

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26270
Docket Number MW-26280

Marty E. Zusman, Referee

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(The Chesapeake and Ohio Railway Company
(Northern Region)

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

(1) The Carrier violated the Agreement when **it** used a Transportation Department **employee** instead of a Track Department employee to provide flag protection for the safe passage of trains at Mile Post 86.4 December 21, 1983 through December 30, 1983, both dates inclusive (System File C-TC-2119/-MG-4448).

(2) Furloughed **Trackman** R. Brooks shall be allowed thirty-three (33) hours and ten (10) minutes of pay at his appropriate rate because of the violation referred to in Part (1) hereof."

OPINION OF BOARD: The instant Claim alleges Carrier violation of the Scope Rule wherein it assigned flag work to Transportation employees when such work belonged exclusively to Maintenance of Way employees. Due to the construction of an advertisement sign along the Carrier's main line at MP 86.4, the Carrier assigned the work of flagging **to** Transportation employees on December 21, 22, 29 and 30, 1983. These employees performed flag work to assure that tracks were clear for the safe passage of trains through the construction area.

The Organization **maintains** that said work "comes exclusively under the scope of the Maintenance of Way Agreement." In support of its position it submits the Agreement and a past Award of Public Law Board No. 1204.

The Carrier denies both the allegation and the **substance** of the Award cited by the Organization. It is the Carrier's position that flagging is not work which belongs exclusively to **Maintenance** of Way employees. It notes that within the switching limits of a terminal, Yard "Conductors have performed flagging work and that two Public Law Boards have already ruled that "flagging does not accrue exclusively to Maintenance of Way Employees" (PLB 1210, Award No. 1 and PLR 2630, Award No. 13).

This Board has carefully viewed the evidence as presented on property and finds nothing in the Agreement of clear and **unambiguous** language assigning such work as herein disputed exclusively to the Maintenance of Way employees. The Rule disputed refers **to** "patrolling and watching track where bridges **or** structures are not involved." A review of the probative evidence presented by the Organization does not establish exclusivity. Patrolling and watching does not **contain contractual** language explicitly defined or encompassing the protection of trains. As stated in Public Law Board 2630, Award No. 13:

"So far as the record shows, the trainmen were used not to flag traffic over a crossing, but to protect train movements. **There** is no evidence that by rule or practice the protection of train movements on this property is reserved exclusively for Maintenance of Way watchmen. In the absence of such a showing, it would **appear** that it was not improper to call upon trainmen to perform that work."

Although the circumstances herein differ, the logic of the above Award holds. As such, this Board denies the Claim as the contractual language does not evidence exclusivity. Absent probative evidence to establish that such work has historically been exclusively performed by members of that craft by custom, practice or tradition, **the** burden or proof has not been met.

FINDINGS: The Third Division of the Adjustment Board, after giving the **parties** to this dispute due notice of hearing thereon, and **upon the whole** record and all the evidence, finds and holds:

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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of March 1987.