice of the Contractor's work until it had begun. The Organization contends that the use of Contractor's forces, in this instance, was a violation of the Scope Rule, Rule 1--Seniority, Rule 2--Retention in Force Reduction, Rule 11--Roster, Rule 24(k)--Work on Unassigned Days, and Rule 52--Classification of Work, of the Agreement. The Organization further alleges, (1) that the cutting and clearing of brush and weeds from the right-of-way is historically, customarily and traditionally the exclusive work of Maintenance of Way Employees in the Track Department; (2) that there were Track employees available; (3) that no emergency existed; (4) that Carrier provided tools to perform such right-of-way clearing work; (5) that Carrier caused the heavy growth of vegetation by deferred maintenance which it could have prevented; (6) that the Organization, on the date of the alleged violation so informed Carrier, and (7) that the Organization's active track employees listed on the Roadmaster Seniority Roster be reimbursed, for the period involved, an equal proportionate share of the total number of hours worked by the Contractor's forces.

The Carrier denies all of the contentions of the Organization, and contends (1) that because of the size of the project and the fact that sufficient employees were not available, the use of outsiders on a contract basis was not a violation of any rule; (2) that the claim is not specific as to the individual Claimants; (3) that available employees were already engaged in such project on an overtime basis; (4) that the Organization itself recognizes that such work is not exclusively assigned to Track Department Employees and that Communications Department employees have also cleared the right-of-way.

The Board must first consider the Scope Rule and Rule 52-Classification of Work. Rule 52 (c) pertains to Track Department employees and when their class of work may be contracted to outsiders.

"SCOPE.

The rules contained in this agreement shall govern the hours of service, working conditions and rates of pay of all employees in the Maintenance of Way Department and highway crossing watchmen in the Transportation Department on the Nickel Plate, Lake Erie and Western, and Clover Leaf Districts, *except supervisory employees above the rank of foreman and employees included within the scope of other agreements.*"

"RULE 52.

CLASSIFICATION OF WORK

* * * * *

(c) All work of construction, maintaining, renewing and removing tracks, roadways, right of way fences and bituminous highway crossings and other work incidental thereto shall be performed by employees in the Track Department. This work may be done by contract where there is not a sufficient number of employees available or the railroad company does not have proper equipment to perform it."

The Scope Rule of this Agreement is general in its terms and the terms do not specify the work reserved to such employs. When the Scope Rule is general in nature and does not define the work to be performed by the employees listed or named, nor does it contain any job descriptions, the petitioner not only has the burden of proving by a preponderance of the evidence that the work in question has been traditionally and customarily been performed by them, but, also, that it constitutes work which they have performed to the exclusion of others.

The evidence presented on the property shows that the Carrier did not overcome the Organization's evidence that it had an historical, traditional, and exclusive right to clear brush and weeds from the right-of-way. Thus, the evidence did show that such work was done by the Organization to the exclusion of others.

On the property, the Carrier's main contention was that the work came under the exception set out in Rule 52 (c), which reads:

"This work may be done by contract where there is not a sufficient number of employees available or the railroad company does not have proper equipment to perform it."

Carrier alleged that there was not a sufficient number of employees available and those available worked as much as possible and, therefore, suffered no loss. The Carrier is raising an affirmative defense, and has the burden to prove such defense by competent evidence. This the Carrier failed to do.

Mere assertions, self-serving declarations and general statements are of no real probative value to this Board. The fact Claimants were working where Carrier had assigned them does not make them unavailable. (Awards 15497, et al.) The Carrier attempts to raise the contention that the Claimants are too indefinite to be given consideration. The Carrier was furnished a roster containing the names of the Claimants, and the claim reasonably described the Employees so that they could be identified. Carrier should have no difficulty in identifying them by an examination of its records. (Awards 14672, 15333, 15497, et al.)

The evidence not presented on the property will not be considered by the Board.

In view of the evidence presented, the Board must find that the Agreement has been violated and that the claim should be allowed.

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.

AWARD

Claim allowed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of March 1969.

CARRIER MEMBERS' DISSENT TO AWARD 17051, DOCKET MW-17573

(Referee Jan Eric Cartwright)

The Referee properly interpreted the Scope Rule, but from that point on he fell into error. First, and foremost, his conclusion that track employees had historically and traditionally performed the claimed work to the exclusion of others is not supported by the evidence. The record contained evidence that track employees had performed such work, but there was no evidence that they had historically and traditionally performed the work to the exclusion of others.

With the Organization having failed to sustain the burden of proving that which was necessary to establish an exclusive right to the work, it follows that the remainder of the award is equally in error.

For these and other reasons, of which the Referee is fully aware, the award is erroneous, and we dissent.

J. R. Mathieu

R. A. DeRossett

C. H. Manoogian

C. L. Melberg

H. S. Tansley