

Award No. 17059

Docket No. MW-17425

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Gene T. Ritter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**NORFOLK AND WESTERN RAILWAY COMPANY
(Lake Region)**

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

(1) The Carrier violated the Agreement when it assigned the work of cutting and clearing brush from the right-of-way on the Middle Division of the Lake Erie and Western District to the Tree Surgery Corporation. (System file 30-20-163)

(2) Each claimant* be allowed pay at his respective pro rata rate of pay 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.

*Raymond G. Ruble - Section Foreman
A. Riley Reff - Asst. Foreman
Roy L. Blanton - Laborer-Truck Driver
Jacob Stephen - Section Laborer
Harry Beal - Section Laborer
Chester Whitlock - Section Laborer
Charles Jellison - Section Laborer
Herschel Harness - Section Laborer
John E. Walker - Section Foreman
Merle E. Walker - Asst. Foreman
Jacob E. Stonecypher - Laborer-Truck Driver
Wesley B. Adams - Section Laborer
Harold E. Stonecypher - Section Laborer
Joseph Hobberchalk - Section Laborer
Miral S. Huffer - Section Foreman
Dennis H. Dickey - Asst. Foreman
Darrell Ricks - Laborer-Truck Driver
Salathiel Crider - Section Laborer

Fred Greathouse - Section Laborer
Clarence N. Souders - Section Laborer
Harold Holt - Section Laborer
Berl Phillips - Section Foreman
Carl Whitlock - Laborer-Truck Driver
Robert Morris - Section Laborer
Charles K. Secrest - Section Foreman
Harry Burge - Asst. Foreman
Charles P. Gick - Laborer-Truck Driver
Charles S. Hardesty - Section Laborer
Eugene H. Frye - Section Laborer
Renos R. Orman - Section Laborer
Roger Brown - Section Laborer
Doyle Phillips - Welder

EMPLOYEES' STATEMENT OF FACTS: During the period from March 14, 1966, to March 28, 1966, inclusive, employees of the Muncie Tree Surgery Corporation performed the work of cutting and clearing brush on the right-of-way from Muncie, Indiana to Tipton, Indiana on the Middle Division of the Lake Erie and Western District. The Carrier assigned said work to outside forces without benefit of notice to the Employees and without benefit of discussion and agreement with the Employees.

The brush along the right-of-way had grown and accumulated because of a deferred maintenance program. However, it did not interfere with the safe and efficient operation of trains through the area, and did not create an emergency condition. The sole reason for performing this work during this particular period was to create an impression of good housekeeping to the Carrier's president, who was scheduled to pass through this area shortly thereafter.

On March 14, 1966 (the first day on which the violation took place), the undersigned General Chairman informed the Chief Engineer by telephone that this work assignment was in violation of the agreement, and suggested that the violation be discontinued immediately. His suggestion and advice was ignored.

There is an agreement in effect between the Norfolk and Western Railway Company-Lake Region (formerly The New York, Chicago and St. Louis Railroad Company-Nickel Plate, Lake Erie and Western and Clover Leaf Districts) and its employees represented by the Brotherhood of Maintenance of Way Employees effective February 1, 1951 (Schedule No. 5). Copy of that agreement, as amended, is on file with this Board and is, by reference, made a part of this submission.

CARRIER'S STATEMENT OF FACTS: The instant dispute involves the interpretation and application of the working agreement effective February 1, 1951, made between The New York, Chicago and St. Louis Railroad Company (The New York, Chicago and St. Louis Railroad Company was merged into the Norfolk and Western Railway Company effective October 16, 1964), and its employees represented by the Brotherhood of Maintenance of Way Employees on the Nickel Plate, Lake Erie and Western and Clover

