Award No. 18365
Docket No. MW-18841

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Gene T. Ritter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SEABOARD COAST LINE RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when, without a conference having been held between the Assistant Vice President, Engineering and Maintenance of Way, and the General Chairman as required by Rule 2, it assigned the work of plowing forty-six (46) miles of fireline on the Raleigh Division to outside forces. (System File 12-2/C-4).

(2) The Carrier further violated the Agreement when it assigned the work of burning forty-six (46) miles of right-of-way on the Raleigh Division to outside forces.

(3) Roadway Machine Operators J. A. Baggett, Jr., R. E. Baggett, H. Lee, M. Boan, J. T. English, J. C. Brock and R. C. Mills each be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man hours consumed by outside forces in performing the work referred to within Part (1) of this claim.

(4) The Track Foremen and trackmen, who were assigned to the section territories on which the work referred to in Part (2) of this claim was performed, each be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man hours consumed by outside forces in performing the work referred to in Part (2) of this claim.

EMPLOYES' STATEMENT OF FACTS: On September 12, 1968, the North Carolina Department of Forestry informed the Carrier that an alleged fire hazard existed along its right-of-way on the Raleigh Division. Without first notifying the undersigned General Chairman and without extending any effort to consummate an agreement as required under Rule 2, the Carrier entered into a contract with the North Carolina Department of Forestry to plow fire lines and to burn right-of-way.

edge of the past practice shown of record, and where a contract is negotiated and existing practices not abrogated by its terms, such practices are, in the absence of clearly inconsistent provisions, deemed to have been incorporated in the new instrument and enforceable to the same extent as its other provisions. Awards 5404 and 4086. We conclude that the Carrier did not violate the Agreement as charged.'

"Therefore, there is no merit to the penalty payments claimed and the claim is declined."

NOTE: Signed statements of Division Engineer Alcorn and Roadmaster Watson, as next above referred to are attached as Carrier's Exhibit "A."

Assistant Vice President - Personnel to General Chairman, December 1, 1969.

"Confirming conference discussion with Mr. Dick on October 21 covering claims for work contracted out by the Carrier to North Carolina Forestry Department, Raleigh Division, and to Georgia State Forestry Service, Savannah Division, as listed in your conference listings of October 3.

You did not present anything new in support of these claims and you were advised that there was no reason for changing our decisions of August 22."

OPINION OF BOARD: On September 12, 1968, the North Carolina Dept. of Forestry notified Carrier that a fire hazard existed along its right-of-way on the Raleigh Division. Carrier then contracted with the North Carolina Department of Forestry to plow fire lines and burn this 46 miles of right-of-way. The Organization contends that Carrier violated Rule 2, the pertinent part of which is:

"This Agreement requires that all maintenance work in the Maintenance of Way and Structures Department is to be performed by employes subject to this Agreement except it is recognized that, in specific instances, certain work that is to be performed requires special skills not possessed by the employes and the use of special equipment not owned by or available to the Carrier. In such instances, the Assistant Vice-President, Engineering and Maintenance of Way, and the General Chairman will confer and reach an understanding setting forth the conditions under which the work will be performed.

It is further understood and agreed that although it is not the intention of the Company to contract construction work in the Maintenance of Way and Structures Department when Company forces and equipment are adequate and available, it is recognized that, under certain circumstances, contracting of such work may be necessary. In such instances, the Assistant Vice-President, Engineering and Maintenance of Way, and the General Chairman will confer and reach an understanding setting forth the conditions under which the work will be performed. In such instances, consideration will be given by the Assistant Vice-President, Engineering and Maintenance of Way, and the General Chairman to performing by contract the grading, drainage and certain other Structures Department work of magnitude or requiring special skills not possessed by the employes, and

the use of special equipment not owned by or available to the Carrier and to performing track work and other Structures Department work with Company forces."

Carrier defends this Claim by showing that the State Forestry Dept. had performed this work in the past and by alleging that the Forestry Dept. had trained personnel and specially designed equipment not owned by Carrier to perform this work. Carrier also alleges that this work is not the exclusive work of the Maintenance of Way Craft. The only question to be determined in this dispute is whether or not the plowing of fire lines and burning of the right-of-way is work which is contractually reserved to the Maintenance of Way Employes. The fact that the Agreement only became effective July 1, 1968, precludes past practice (prior to the effective date as a guide line). A careful inspection of the Agreement, and more particularly Rules 1, 2 and 5, leads this Board to the conclusion that the involved work was contemplated by the signatory parties and is work reserved by the Maintenance of Way Employes. On page 9 of the Agreement under the heading of "Maintenance of Way—General Subdepartment Group A—Roadway Machines" is listed, among other machines, Fireline Plows. This is under Rule 5 of the Agreement which also sets out the classes of employes, and rates of pay for operating equipment for plowing of fire lines. The clearing of weeds on Carrier's right-of-way has also been performed by Track Employes covered by this Agreement. Therefore, Rule 2 does apply in this case and Carrier violated the Agreement when it failed to call a conference between the Assistant Vice-President, Engineering and Maintenance of Way and the General Chairman in an effort to reach an understanding as required. Failure to call such a conference prior to contracting out the involved work constituted an arbitrary and unilateral act by Carrier contrary to the Agreement. Although it was vigorously argued that no monetary Award should be made for the reason that Claimants were fully employed during the time of the involved work, there was no proof in the record that this work could not have been performed on overtime; or that these Claimants could not have performed this work by rescheduling their work schedule. Therefore, this 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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of January 1971.

