

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20215
Docket Number MW-20013

Irving T. Bergman, 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 weed spraying work on the Lake Erie & Western and Cloverleaf Districts to outside forces (System Files MW-MUN-71-4; MW-MUN-71-5).

(2-a) Foreman Darrell Ricks and Machine Operator G. M. Stephen each be allowed pay at their respective straight-time rates for an equal proportionate share of the total number of man hours expended by outside forces in the performance of this work on the Lake Erie & Western District beginning on June 23 through July 2, 1971.

(2-B) Foreman George Witt and Mr. W. S. Mattingly be allowed pay at the foreman and machine operator's straight-time rate of pay respectively for an equal proportionate share of the total number of man hours expended by outside forces in the performance of this work on the Cloverleaf District on June 28, 29, 30 and July 1, 1971.

OPINION OF BOARD: Claimants rely upon that part of Rule 52, Classification of Work, subdivision (c) which states: "All work of --, maintaining, --tracks--and other work incidental thereto shall be performed by employes in the Track Department." In prior Third Division Awards 17051 and 17059 the scope rule was held to be general in nature. Award 17100 followed that interpretation. Award 17199 concurred with those Awards. These Awards involved cutting and clearing brush and weeds. The Carrier has denied that "weed spraying work" involved in the present case is the same. This has not been contradicted by the Organization. A more recent Award 19457 has also followed these earlier Awards. All the Awards cited above were between the same parties.

In Award 19903 it was stated that prior Awards have consistently decided that where the work rule is general regarding the work in question, the burden is upon the Petitioner to demonstrate that the work has uniformly been assigned on a system wide basis exclusively to the Maintenance of Way employes in the past. From all the facts set forth in the record in this case, the Petitioner has not sustained this burden.

Other Awards such as 19724, 19657, 20020, 19635, 19631, 19627, 19619, 19574, 19552, 19426, 19327 and 19155 are not helpful. They involve other Agreements with different Carriers involving work of a different nature such as removal of debris from tracks, use of tamping machines, paving roads, cutting ballast from ends of ties, grading and drainage work, remodeling floors using carpentry, painting and masonry, blacktopping, repairing roof, installing track ties, placing fences, plowing ballast and plowing fire lines. Award 19305 involving track maintenance referred to raising track structure. Award 19399 which referred to routine track maintenance, did not describe the work performed.

The claim as stated does not include any reference to violation of Article IV of the National Agreement. However, it was set forth in the claim made on the property and it was discussed in the handling on the property. Award 19899 has discussed at length the application of Article IV to the use of outside forces, the damages flowing from violation of the Article and the need to lend force and effect to the intention of Article IV. That discussion included reference to Award 18305 and Awards subsequent to it which agree that the "contracting out" prohibition of Article IV deals with work within the scope of the Agreement. Nevertheless, the Awards have held that in proving violation of Article IV, the Organization is not required to show that the work in question had been performed exclusively. Regardless of any other consideration, the Carrier was obligated to comply with Article IV.

In addition, the Carrier has argued that claimants suffered no monetary loss. The Organization has contended that the employees could have been used on their rest days. Awards 19327, 19334, 19335, 19399, 19440, 19574 and 19948, have held that where no monetary loss was suffered or where there was full employment, compensation was denied.

In Award 18773, it was held that in the proper use of this Board's adjudicatory function, questions should be determined on a case by case basis and not by broad general pronouncements. Award 19899 clearly demonstrated that the issue of compensation has not been resolved and that Awards differ on this subject. We do not award compensation in this case.

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

The Carrier did not violate the Agreement. The Carrier did violate Article IV.

A W A R D

Claim disposed of in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1974.