- CARRIER'S EXHIBIT C - July 6, 1966 - Appeal - Vice Chairman to Division Engineer.
- CARRIER'S EXHIBIT D - July 21, 1966 - Denial of appeal - Division Engineer to Vice Chairman.
- CARRIER'S EXHIBIT E - August 25, 1966 - Appeal - General Chairman to Regional Engineer.
- CARRIER'S EXHIBIT F - September 1, 1966 - Denial of appeal - Regional Engineer to General Chairman.
- CARRIER'S EXHIBIT G - October 26, 1966 - Appeal - General Chairman to Director of Personnel.
- CARRIER'S EXHIBIT H - October 31, 1966 - Acknowledgment of appeal - Director of Personnel to General Chairman.
- CARRIER'S EXHIBIT I - December 21, 1966 - Denial of appeal - Director of Personnel to General Chairman.
- CARRIER'S EXHIBIT J - August 28, 1967 - Affirmation of denial - Manager Labor Relations (formerly Director of Personnel) to General Chairman.
- CARRIER'S EXHIBIT K - August 29, 1967 - Letter - General Chairman to Manager, Labor Relations.
- CARRIER'S EXHIBIT L - September 21, 1967 - Letter - Manager, Labor Relations to General Chairman.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier contracted out the work of cutting and clearing brush on Carrier's right of way from Muncie, Indiana to Tipton, Indiana, to employees of the Muncie Tree Surgery Corporation. This work was performed during the period from March 14, 1966 to March 28, 1966, inclusive, by the said employees of Muncie Tree Surgery Corporation. On March 14, 1966 the General Chairman informed Carrier's Chief Engineer that this work assignment was in violation of the Agreement, and urged that the violation be discontinued. The Organization relies on Rule 1 (Seniority Rule), and Rule 52 (Classification of Work Rule) for support of this claim. Carrier contends that this claim should be dismissed for the reason that it is too vague and indefinite; and that the claim presented to this Board is at variance with the original claim submitted on the property. Carrier further contends, in defense on the merits, that this work is not the exclusive work of Claimants under the Scope Rule, which is general in nature and that other employees of the craft involved in this dispute have historically, customarily, and traditionally performed this work. The Organization contends that Carrier's jurisdictional objections were not raised on the property, and should not be considered by this Board.

This Board finds that the claim presented is not vague or indefinite in that the Claimants were at all stages of the handling of this dispute easily identifiable and ascertainable. This Board also finds that there is no fatal variance between the original claim filed on the property and the claim submitted to this Board. Therefore, Carrier's jurisdictional objections are hereby overruled, and the dispute will be decided on its merits.

A very careful perusal of the record reflects that the Scope Rule involved in this dispute is general in nature, and this finding places the burden of proof by a preponderance of evidence on the Organization that this work has been historically, customarily and traditionally performed by these employees. In the event the Organization is successful in presenting a prima facie case of exclusivity, then the burden of proof shifts to Carrier, which must produce affirmative evidence to the contrary. This Board finds that the Organization has presented a prima facie case abundant with competent, probative evidence that the involved work has historically belonged to employees of the Maintenance of Way craft (Claimant's Exhibits B-1 through B-5). The only rebuttal contained in the record refers to isolated instances of permitting land-owners or farmers whose land adjoins the Right of Way to clear brush in exchange for railroad ties. This Board finds that these allegations submitted by Carrier do not rise to that degree required to constitute a preponderance of evidence necessary to successfully rebut the prima facie case presented by the Organization. The meager proof of only a few isolated deviations from the normal established and long standing practice, is not sufficient to overturn the overwhelming proof that constitutes custom, practice and tradition. See Awards 16830, 13478, 13349. Carrier likewise failed to prove that it lacked the manpower or equipment; or that an emergency existed. There being no other exceptions appearing in the Agreement, none other will be implied. See Awards 16830, 15876, 15467, 13863, 13478.

As to the question of damages, this Board finds that Carrier has failed to show by any evidence that this work could not have been performed by these employees on overtime or rest days; or that it could not have been performed by them through a re-arrangement of their work schedule during their regular hours. Therefore, it is found that these employees lost their rightful opportunity to perform this work, and that they are entitled to their monetary claim. See Awards 16009, 15888, 15874, 15689, 15497, 14982, 14371 and 14321.

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 16th day of April 1969.

**CARRIER MEMBERS' DISSENT TO AWARD 17059,
DOCKET MW-17425 (Referee Gene T. Ritter)**

The Referee holds that the Scope Rule is general, and that the burden was on the Organization to prove that employees had historically, customarily and traditionally performed the claimed work. What the Referee ignored and didn't say, in contrast with other awards he has made involving general type Scope Rules, is that the Organization's burden was to prove that, on a system-wide basis, Agreement employees had performed the work to the exclusion of all others. See Awards 14877, 14971, 16624, 16780.

That Agreement employees had performed the claimed work was not disputed, but there was no evidence they had, on a system-wide basis, performed the work to the exclusion of all others. See, for example, Award 17003, which involved the present parties. Further, we do not know how the Referee was able to conclude there were only "isolated" instances of others performing the work, but that others had performed the work evidences that Agreement employees had not performed the work to the exclusion of all others.

In the subject award the Referee is inconsistent with other awards he has made involving general type Scope Rules. For this, and other reasons, Award 17059 is erroneous and we vigorously dissent.

**J. R. Mathieu
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C. H. Manoogian
C. L. Melberg
H. S. Tansley**

Keenan Printing Co., Chicago, Ill.

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