CARRIER MEMBERS' DISSENT TO AWARDS 18365 AND 18366,
DOCKETS MW-18841 AND MW-18842

(Referee Ritter)

The Referee completely ignored the record covering the handling on the property and the undisputed evidence in connection therewith. The claim filed and progressed on the property was premised on the unsupported allegation that, "The work of cutting or plowing fire lines and burning right-of-way has been traditionally and historically performed by Maintenance of Way Employes, and is work that is generally recognized as belonging to them." Carrier presented signed statements of Division officers stating unequivocally that State Forestry personnel had for many years performed such work, without claim or protest by the Organization, and that it had never been recognized as belonging exclusively to Maintenance of Way employes. Such was never refuted or disputed by the Organization, so the Organization failed to sustain the burden of proof that such work had been traditionally and historically performed by Maintenance of Way employes as alleged. This was even acknowledged, although disregarded, by the Referee in his statement that, "Carrier defends this Claim by showing that the State Forestry Dept. had performed this work in the past * * *"

The Referee further disregarded the record in stating, "The fact that the Agreement only became effective July 1, 1968, precludes past practice (prior to the effective date as a guide line)." As shown by the record in filing and progressing the claim the Organization alleged that "the work of cutting or plowing fire lines and burning right-of-way has been traditionally and historically performed by Maintenance of Way Employes," which the Carrier clearly refuted. Then in its submission the Organization stated:

> "Rule 2 was carried forth from a previous agreement between the Atlantic Coast Line Railroad and this Organization. When this rule was carried forth into the current agreement between the Seaboard Coast Line Railroad (the former Atlantic Coast Line Railroad merged with the former Seaboard Airline Railroad) and this organization, all interpretations thereof were also carried forth."

The Organization then cited the holding in Award 13461 (House), "which involved the former Atlantic Coast Line Railroad, this same rule and similar circumstances," followed by statement that:

> "The agreement dated October 1, 1956, which involved the case decided by Award 13461, was superseded by the July 1, 1968 Agreement. Rule 2 of the July 1, 1968 Agreement is precisely identical in language, meaning and intent to Rule 13 which was interpreted by Award 13461. Inasmuch as this rule was readopted and carried forth without change, the interpretations theretofore applied are also carried forth."

The Organization then cited a multiplicity of Awards in support of its position.

The applicability of Award 13461 in establishing the meaning and intent and interpretation of the contracting rule at issue in the case was properly established by the Carrier in its Answer to the Organization's submission as follows:

"Actually, such Award points up the weakness of the Organization's position and the invalidity of the claim because the Award specifies that contracting out the work without prior conference is a violation **'if the involved work was reserved exclusively to the Organization.'** As conclusively established by the record covering the instant claim the involved work was **not** reserved exclusively to the Organization. So Award 13461 actually supports the Carrier's position and establishes that the instant claim has no merit."

The record clearly established that the Organization failed to sustain the burden of proving that the work in question had been traditionally and historically performed by Maintenance of Way employes as claimed and that Carrier violated Rule 2 of the Agreement. The Referee completely ignored the record and the burden of proof principle and concluded "that the involved work was contemplated by the signatory parties and is work reserved by the Maintenance of Way Employes." The Referee certainly displayed a unique conception of the burden of proof principle and his responsibility as a Referee to render a proper decision. Such a holding is also inconsistent with other Awards he has rendered involving similar cases.

The Referee further departed from the record in stating, "The clearing of weeds on Carrier's right-of-way has also been performed by Track Employes covered by this Agreement." Nowhere in the record is any reference made to "weeds." In filing the claim the General Chairman alleged "that the Carrier has allowed its forces to deteriorate over a period of years, and allowed the growth of bushes, small trees and other growth on its right of way to become hazardous to adjacent property owners, but this does not justify the Carrier contracting out the work that has been performed by its Maintenance of Way employes for many, many years." As the record shows, such allegation was refuted.

The Awards, to say the least, are palpably erroneous and we dissent.

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P. C. Carter

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