

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30160  
Docket No. MW-29979  
94-3-91-3-370

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(CSX Transportation, Inc. (former Chesapeake  
(and Ohio Railway Company)

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

1. The Carrier violated the Agreement when, from 7:00 A.M. to 3:30 P.M. on April 20, 1990, it assigned Conductor R. Powell, Road Foreman of Engineers T. Berry, Yard Master D. Hilton and Assistant Track Inspector F. Barker, Jr., instead of the Clifton Forge Section Force 5GB8, i.e., Track Foreman A. Baird and Track Laborers C. Reynolds, T. Nicely and D. Hanna, to perform Maintenance of Way brush cutting work on the Buena Vista Industrial Branch (B-11) on the James River Subdivision [System File C-TC-6087/12(90-574) COS].
2. As a consequence of the violation referred to in Part (1) above, Claimants A. Baird, C. Reynolds, T. Nicely and D. Hanna shall each be compensated eight (8) hours' 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 employee or employees involved in this dispute are respectively carrier and employee 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 Organization asserts that on April 20, 1990, the James River District Safety Committee (that day consisting of the Conductor, Road Foreman of Engineers, Yard Master and Assistant Track Inspector named in the claim) cut and cleared bush from the right-of-way on the Buena Vista Industrial Branch of the James River Subdivision. With the exception of the Assistant Track Inspector who came from the Engineering Department, the Safety Committee allegedly doing the work was comprised of Transportation Department employees.

The Carrier concedes that the Safety Committee spent "a considerable amount of time on or near the Buena Vista Industrial Branch of the James River Subdivision on April 20, 1990" and that "[w]hile on this trip the men of this Safety Committee cut some of the brush that was rubbing against the side of locomotives and equipment serving the Buena Vista Industrial area." However, the Carrier asserts "that the safety committee did indeed work between the hours of 7:00 A.M. and 3:30 P.M. but that only a small amount of this time was actually spent cutting brush on the Buena Vista Industrial Branch." Further, according to the Carrier "[i]t has been the practice in the past and shall continue to be the practice in the future for these committees to make necessary corrections as they proceed during their daily inspections in order to show their fellow employees the spirit of safety."

Rule 66(b) states that "... section and extra gangs will perform work to which they are entitled ... in connection with ... mowing and cleaning right-of-way (except such cleaning of snow, ice, sand and other materials as signal employees may do in connection with signal and interlocker facilities) ..." The type of work involved in this case falls within the purview of that Rule.

Rule 66(b) cannot be circumvented under the rationale that members of the Safety Committee did the work. Taken to its logical extent, that argument would permit members of the Safety Committee to totally supplant the covered employees notwithstanding the provisions of Rule 66(b).

Emergency or de minimis work performed by a Safety Committee which ordinarily is to be performed by the covered employees will not violate the Rule. But the record does not support a conclusion that the work was of an emergency or de minimis nature.

No showing has been made that an emergency existed which necessitated the Safety Committee to do the work. The brush was rubbing against the side of locomotives and equipment serving the Buena Vista Industrial area. However, it has not been shown by the Carrier that the conditions were of a degree constituting an emergency. Nor has it been shown that the covered employees were not available to make the necessary corrections. The existing conditions described by this record are precisely those necessitating the use of covered employees as contemplated by Rule 66(b).

With respect to the amount of work performed, while the Carrier asserts that the extent of the brush cutting work constituted "a small amount" of the Safety Committee's work, the Organization's General Chairman stated in the record that in an effort to resolve the matter he contacted a Carrier official "on several occasions to report what was going on" and "you yourself called the Clifton Forge area to talk to the Trainmaster on a Friday and were told, "he's out cutting brush." That showing is sufficient to require the Carrier to come forward with more of a factual showing than only the allegation that the work amounted to "a small amount." Given the Organization's showing, this record makes no such factual demonstration in rebuttal to support the Carrier's desired conclusion that the work was only "a small amount."

The Carrier's past practice argument is not persuasive. While there has been a practice established on the property of the Safety Committee performing its functions, the evidence does not show that a past practice exists whereby the brush cutting work from the right-of-way has been performed by that committee to the extent involved in this claim.

Nor do we find Third Division Award 26477 dispositive. In that case, two Brakeman members of the Safety First Committee applied a coat of red primer to a tank car, after which a local volunteer applied a final coat of yellow safety paint. Without discussion, the Board summarily denied the claim holding "[t]hat Safety Committee performed the work as part of an ongoing beautification and safety program." The work performed in that case appeared to be an isolated incident. The work performed in this case is not isolated. Aside from the extent of the work performed on the date set forth in the claim, as discussed in Third Division Award 30161, a similar kind of activity (there cleaning of debris and painting work) was involved on other dates whereby a Safety Committee performed work ordinarily performed by covered employees.

No matter how important the Safety Committee's work may be, without a showing that an emergency existed and covered employees were not available or that the work performed by the Committee was of a de minimis nature, that Committee cannot undermine the rights of the employees established by the duly negotiated Agreement.

The record establishes that Claimants lost a work opportunity when members of the Safety Committee did work which should have been performed by covered employees. For purposes of a remedy, although we have not found that the work performed by the Safety Committee was de minimis, the record is not clear precisely how long the Safety Committee spent performing the brush cutting work. To require the Carrier to compensate Claimants for a full eight hours as sought in the claim may well award to Claimants more than they are entitled for the demonstrated violation. Therefore, in order to make Claimants whole for the lost work opportunity, we shall require Claimants to be compensated for a reasonable amount of time attributable to the Safety Committee's performance of the brush cutting work on the date set forth in the claim as determined by the parties.

A W A R D

Claim sustained, in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest: Linda Woods  
Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 26th day of April 1994.