



Award No. 17100

Docket No. MW-17584

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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 and weeds from the right-of-way on the Buffalo District of the Lake Erie Division to forces outside the scope of the Agreement. (System File 30-20-170)
- (2) Each claimant * be allowed pay at his respective pro rata rate for an equal proportionate share of the total number of hours consumed by outside forces in the performance of the work referred to within Part (1) of this claim.

*Manuel C. Bonilla	Laborer
Sebastian Russo	Asst. Foreman
Iwan Gedej	Laborer
Chester Drabek	Foreman
Anthony Lancione	Laborer
John A. Paradiso	Laborer
Gabriel White	Laborer
Enrique M. Gorgas	Laborer
Joseph Pickens	Laborer-Driver
Cruz B. Rolon	Laborer
Frank Cusack	Laborer
Louis J. Lobello	Laborer-Driver
Millard R. Newcomb	Laborer
Patsy Borrello	Foreman
Joseph R. Tampio	Asst. Foreman
Antonio J. Flitt	Laborer
Herminio C. Negron	Laborer
Louis S. Rizzo	Foreman
Charles DiCarra	Laborer
A. Borrello, Jr.	Asst. Foreman
Francisco Vega	Laborer

Exhibit "L"—September 21, 1967—Letter—Manager Labor Relations to General Chairman.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim herein is another of a number arising between the same parties because of the Carrier contracting for the cutting and clearing of brush on the Carrier's right-of-way. In the present case the dispute involves the cutting and clearing of brush on the Carrier's right-of-way between Buffalo Junction, New York, and Conneaut, Ohio.

In recent Awards 17051 and 17059 the claims of the employees were sustained. We have carefully reviewed those Awards and do not find them to be palpably erroneous. In Award 17051 we held:

"The Scope Rule of this Agreement is general in its terms and the terms do not specify the work reserved to such employees. When the Scope Rule is general in nature and does not define the work to be performed by the employees listed or named, nor does it contain any job descriptions, the petitioner not only has the burden of proving by a preponderance of the evidence that the work in question has been traditionally and customarily been performed by them, but also that it constitutes work which they have performed to the exclusion of others.

"The evidence presented on the property shows that the Carrier did not overcome the Organization's evidence that it had an historical, traditional, and exclusive right to clear brush and weeds from the right-of-way. Thus, the evidence did show that such work was done by the Organization to the exclusion of others.

"On the property, the Carrier's main contention was that the work came under the exception set out in Rule 52(c) which reads:

"This work may be done by contract where there is not a sufficient number of employees available or the railroad company does not have proper equipment to perform it."

"Carrier alleged that there was not a sufficient number of employees available and those available worked as much as possible and therefore suffered no loss. The Carrier is raising an affirmative defense and has the burden to prove such defense by competent evidence. This the Carrier failed to do. Mere assertions, self-serving declarations and general statements are of no real probative value to this Board. The fact Claimants were working where Carrier had assigned them does not make them unavailable. (Awards 15497, et al.) The Carrier attempts to raise the contention that the Claimants are too indefinite to be given consideration. The Carrier was furnished a roster containing the names of the Claimants and the claim reasonably described the Employees so that they could be identified. Carrier should have no difficulty in identifying them by an examination of its records. (Awards 14672, 15333, 15497, et al.)

"The evidence not presented on the property will not be considered by the Board.

"In view of the evidence presented the Board must find that the Agreement has been violated and that the claim should be allowed." (Emphasis theirs.)

Award 17059 followed substantially the same reasoning.

The reasoning of Awards 17051 and 17059 is applicable to our present docket and the claim will be sustained.

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April, 1969.