Award No. 16726
Docket No. MW-17077

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

LOUISVILLE & NASHVILLE RAILROAD COMPANY

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

(1) The Carrier violated the Agreement and established practices thereunder when, on September 9, 10 and 17, 1966, it assigned the work of cleaning debris from tracks at Collins Yard on the Huntsville Branch to outside forces.

(2) Because of the violation which occurred on Friday, September 9, 1966, Section Foreman J. C. Rutland and Section Laborers L. Gordon, A. Benson, R. McGraw, J. B. Clark No. 3, W. Coats and J. L. Anderson each be allowed eight (8) hours' pay at their respective straight time rates.

(3) Because of the violations which occurred on Saturday, September 10, 1966 and on Saturday, September 17, 1966, Section Foreman J. C. Rutland and Section Laborers L. Gordon, A. Benson, R. McGraw, J. B. Clark No. 3, W. Coats and J. L. Anderson each be allowed sixteen (16) hours' pay at their respective time and one-half rates.

EMPLOYES' STATEMENT OF FACTS: The claimants were regularly assigned to their respective positions on Section No. 51, with headquarters at Bessemer, Alabama. They were assigned to a work week extending from Monday through Friday (Saturdays and Sundays were rest days).

On Friday, September 9, **Saturday**, September 10 and **Saturday**, September 17, 1966, the Carrier assigned and used outside forces to perform the work of cleaning debris from and between the main line track, Track No. 1 and Track No. 2 and from along the outside of Track No. 2 at Collins Yard on the Huntsville Branch, which is within the territorial limits of Section No. 51. This work consisted of loading debris such as coke, coal, scrap iron, etc., onto a truck and hauling it from the right-of-way. The outside forces consumed a total of fifty-six (56) hours on each date here involved in the performance of this work.

The type of work in question is not work reserved exclusively to employes in the maintenance of way department, as such work has not only been performed by maintenance of way employes in the past but in many instances by contractors. As an example, there are contracts for garbage disposal at various locations on our property which includes all kind of debris and all that the contractor did in this instance was to collect and remove debris. He did no track work.

This is nothing more than a penalty claim but you realize, of course, that such is not provided for by the agreement. On September 9, the employes worked their regular assignment for which they were properly compensated. On Saturday, September 17, they claimed overtime although they did not work. In this connection, your attention is called to Third Division Award 14319 which states:

> 'We are mindful of the fact that this Board as well as our courts abhor a penalty. In the absence of a penalty provision in the effective agreement between the parties, we may not impose one.'

In view of the circumstances involved, we see no basis for the claim and it is, therefore, respectfully declined.

Yours truly,

/s/ W. S. Scholl
Dir. of Personnel"

There is on file with this Division a copy of the current working rules agreement, and it, by reference, is made a part of this submission.

OPINION OF BOARD: The parties herein are the same as were involved in our recent Award 16028, and the work that was performed by a contractor is similar to the work contracted in that Award.

As we stated in Award 16028, Rule 2 (f) of the Agreement sets forth the conditions under which the Carrier may contract work and numerous disputes have been before the Board involving that rule. In the handling of the present dispute on the property and in its initial submission to the Board, the Carrier did not rely upon Rule 2(f). The Carrier does cite Rule 2(f) in its rebuttal statement, but under well established rules of the Board we will not consider the argument there raised as to its application.

As was held in Award 16028, the Carrier has not, in our opinion, offset the showing of the Employes that the work complained of has been considered as Maintenance of Way work on the property.

Based on the record as submitted, we sustain Parts (1) and (3) and deny Part (2) of the claim. This Award, like Award 16028, is not to be construed or cited as a precedent.

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;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Parts (1) and (3) of claim sustained; Part (2) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of October 1968.

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