NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25930
THIRD DIVISION Docket Number MW-25676

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Peoria and Pekin Union Railway Company

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

(1) The Carrier violated the Agreement when it assigned weed mowing work to outside forces on August 14, 15, 20, 25, September 7 and 9, 1982 (System File PPUT-3496/TC 57-82).

(2) The Carrier also violated Rule 40 when it did not give the General Chairman advance written notice of its intention to contract said work.

(3) As a consequence of the aforesaid violations, furloughed Roadway Equipment Operator R. Meyers shall be allowed thirty-two (32) hours of pay at the roadway equipment operator's rate."

OPINION OF BOARD: It is the Organization's position that Carrier violated the controlling Agreement when outside forces were used to mow grass and weeds along Carrier's right-of-way. Said work was performed on August 14, 15, 20, 25, September 7 and 9, 1982. The Organization avers that work of this character is reserved to the Maintenance of Way Structures Department forces under the provisions of Rules 1, 39 and 51. In particular, it asserts that Carrier failed to give the General Chairman advance written notice of its plan to contract out this work as required by Rule 40 and such failure was a material breach of a definitive obligation. It maintains that until Carrier complies with the applicable rules, the employer is precluded from initiating unilateral action. Moreover, it argues that consistent with the December 11, 1981 National Agreement, signed by both the national leadership of the Brotherhood of Maintenance of Way Employes and the National Railway Labor Conference, Carrier was required to make a good faith effort to procure the necessary equipment through rental or leasing arrangements. It recognizes that Carrier used outside forces to perform this work for some twelve (12) years, but notes that it was unaware of this practice. It avers that the acquiescence of the Local Chairman or for that matter individual employes to the Carrier's use of outside contractors does not change the explicit Agreement rules.

Carrier contends that it is virtually unthinkable to believe that the Local Chairman failed to note that this work was being performed on a routine and predictable basis by outside forces. It asserts that since the Scope Rule does not reserve this work to the Organization, it cannot follow that an Agreement violation occurred. It argues that the Organization as the

moving party has the singular burden of proving a rule violation and predicated upon the developed record, the Organization has not proven the Scope Rule or any other rule was violated. It observes that a historical perspective is needed to understand what in fact occurred and noted that because of retrenchment decisions made in the early 1950's, a program of property disposal was implemented to generate operating and investment funds. It avers that as a result of these actions the number of acres maintained decreased and the operating condition of the mowing equipment deteriorated. It argues that it was more economical to contract out for the reduced mowing needs and consequently outside forces were used in full view of the Local Chairman and his constituents for twelve (12) years.

In our review of this case, we concur with the Organization's position. We are certainly mindful of the long term practice of using outside forces to mow grass and weeds along Carrier's right-of-way, but this practice does not negate nor vitiate clear contract language. The Classification of Work Rule (Rule 39) and the implicit acknowledgment that none but Maintenance of Way forces performed this work before circa 1970, establishes an Agreement right to perform the work. The Organization is not barred from insisting on compliance with the Agreement. (See Third Division Awards 19552, 14599, 22214.) We are indeed surprised by the Organization's nonchalant attitude during the many years outside forces were used and somewhat perplexed by Carrier's failure to comply with Rule 40, especially in 1970 when outside contractors were first used. In the intervening years, there were no changes in the rules cited in this dispute, and by extension, they were still operative. In view of the Organization's apparent acquiescence to the use of outside forces and Carrier's reliance upon this acceptance, it would be unfair to hold Carrier liable for the compensatory portion of the claim. Both parties must share responsibility for what had occurred. Accordingly, we find that the Agreement was violated. The disputed work belongs to the Organization.

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 in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1986.