



Award Number 17944

Docket Number MW-18356

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

John S. McGovern, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
NEW ORLEANS PUBLIC BELT RAILROAD**

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

- (1) The Carrier violated the Agreement and practices thereunder when it assigned weed eradication (spraying) work on its tracks and right-of-way to R. H. Bogle and Company on May 10 to 17, 1968, (both dates inclusive) and again in August 13 through 23, 1968, (excluding only the date of August 18, 1968).
- (2) Track Foreman W. J. Pourciau and Roadway Machine Operator Emile L. Clade each be allowed 120 hours' pay at their respective straight time rates and 50 1/2 hours at their respective time and one-half rates because of the violations referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: On May 10 to 17, 1968 (both dates inclusive) and again on August 13 through 23, 1968 (excluding only the date of August 18, 1968) the Carrier assigned and used outside forces (R. H. Bogle and Company) and Carrier officers to perform weed eradication work (spraying) on its tracks and right-of-way. This work assignment was placed into effect without notice to or discussion with representatives of the Brotherhood of Maintenance of Way Employees.

The Carrier owns weed eradication equipment which, until this instance, had been utilized by maintenance of way forces to perform weed eradication work. This was the first time that the Carrier assigned and used outside forces to perform work of this character. The claimants were qualified and available to perform work of the character here involved which heretofore had been historically and traditionally performed by maintenance of way employees under the provisions of Rules 30 (b) and 30 (f).

Rule 30 (b) and the pertinent portion of Rule 30 (f) read:

Rule 30 (b): "All work in connection with the construction, maintenance or dismantling of roadway and track, including patrolling and watching, loading and unloading of all kinds of material, emergency transfer of loads, clearing wrecks, emergency cleaning of cars and all general labor work, except that performed by shop labor forces, shall be performed by employees in the Track Sub-Department."

Rule 30 (f): "A machine operator in the track Sub-Department will be used to operate such major roadway machines, controlled by

August 15, 1968	8	0	8
August 16, 1968	8	0	8
August 17, 1968	0	8	5½
August 19, 1968	8	0	8
August 20, 1968	8	0	8
August 21, 1968	8	5	10
August 22, 1968	8	0	8
August 23, 1968	8	0	8
	120	50½	137½

As can readily be seen from the above record, the Organization has claimed 33 hours over and above the number of hours required to perform the work. In addition, Claimant E. L. Clade was not available for work on May 17, 1968, as he was off on request, without pay, to attend court.

(Exhibits Not Reproduced)

OPINION OF BOARD: The Carrier in this case engaged the services of an outside, independent Contractor for the purpose of chemically spraying weeds, grass and vegetation on the tracks and right of way. The Carrier also utilized some of its officials to supervise this work, all in contravention, as alleged by the Organization, of the existing collective bargaining Agreement to which both contending parties are signatories.

The Petitioning Organization alleges specifically a violation of Rule 1, The Scope Rule together with Rules 30 (a), (b), (c) and (f) of the Agreement.

We will direct our attention to the Scope Rule, Rule 1. It is a general type Rule, which under innumerable decisions handed down by this Board requires that the party alleging a violation of the rule must show by a preponderance of evidence that over a long, protracted period of time, they have performed the work in question to the exclusion of all others. To be sure, the Organization in its submission to this Board has stated categorically that the work has been exclusively, customarily and historically assigned to and performed by the employes on whose behalf the claim is now before us. On the other hand, the Carrier readily admits that the spraying of weeds etc. has been performed in the past by the Maintenance of Way forces, but not to the exclusion of all other employees. We are consequently confronted with two contradictory assertions by opposing sides without substantial evidence having been presented by either side to support their respective contentions.

It is axiomatic that the party alleging the breach of contract, has the burden of presenting evidence sufficiently substantial to enable us to render a sustaining award. We find no such evidence in this case. Since the Scope Rule is the primary rule invoked in this case, we need not direct our attention to the other rules cited by the Organization since they do not become operative until a violation of the Scope Rule is found. We will accordingly 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 Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;