

Award No. 18366
Docket No. MW-18842

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Gene T. Ritter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SEABOARD COAST LINE RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when, without a conference having been held between the Assistant Vice President, Engineering and Maintenance of Way and the General Chairman, as required by Rule 2, it assigned the work of plowing firelines from M.P. 466.5 to M.P. 482 and from Savannah to Macon, Georgia on the Savannah Division to outside forces. (System File 12-2/C-4).

(2) Roadway Machine Operators W. O. Cannon, C. P. Futrell, J. S. Mallard, H. H. Brigman, G. L. Gaddy, P. Collins, Jr., H. C. McDuffie, W. A. Moore, Jr., M. O. Tindall, W. F. Jennings, G. Mott, W. F. Driggers, C. G. Fennell and J. E. Roscoe each be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man hours consumed by outside forces in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Carrier entered into a contract with the Georgia State Forestry Service to perform the work of plowing firelines on the Savannah Division. The work was performed between the dates of September 26 and December 11, 1968.

When such contracting is contemplated, the Assistant Vice-President, Engineering and Maintenance of Way, and the General Chairman are obligated to confer and to reach an understanding setting forth the conditions under which the work will be performed, under the provisions of Rule 2 which reads:

"This Agreement requires that all maintenance work in the Maintenance of Way and Structures Department is to be performed by employees subject to this Agreement except it is recognized that, in specific instances, certain work that is to be performed requires special skills not possessed by the employees and the use of special equipment not owned by or available to the Carrier. In such instances, the Assistant Vice-President, Engineering and Maintenance of Way, and the General Chairman will confer and reach an understanding setting forth the conditions under which the work will be performed.

(Exhibits not reproduced.)

OPINION OF BOARD: The dispute in this case is identical to that contained in Award 18365. Therefore, the claim in this case will be sustained for the same reasons as contained in said Award 18365.

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 sustained.

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

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of January 1971.

**CARRIER MEMBERS' DISSENT TO AWARDS 18365 AND 18366,
DOCKETS MW-18841 AND MW-18842
(Referee Ritter)**

The Referee completely ignored the record covering the handling on the property and the undisputed evidence in connection therewith. The claim filed and progressed on the property was premised on the unsupported allegation that, "The work of cutting or plowing fire lines and burning right-of-way has been traditionally and historically performed by Maintenance of Way Employees, and is work that is generally recognized as belonging to them." Carrier presented signed statements of Division officers stating unequivocally that State Forestry personnel had for many years performed such work, without claim or protest by the Organization, and that it had never been recognized as belonging exclusively to Maintenance of Way employees. Such was never refuted or disputed by the Organization, so the Organization failed to sustain the burden of proof that such work had been traditionally and historically performed by Maintenance of Way employees as alleged. This was even acknowledged, although disregarded, by the Referee in his statement that, "Carrier defends this Claim by showing that the State Forestry Dept. had performed this work in the past * * *"

The Referee further disregarded the record in stating, "The fact that the Agreement only became effective July 1, 1968, precludes past practice (prior

to the effective date as a guide line)." As shown by the record in filing and progressing the claim the Organization alleged that "the work of cutting or plowing fire lines and burning right-of-way has been traditionally and historically performed by Maintenance of Way Employees," which the Carrier clearly refuted. Then in its submission the Organization stated:

"Rule 2 was carried forth from a previous agreement between the Atlantic Coast Line Railroad and this Organization. When this rule was carried forth into the current agreement between the Seaboard Coast Line Railroad (the former Atlantic Coast Line Railroad merged with the former Seaboard Airline Railroad) and this organization, all interpretations thereof were also carried forth."

The Organization then cited the holding in Award 13461 (House), "which involved the former Atlantic Coast Line Railroad, this same rule and similar circumstances," followed by statement that:

"The agreement dated October 1, 1956, which involved the case decided by Award 13461, was superseded by the July 1, 1968 Agreement. Rule 2 of the July 1, 1968 Agreement is precisely identical in language, meaning and intent to Rule 13 which was interpreted by Award 13461. Inasmuch as this rule was readopted and carried forth without change, the interpretations theretofore applied are also carried forth."

The Organization then cited a multiplicity of Awards in support of its position.

The applicability of Award 13461 in establishing the meaning and intent and interpretation of the contracting rule at issue in the case was properly established by the Carrier in its Answer to the Organization's submission as follows:

"Actually, such Award points up the weakness of the Organization's position and the invalidity of the claim because the Award specifies that contracting out the work without prior conference is a violation 'if the involved work was reserved exclusively to the Organization.' As conclusively established by the record covering the instant claim the involved work was **not** reserved exclusively to the Organization. So Award 13461 actually supports the Carrier's position and establishes that the instant claim has no merit."

The record clearly established that the Organization failed to sustain the burden of proving that the work in question had been traditionally and historically performed by Maintenance of Way employees as claimed and that Carrier violated Rule 2 of the Agreement. The Referee completely ignored the record and the burden of proof principle and concluded "that the involved work was contemplated by the signatory parties and is work reserved by the Maintenance of Way Employees." The Referee certainly displayed a unique conception of the burden of proof principle and his responsibility as a Referee to render a proper decision. Such a holding is also inconsistent with other Awards he has rendered involving similar cases.

The Referee further departed from the record in stating, "The clearing of weeds on Carrier's right-of-way has also been performed by Track Employees

covered by this Agreement." Nowhere in the record is any reference made to "weeds." In filing the claim the General Crairman alleged "that the Carrier has allowed its forces to deteriorate over a period of years, and allowed the growth of bushes, small trees and other growth on its right of way to become hazardous to adjacent property owners, but this does not justify the Carrier contracting out the work that has been performed by its Maintenance of Way employes for many, many years." As the record shows, such allegation was refuted.

The Awards, to say the least, are palpably erroneous and we dissent.

P. C. Carter
P. C. Carter

R. E. Black
R. E. Black

H. F. M. Braidwood
H. F. M. Braidwood

W. B. Jones
W. B. Jones

G. L. Naylor
G. L. Naylor