

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

(Brotherhood of Maintenance of Way **Employes**
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, without a conference having been held as required by the October 24, 1957 Letter of Agreement (Appendix 'F'), it assigned outside forces to perform right-of-way cleaning work at Waverly Yard in Holland, Michigan on August 1, 1984 (**System File C-TC-2158/MC-4840**).

2. Because of the aforesaid violation, Foreman T. Weaver and Machine Operator G. Bosch shall each be allowed eight (8) hours of pay at their respective straight time **rates**."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds **that**:

The carrier or carriers and the **employe** or employees involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment **Board** has jurisdiction over the dispute involved herein.

Parties to said **dispute** waived right of appearance at hearing **thereon**.

The instant dispute claims violation of the Agreement due to an outside contractor removing waste and cleaning up Track No. 12 at Waverly Yard in Holland Michigan on August 1, 1984. The Organization **argues** that among other **Rules**, the Carrier violated Rule 59(b) which reads in pertinent part:

. . . . Track Forces will perform work to which they
are entitled . . . in connection with the
maintenance, and/or removal of roadway and track
facilities, such as . . . cleaning right-of-way
. . .

Claim is that the Carrier did not advise the General Chairman on its intent to contract out the clean-up work prior to assigning a contractor **as** required by Appendix **F** and Article IV of the National Agreement.

The Carrier argues on property that this work was not Maintenance of Way work as Track No. 12 is not a conventional yard track. The Carrier also contends that past practice has been to assign such work to an outside contractor at least once or twice a year for over ten years.

As a preliminary point, the Claim before this Board has been amended from notice to conference. A conference was not discussed on property and is barred from consideration at this time. However, as we stated in Third Division Award 26791 this "is essentially the same claim as handled on property and to that extent this Board will consider it as valid." Our consideration and decision rests on whether the disputed work was contracted to outside forces in violation of the Agreement.

To make a prima facie case the Organization must show with probative evidence that its work was contracted without notice. The record shows that Rule 59(b) reserves "cleaning right-of-way" to the employees. There is no dispute in the record that outside forces did clean up and remove waste from Track No. 12. There is nothing in the record where Carrier argues that said work did not occur on Carrier's right-of-way, but only that it was track assigned to the Car Department. There is nothing in the Agreement before this Board relevant to this distinction as to the assignment of track. The Organization has made its case.

On merits the Claim must be sustained to the extent that no notice was given the General Chairman before this work went to outside forces. The Carrier maintains that removal of waste material was involved as well as clean-up and Carrier was not equipped for such work. That may well be the case, but the Agreement requires Maintenance of Way work to be done by Maintenance of Way Employees unless **special** conditions exist, in which case the Carrier is required to first give notice to the General Chairman of its intent. That is the central issue of the case at bar, and Carrier's failure to give notice is a violation of the Agreement Rules which are the subject of this Claim.


As for **compensat lo**", the record indicates that the disputed work was done once or twice a year for ten to twelve years. It appears to have been past practice on the property. We are not persuaded by the Organization's arguments to the contrary. The Board **will** sustain the Claim, but without compensation. When the **Carrier** has for a number of years considered its actions valid due to acquiescence by the Organization, the Board **must** deny compensation (see Third Division Award 26436, inter alla).

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of January 1988.