



Award No. 17199

Docket No. MW-17654
NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(SUPPLEMENTAL)

Morris L. Myers, 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, on March 19 and 20, 1966, it assigned the work of cutting and clearing brush and weeds from the right-of-way between Erie, Pennsylvania and Dunkirk, New York, to forces outside the scope of the Agreement. (System file 30-20-174)

(2) Section Foreman W. G. Bensus, Assistant Section Foreman Bernard Julio and Section Laborers Andrew Spak, Maximino M. Gonzales, Louis M. Rosado, Elmer Wilcox and Jaime M. Roble each be allowed eighteen (18) hours' pay at their respective time and one-half rate because of the violation referred to in Part (1) of this claim."

EMPLOYEES' STATEMENT OF FACTS: Section Foreman W. G. Bensus, Assistant Section Foreman Benard Julio, Section Laborers Andrew Spak, Maximino M. Gonzales, Louis M. Rosado, Elmer Wilcox and Jaime M. Roble hold seniority within their respective classes and are regularly assigned to Section 7 with a work week extending from Monday through Friday (Saturdays and Sundays are rest days).

On March 19 and 20, 1966, (the claimants' rest days) the Carrier assigned the work of cutting and clearing brush along the right-of-way on the claimants' seniority district to forces employed by Van Sikle Tree and Saw Shop, by Steimor Company, by Giebon of Dunkirk, by Hamtrack and by Davey Tree Experts.

The brush along the right-of-way had grown and accumulated because of a deferred maintenance program. It did not, however, interfere with the safe and efficient operation of trains through the area. The sole reason for performing this work on March 19 and 20, 1966, was to create an impression of good housekeeping to the Carrier's President who was scheduled to pass through this area shortly thereafter.

The claimants were fully equipped, available and willing to have performed this work had they been given an opportunity to do so.

Claim was timely and properly presented and handled by the Employes at all stages of appeal up to and including the Carrier's highest appellate officer.

OPINION OF BOARD: The claim in this case arises from the Carrier's having contracted with several independent contractors for the work of cutting and clearing brush on the Carrier's right-of-way between Erie, Pennsylvania, and Dunkirk, New York, instead of the Carrier's utilizing its own employes represented by the Organization to perform this work. The claim in this dispute is limited to the dates of March 19 and 20, 1966.

There have been several recent awards of this Board resulting from claims of a similar nature involving the same parties. With one exception only (Award No. 17003), this Board has held that the Carrier violated the Scope Rule of the Agreement in contracting out the work in question. We believe that the reasoning in those awards is applicable to the facts in this case and we, therefore, follow them. (See Awards Nos. 17051, 17059, 17100.)

The Carrier attempted to assert a defense that the Claimants in this case are not entitled to recover because they were regularly assigned to Section 7 on the Buffalo Seniority District, whereas the work that was performed by the employes of the independent contractor on March 19 and 20, 1966, was on another Section on that Seniority District. It was incumbent on the Carrier to raise this defense on the property, and the truth of the matter is that the record on the property is devoid of any reference to this defense. In fact, the only indication that the Carrier may have raised this defense on the property stems from a solitary sentence in the Employee's initial ex parte submission to this Board, clearly insufficient so as to permit the Carrier to assert this defense to this Board. However, the Board wishes it clearly understood that had the defense been raised by the Carrier on the property, this claim may have been decided differently, yet again, it may not have been decided differently. In any event, the Carrier's failure to raise the defense on the property is fatal to its attempt to do so before this Board.

There is also an indication that a claim has been made in another case involving many of the Claimants herein, which other case concerns itself also with the contracting out of the work of cutting and clearing brush and weeds on the Buffalo Seniority District during the period of March 14 through March 28, 1966. That other case carries Docket No. MW-17584 and has resulted in Award No. 17100 which sustained the claim. Obviously, the Claimants in the instant case are not entitled to collect twice from the Carrier because of the same violation. Therefore, the amount of money to which the Claimants are entitled by virtue of this Award should be offset by any monies awarded to the Claimants in Award No. 17100 attributable to the dates of March 19 and 20, 1966, the days that are involved in the instant claim.

As for damages in the instant claim, inasmuch as March 19 and 20, 1966, were overtime days had the Claimants performed the work in dispute instead of its having been performed by employes of the independent contractors, in order to make the Claimants whole for the violation of the Agreement they are entitled to pay at the time and one-half rate for those days.

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 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.

A W A R D

Claim sustained consistent with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 6th day of June 1969.